

2012-212981
ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari
To the Court of Appeals

RECEIVED

OCT 29 2012

Appeal From Charleston County
Roger M. Young, Sr., Circuit Court Judge

S.C. Supreme Court

THE STATE,

Petitioner,

vs.

BRYANT KINLOCH,

Respondent.

APPENDIX

ALAN WILSON
Attorney General

KATHRINE H. HUDGINS
Appellate Defender

WILLIAM M. BLITCH, JR.
Assistant Attorney General

South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589
(803) 734-1330

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEY FOR RESPONDENT

ATTORNEYS FOR PETITIONER

INDEX

SC COURT OF APPEALS OPINION NO.2012-UP-432 (July 18, 2012)	1
PETITION FOR REHEARING	3
ORDER DENYING PETITION FOR REHEARING	16

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Appellant,

v.

Bryant Kinloch, Respondent.

Appellate Case No. 2010-150606

Appeal From Charleston County
Roger M. Young, Sr., Circuit Court Judge

Unpublished Opinion No. 2012-UP-432
Heard June 19, 2012 – Filed July 18, 2012

AFFIRMED

Attorney General Alan Wilson, Chief Deputy Attorney
General John W. McIntosh, Senior Assistant Deputy
Attorney General Salley W. Elliott, Assistant Attorney
General William M. Blich, Jr., all of Columbia, and
Solicitor Scarlett A. Wilson, of Charleston, for Appellant.

Appellate Defender Kathrine H. Hudgins, of Columbia,
for Respondent.

PER CURIAM: The State appeals the circuit court's decision to grant Bryant Kinloch's motion to suppress evidence discovered during the execution of a warrant to search his residence. We affirm pursuant to Rule 220(b)(1), SCACR.

We find no clear error in the circuit court's determination that the search warrant was not supported by probable cause. *See State v. Wright*, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) (stating on review of a circuit court's ruling on a motion to suppress based on the Fourth Amendment, "[t]he appellate court will reverse only when there is clear error"); *State v. Gentile*, 373 S.C. 506, 514-16, 646 S.E.2d 171, 174-76 (Ct. App. 2007) (finding magistrate lacked a substantial basis for concluding probable cause existed, where information presented to magistrate did not adequately connect evidence of drug activity to respondent's residence).

The State's arguments regarding good-faith exceptions are not preserved. *See State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (finding argument asserted on appeal unpreserved because it was not raised to and ruled upon by lower court).

We do not address the additional sustaining ground Kinloch raises. *See State v. Bostick*, 392 S.C. 134, 139 n.4, 708 S.E.2d 774, 776 n.4 (2011) (declining to address issue because court's resolution of another issue was dispositive of the appeal).

AFFIRMED.

FEW, C.J., and HUFF and SHORT, JJ., concur.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Charleston County
Hon. Roger M. Young, Sr., Circuit Court Judge
Appellate Case No. 2010-150606

The State,

Appellant,

v.

Bryant Kinloch,

Respondent.

PETITION FOR REHEARING

On July 18, 2012, this Court affirmed the trial court's decision suppressing the results of a search warrant on the grounds the search warrant was not supported by probable cause. This Court misapprehended and misapplied the standard of review applicable in this case and overlooked the error of law committed by the circuit court in reviewing the warrant as well as the facts which clearly supported probable cause for the search warrant. In addition, this Court incorrectly found the issue of whether the Leon good faith doctrine applied was not properly preserved for review on appeal and failed to apply the doctrine in this case. Accordingly, pursuant to Rule 221(a), SCACR, the Court should grant the petition for rehearing, find the trial court erred in finding the search warrant was not supported by probable cause, and reverse the trial court's grant of Respondent's motion and remand for trial.

Standard of Review

This Court incorrectly applied a standard of review deferential to the circuit court as opposed to one applicable to the consideration of a magistrate's determination of probable cause for a search warrant. This Court cited State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) for the standard of review indicating "on review of a circuit court's ruling on a motion to suppress based on the Fourth Amendment, '[t]he appellate court will reverse only when there is clear error.'" Wright is not the correct standard of review for a determination related to a search warrant. Wright involved whether evidence seized in plain view was seized in violation of the Fourth Amendment and did not involve a factual finding of probable cause by a magistrate court.

The correct standard of review is provided in State v. Spears, 393 S.C. 466, 483, 713 S.E.2d 324, 333 (Ct. App. 2011): "The duty of the appellate court is simply to determine whether the magistrate had a substantial basis for concluding that probable cause existed." (citing State v. Bellamy, 336 S.C. 140, 144, 519 S.E.2d 347, 349 (1999)). Further, as the Supreme Court explained in State v. Herring, 387 S.C. 201, 212, 692 S.E.2d 490, 495 (2009): "The duty of the reviewing court is to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed." Additionally, "[t]he appellate court should give great deference to a magistrate's determination of probable cause." Spears, 393 S.C. at 483, 713 S.E.2d at 333 (citing State v. Dunbar, 361 S.C. 240, 253, 603 S.E.2d 615, 622 (Ct. App. 2004)) (emphasis added); see also, Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); State v. Crane, 296 S.C. 336, 372 S.E.2d 587 (1988) ("A magistrate's determination of probable cause to search is entitled to substantial deference by this Court on review."). The standard does not suggest deference to the trial court's determination, it is deference to the magistrate's factual determination of whether probable cause exists.

As a result, the proper standard is whether the magistrate court had a substantial basis to conclude probable cause existed for the issuance of the search warrant. The State believes a different result is reached when the proper standard of review is considered because the facts and circumstances, especially when deference is given to the magistrate, support the magistrate's determination of probable cause.

Probable Cause

This Court misapprehended or overlooked the relevant facts, especially when viewed in light of the appropriate standard of review. "An appellate court reviewing the decision to issue a search warrant should decide whether the magistrate had a substantial basis for concluding probable cause existed." State v. Dupree, 354 S.C. 676, 683, 583 S.E.2d 437, 441 (Ct. App. 2003); see also, State v. Baccus, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006) ("The duty of the reviewing court is to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed."). The United States Supreme Court adopted a "totality-of-the-circumstances" test for probable cause determinations:

The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983) (emphasis added); see also, State v. Keith, 356 S.C. 219, 223-224, 588 S.E.2d 145, 147 (Ct. App. 2003).

A reviewing court should give great deference to a magistrate's determination of probable cause. State v. Rutledge, 373 S.C. 312, 316, 644 S.E.2d 789, 791 (Ct. App. 2007) (citing State v. Davis, 354 S.C. 348, 355, 580 S.E.2d 778, 782 (Ct. App. 2003)). The United States Supreme Court

has expressly recognized “affidavits in support of search warrants should not be subject to ‘[t]echnical requirements of elaborate specificity,’ and that a magistrate has the ‘authority . . . to draw such reasonable inferences as he will from the material supplied to him by applicants for a warrant.’” U.S. v. Bynum, 293 F.3d 192, 197 (4th Cir. 2002) (quoting Gates, 462 U.S. at 235, 240). “The term ‘probable cause’ does not import absolute certainty.” Dupree, 354 S.C. at 683, 583 S.E.2d at 441 (internal citations omitted). “Rather, in determining whether a search warrant should be issued, magistrates are concerned with probabilities and not certainties.” Id.

“[T]he nexus between the place to be searched and the items to be seized may be established by the nature of the item and the normal inferences of where one would likely keep such evidence.” U.S. v. Anderson, 851 F.2d 727, 729 (4th Cir. 1988); see also, United States v. Grossman, 400 F.3d 212, 217-18 (4th Cir. 2005); United States v. Servance, 394 F.3d 222, 230 (4th Cir.), *vacated on other grounds*, 544 U.S. 1047, 125 S.Ct. 2308, 161 L.Ed.2d 1086 (2005); United States v. Williams, 974 F.2d 480, 481-82 (4th Cir. 1992). The Fourth Circuit Court of Appeals held “a sufficient nexus may be present even if the affidavit contains no factual assertions directly linking the items sought to the defendant’s residence.” See Anderson, 851 F.2d at 729 (upholding search warrant for residence after defendant attempted to sell firearm even though affidavit did not link firearm to residence); Williams, 974 F.2d at 481-82 (upholding search warrant for motel room of known drug dealer where motel receipt was sole connection to defendant).

This Court has also discussed the required evidentiary standard to establish a nexus between drugs and the residence of a person suspected of dealing or possessing drugs. In State v. Keith, this Court articulated the existence of probable cause to search a residence is a common-sense determination based on a totality of the circumstances. Keith, 356 S.C. 219, 225, 588 S.E.2d 145, 148. This Court explained: “In the case of drug dealers, evidence is likely to be found where the

dealers live.” Id. (citing United States v. Angulo-Lopez, 791 F.2d 1394, 1399 (9th Cir. 1986); State v. Scott, 303 S.C. 360, 362, 400 S.E.2d 784, 786 (Ct. App. 1991)).

The trial court in this case found the State failed to establish a nexus between the drugs and the residence at 609A. (T.92-96; R.92-96). The affidavit, however when viewed with deference to the magistrate, provided ample evidence to support the magistrate’s determination probable cause existed to believe drugs would be found in the residence at 609A. In making its decision, the circuit court erred as a matter of law utilizing an incorrect standard for determining probable cause by requiring near certainty and not a “fair probability” based on a practical, common-sense determination viewing the totality of the circumstances including reasonable inferences that can be made from the affidavit.

The officers received numerous tips, albeit from unidentified sources, indicating drug activities took place at the residence. As a result, the officers conducted surveillance at the location and witnessed activities consistent with the drug transactions reported in the complaints. First, the officers indicated two individuals arrived on scene, entered the residence at 609A with Respondent, and then left approximately one minute later. Next, the officers witnessed three to four quick hand-to-hand transactions between Respondent and other individuals at the corner of the residence at 609A. After each transaction, Respondent counted money as he re-entered the residence.

The officers also conducted surveillance on another individual seen with Respondent during the quick hand-to-hand transactions. This individual was seen entering and leaving the residence at 609A with Respondent. Later during their surveillance, this individual left the residence, went straight to a hand-to-hand transaction away from the residence, and then returned to the residence after the hand-to-hand transaction. During the hand-to-hand transaction, one officer witnessed a “clear plastic wrapping” being exchanged for U.S. currency. The individual receiving the “clear

plastic wrapping” was stopped and threw down a clear plastic bag containing an off-white powdered substance which tested positive for heroin.

Clearly, the tips coupled with the officers’ surveillance supported a “practical, common sense” conclusion Respondent and the other individual with him were involved in narcotics dealing. Further, the dealings generally took place in front of the residence at 609A, which Respondent and the other individual were seen exiting before each transaction and re-entering with money after each transaction. Finally, all of the observations detailed in the affidavit for the search warrant took place mere hours before the search warrant was obtained and not days or weeks, so the recent nature of the activities would heighten the likelihood drugs would be discovered in the residence at 609A.

This case is also distinguishable from State v. Gentile, 373 S.C. 506, 646 S.E.2d 171 (Ct. App. 2007), relied on by the Court. In Gentile, all the affidavit provided the court were unconfirmed tips and the drug bust of a visitor to the residence. Further, there was no surveillance prior to the drug bust to determine whether the visitor received the drugs prior to coming to the residence. Id. at 515-516; 646 S.E.2d at 175-176. In this case, however, several hand-to-hand transactions involving Respondent were witnessed occurring directly in front of the residence. The magistrate could and did clearly infer drug transactions were taking place outside the residence, and because Respondent continuously entered and exited the residence around the time of the transactions, there is a clear nexus established.

The circuit court in this case utilized an incorrect standard in reviewing the magistrate’s determination of probable cause. The court required near certainty as opposed to determining whether the totality of the circumstances created a “fair probability” evidence would be found in the residence at 609A. The affidavit established the requisite nexus between the residence at 609A and Respondent’s drug dealing. As a result, the circuit court’s suppression of the evidence should be

reversed and the case remanded for the State to present its evidence, including all evidence seized from the residence at 609A, at trial.

Leon Good Faith

This Court further misapprehended or overlooked the trial court's finding regarding the Leon good faith doctrine allowing the admission of evidence even if a warrant is deemed ineffective. This Court found the issue unpreserved for review on appeal; however, it is clear the trial court ruled on the issue and foreclosed the State's ability to raise the issue. The trial court ruled the evidence from the search warrant should be suppressed because of a lack of probable cause, and then immediately ruled the good faith exception did not apply. Specifically, the court found:

So I find it's proper to suppress the search warrant, and that motion is granted. I don't think the good faith exception applies because it's clear that doesn't apply when the basis for dismissing the search warrant is lack of probable cause, and in this case I'm saying there was not sufficient probable cause for the issuance of a search warrant. So the motion to suppress is granted.

(R.95-96). By making the ruling at the same time he ruled the evidence suppressed, the court prevented the State from raising the good faith argument, and it would be futile for the State to continue to argue to apply a doctrine the court already ruled inapplicable. See Fettler v. Gentner, 396 S.C. 461, 469, 722 S.E.2d 26, 31 (Ct. App. 2012) ("This [c]ourt does not require parties to engage in futile actions in order to preserve issues for appellate review.") (quoting Staubes v. City of Folly Beach, 339 S.C. 406, 415, 529 S.E.2d 543, 547 (2000)); State v. Passmore, 363 S.C. 568, 584, 611 S.E.2d 273, 282 (Ct. App. 2005) ("[O]ur courts have developed the doctrine of futility, which recognizes that in circumstances where it would be futile to raise an objection to the trial [court], failure to raise the objection will be excused."). As a result, this Court should find the issue properly preserved for review on appeal and consider the merits of the good faith exception.

The circuit court erred in finding the Leon¹ good faith exception does not apply because the affidavit failed to provide probable cause for the search warrant. Even assuming for the sake of argument the affidavit was insufficient to establish probable cause, the circuit court used the wrong standard in determining the Leon exception does not apply. In this case, the good faith exception should apply and the evidence should not have been suppressed. Further, if the trial court's determination was made under the South Carolina Constitution and not the Fourth Amendment, the same good faith exception should apply.

The United States Supreme Court in Leon articulates that a court should not suppress the fruits of a search conducted under the authority of a warrant, even a "subsequently invalidated" warrant, unless "a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." Leon, 468 U.S. at 922 n. 23. The Supreme Court explained the limited circumstances in which an officer could not be found to have acted with "objective reasonableness," thereby excluding application of this good faith exception:

- (1) "the magistrate ... was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth";
- (2) the magistrate acted as a rubber stamp for the officers and so "wholly abandoned" his detached and neutral "judicial role";
- (3) "an affidavit [is] so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; or
- (4) "a warrant [is] so facially deficient- i.e., in failing to particularize the place to be searched or the things to be seized-that the executing officers cannot reasonably presume it to be valid."

U.S. v. Bynum, 293 F.3d 192, 195 (4th Cir. 2002) (citing Leon, 468 U.S. at 923) (internal quotation marks omitted).

¹United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

The circuit court in this case misapplied the bars to application of the Leon good faith exception, just as the trial court did in Bynum. The Bynum Court noted:

In holding that the third circumstance described by the Leon Court barred application of the good faith exception in this case, the district court misidentified when this circumstance occurs. Thus, the court stated that “[t]he good faith exception . . . does not apply” when the affidavit fails to provide “a substantial basis for determining the existence of probable cause.”

Bynum, 293 F.3d at 195. The circuit court in the instant case made the same incorrect determination:

“I don’t think the good faith exception applies because it’s clear that doesn’t apply when the basis for dismissing the search warrant is lack of probable cause.” (T.96; R.96).

The Fourth Circuit Court of Appeals explained:

“Substantial basis” provides the measure for determination of whether probable cause exists in the first instance. If a lack of a substantial basis also prevented application of the Leon objective good faith exception, the exception would be devoid of substance. In fact, Leon states that the third circumstance prevents a finding of objective good faith only when an officer’s affidavit is “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.” This is a less demanding showing than the “substantial basis” threshold required to prove the existence of probable cause in the first place.

Bynum, 293 F.3d at 195 (internal citations omitted) (emphasis added).

The South Carolina Supreme Court explained the application of the Leon good faith exception: “Suppression is appropriate in only a few situations, including when an affidavit is ‘so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.’” State v. Weston, 329 S.C. 287, 293, 494 S.E.2d 801, 804 (1997) (emphasis added) (quoting Leon, 468 U.S. at 923). “[W]hen an officer acting in objective good faith has obtained a search warrant

from a judge or magistrate and acted within its scope, a reviewing court should not order a suppression of the evidence based on a lack of probable cause.” Id. at 292, 494 S.E.2d at 803-804.

In this case, even if the affidavit does not provide a substantial basis for determining the existence of probable cause under the proper Gates standard, it is not “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.” The affidavit cannot be described as so bare-boned that the magistrate’s issuance of the warrant could be viewed as a mere rubber-stamping of the warrant application, nor is the affidavit so lacking in indicia of probable cause that it was unreasonable for the officers or the magistrate to conclude that probable cause existed. Accordingly, the circuit court erred in failing to find the Leon good faith exception applied in this case to admit the evidence even if the affidavit did not support a determination of probable cause.

In addition, even if the circuit court’s determination of a lack of probable cause was based on application of the South Carolina Constitution’s protection in Article I, section 10, and not the Fourth Amendment to the United States Constitution, a good faith exception to the South Carolina Constitution would allow admission of the evidence in this case. The South Carolina Supreme Court recently acknowledged it would recognize a Leon style “good faith exception” when “the officers reasonably believe the warrant is valid when the search is made, but is subsequently determined to be invalid” under the South Carolina Constitution. State v. Herring, ___ S.C. ___, 692 S.E.2d 490, 497 n.6 (2009); see also, State v. Thompson, 363 S.C. 192, 205 n.3, 609 S.E.2d 556, 563 n.3 (Ct. App. 2005) (acknowledging Leon good faith exception). The officers in this case reasonably believed the search warrant was valid, and they acted in good faith in executing the search warrant. As a result, the evidence seized as a result of the execution of the search warrant based on Investigator Walker’s affidavit, should have been admitted by the circuit court. If this Court finds

the affidavit failed to provide the magistrate with probable cause to authorize the search warrant for the residence at 609A, the good faith exception under Leon or Herring should apply to allow admission of the evidence at trial.

CONCLUSION

For all of the foregoing reasons, the State requests the panel grant the petition for rehearing, find the trial court erred in failing to give proper deference to the findings of the magistrate, find the magistrate properly concluded the search warrant was supported by appropriate probable cause, in the alternative find the good faith exception applies in the instant case, and reverse the decision of the circuit court suppressing the evidence obtained as a result of the execution of the search warrant.

Respectfully submitted,

ALAN WILSON
Attorney General

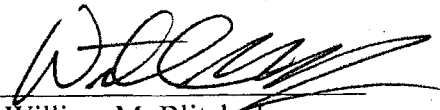
JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

101 Meeting Street, Suite 400
Charleston, South Carolina 29401
(843) 958-1900

BY: 
William M. Blitch, Jr.
S.C. Bar No. 15608
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

August 2, 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Charleston County
Hon. Roger M. Young, Sr., Circuit Court Judge
Appellate Case No. 2010-150606

The State,

Appellant,

v.

Bryant Kinloch,

Respondent.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Petition for Rehearing by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.
This 2nd day of August, 2012.

Ellen R. DuBois
ELLEN R. DuBOIS
Legal Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

The South Carolina Court of Appeals

RECEIVED

AUG 24 2012 WB

The State, Appellant,

v.

ATTORNEY GENERAL

Bryant Kinloch, Respondent.

Appellate Case No. 2010-150606

ORDER DENYING PETITION FOR REHEARING

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

John Cannon, Jr. C.J.
Thomas E. Hall J.
Paul E. Short, Jr. J.

Columbia, South Carolina

cc:

Alan Wilson
John W. McIntosh
Salley W. Elliott
William M. Blitch, Jr.
Scarlett A. Wilson
Kathrine H. Hudgins

FILED

23 Aug. 2012

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari
To the Court of Appeals

Appeal From Charleston County
Roger M. Young, Sr., Circuit Court Judge

THE STATE,

Petitioner,

vs.

BRYANT KINLOCH,

Respondent.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Appendix on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record,

Kathrine H. Hudgins, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

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

This 29th day of October, 2012.



ELLEN R. DuBOIS

Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Charleston County
Roger M. Young, Circuit Court Judge

ORIGINAL
RECEIVED
OCT 29 2012
S.C. Supreme Court

THE STATE,

Appellant,

vs.

BRYANT KINLOCH,

Respondent.

RECORD ON APPEAL

ALAN WILSON
Attorney General

KATHRINE H. HUDGINS
Appellate Defender

JOHN W. McINTOSH
Chief Deputy Attorney General

South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589
(803)734-1343

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

ATTORNEY FOR RESPONDENT

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

SCARLETT WILSON
Solicitor, Ninth Judicial Circuit

101 Meeting Street, Suite 400
Charleston, South Carolina 29401
(843) 958-1900

ATTORNEYS FOR APPELLANT

INDEX

Transcript of Record	1
Court's Exhibit 1 (Search Warrant and Affidavit)	98
Respondent's Motion to Suppress Evidence	104
True Billed Indictments	105

COUNTY OF CHARLESTON

2008-GS-10-3017

2008-GS-10-3018

2008-GS-10-3019

STATE OF SOUTH CAROLINA)

-VS-

BRYANT KINLOCH,

Defendant.

) TRANSCRIPT OF RECORD

) January 11-12, 2010.

) Charleston, South Carolina

i)

B E F O R E:

The Honorable Roger M. Young, Sr., Judge.

A P P E A R A N C E S:

Stephanie Linder, Assistant Solicitor
Attorney for the State

Mary Beth Mullaney, Esquire
Attorney for the Defendant

Amanda K. Haffenden, RPR, CRR
Circuit Court Reporter

I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
Chito Walker	5 --	23 --	28 34	33 --
Christopher Costanzo	35	48	60	69

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

EXHIBITS

NO.	DESCRIPTION	ID.	EV.
Court's 1	Search Warrant	9	--

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

(January 11, 2010.)

THE COURT: All right. Are we ready?

MS. LINDER: Yes, Your Honor. The state is ready.

THE COURT: All right. Your motion. What do you want to do?

MS. MULLANEY: First, before we begin, Your Honor, I would just like to just preserve or just state for the record that there was a hearing on this case on January 9, 2009 in front of Judge Harrington in which she ruled I was not entitled to disclosure of a confidential informant.

I would just like to renew my objection to that and just state that that ruling prejudices my defense, and under Ruggiero versus US, it's our position that disclosure is relevant and can help the defense of the accused, that the confidential informant should have been disclosed. I should have been able to have that opportunity to investigate, and I possibly would have called him as a witness, depending on what I learned from my investigations.

THE COURT: Okay. Well, noted for the record, and I guess I'm bound by her ruling. I don't know anything about it.

1 MS. MULLANEY: Yes, Your Honor. I
2 understand. I just wanted to preserve that issue for the
3 record, and at this time, if I could, I would like to
4 call officer Chito Walker.

5 THE COURT: Okay. Is this to suppress the
6 statement or the search warrant?

7 MS. MULLANEY: No, sir. This is the search
8 warrant.

9 THE COURT: Okay.

10 CHITO WALKER,
11 having been first duly sworn,
12 was examined and testified as follows:

13 DIRECT EXAMINATION

14 BY MS. MULLANEY:

15 Q. Good afternoon, Officer Walker. And just so I
16 have your title correct, is it detective?

17 A. I'm sergeant now.

18 Q. You were involved in a search warrant that was
19 signed by Judge Gosnell on January 2nd, 2008, correct?

20 A. Yes, ma'am.

21 Q. And you were the officer responsible for getting
22 the affidavit signed by the magistrate?

23 A. Yes, ma'am.

24 Q. And other than the information contained in the
25 affidavit, did you present any additional evidence to the

1 magistrate?

2 A. Yes, ma'am. Well, I physically tell him, you
3 know, the background of the investigation and explain the
4 search warrant to him as I'm getting it signed.

5 Q. Well, did you present anything to him that wasn't
6 in the search warrant?

7 A. As far as to -- pertaining to what?

8 Q. Any other facts. Did you tell him anything
9 additionally that wasn't in the search warrant?

10 A. No, ma'am. Pretty much I just explained the
11 process of whatever is in the search warrant. I
12 physically explained to him what the search warrant is as
13 he's reading it so if he has any questions he can direct
14 them to me.

15 Q. Did you give him any additional evidence than the
16 evidence that was contained in the search warrant?

17 A. No, ma'am.

18 Q. So then the probable cause for this search warrant
19 is contained within the four corners of the affidavit?

20 A. Yes, ma'am.

21 Q. Officer Walker, if I could just pass up the search
22 warrant to you, take a look at it for me. What I'm going
23 to ask you about now is Judge Gosnell's signature, so you
24 may just want to skim through the pages.

25 A. Yes, ma'am.

1 Q. Judge Gosnell signed and dated each page of the
2 search warrant, correct, Officer?

3 A. Yes, ma'am.

4 Q. And, in fact, the times that are written and the
5 date is that written in Judge Gosnell's handwriting?

6 A. Yes, ma'am.

7 Q. If I could direct your attention to the first page
8 of the search warrant, the time that is written on the
9 first page, I believe, is 1620?

10 A. On this -- the very first page here, it is --
11 there is no time -- it's a date of January 2, '08 that he
12 signed, the right-hand corner.

13 Q. In the left-hand corner, under the date, the 2nd
14 of January 2008.

15 A. The second page?

16 Q. Maybe -- let me just pass this up. I didn't
17 staple those so I'm sure -- okay. That page, Officer.

18 A. Yes, ma'am.

19 Q. If you could tell me the time that is written on
20 that page.

21 A. It's 1620.

22 Q. And if I may, the second page, it just has
23 Gosnell's signature and the date, correct?

24 A. Yes, ma'am.

25 Q. There is no time?

1 A. Uh-huh.

2 Q. And if I may, Officer, and the third page, the
3 time written there in Judge Gosnell's handwriting is
4 1820?

5 A. Yes, ma'am.

6 Q. And if I may, the time written on that final page
7 before you is --

8 A. I think it's 1620.

9 Q. And the 1620 is written under your name, correct?

10 A. Yes, ma'am.

11 Q. So did you write that 1620 or --

12 A. That's not my handwriting.

13 Q. So Judge Gosnell wrote that time, 1620?

14 A. Yes, ma'am.

15 Q. Sergeant Walker, could you explain to me why there
16 is two different times?

17 A. It's military time, and if you're not accustomed
18 to regularly using military time, it can easily get
19 confused, but the time that the search warrant was signed
20 should have been 1820, preceding the investigation,
21 leading up to the search warrant.

22 Q. So then it's your testimony that the other
23 times -- where 1620 is written that that, in fact, is an
24 error by Judge Gosnell?

25 A. Yes.

1 Q. And that, in fact, he signed it at 1820 but wrote
2 the time 1620?

3 A. Yes, ma'am.

4 Q. And when was it, Officer, that you recognized this
5 error? Was it just now when I brought it to your
6 attention?

7 A. Yeah. Pretty much, yes, ma'am.

8 Q. Now, Officer, if I may, I'm just going to ask you
9 about a few things in the affidavit.

10 A. Yes, ma'am.

11 Q. And this is an affidavit that you were sworn to;
12 is that correct?

13 A. Yes, ma'am.

14 Q. Would you like -- you tell me, Officer, whichever
15 is easier. Would you like to have a copy before you when
16 I read from it? Would that be --

17 A. That would be much easier for me.

18 Q. Sure. Let me just -- let me hand you a stapled
19 copy so we're in sync with the pages. And if I may, may
20 I get a copy of the search warrant marked as a Court
21 exhibit. Could I have it? Sorry.

22 (Search warrant marked for identification as
23 Court's Exhibit No. 1.)

24 BY MS. MULLANEY:

25 Q. I'm going to ask you about the first paragraph of

1 the affidavit where it says over past several months
2 CPD narcotics units have received numerous complaints
3 about heroin and cocaine transactions taking place at the
4 above mentioned residence.

5 A. Yes, ma'am.

6 Q. Now, those were anonymous citizens complaints,
7 correct?

8 A. Yes, ma'am. Some of them were actual complaints
9 coming in, and the actual case agent for this particular
10 case is Investigator Hürteau and Investigator Costanzo,
11 so they had additional information pertaining to the
12 complaints on this particular residence that I didn't
13 have.

14 Q. Okay. And you didn't have it at the time that you
15 wrote this affidavit?

16 A. No, not -- the complaints, the physical
17 complaints? No, ma'am.

18 Q. And were there actual written complaints that were
19 made?

20 A. I think a lot of those that came in came in like
21 Crime Stopper tips that people call in as far as, like,
22 you live in the neighborhood; either I got a lot of
23 traffic coming back and forth here and there, and then
24 they may have other specific information, like, I don't
25 know general what complaints they physically had at the

1 time they was conducting an investigation.

2 Q. So what you're referring to then is anonymous
3 citizen complaints.

4 A. No, ma'am. They had complaints -- this is how --
5 can I explain to you how the search warrant --

6 Q. Yes, please.

7 A. The search warrant for this particular incident
8 here, we have physical surveillance over a couple of
9 hours, when they have a lot of resources, so Investigator
10 Hurteau and Costanzo were the actual lead investigators
11 on this particular case.

12 I was called in at a later time when we started
13 doing the physical surveillance with some people coming
14 in and out of the residence. At the time we made a
15 decision it was appropriate to get the search warrant,
16 those two investigators who were the lead investigators
17 remained in the field and pretty much dictates the proper
18 cause for me to type the search warrant in the vehicle to
19 go have it signed.

20 Q. Okay.

21 A. So as far as I'm saying, the general complaints, I
22 don't physically have them. They will have to explain a
23 little more as far as the specific complaints they had on
24 file.

25 Q. But you put them in your affidavit, correct?

1 A. Yes, ma'am.

2 Q. And the information that you have in your
3 affidavit, you didn't have a name or an address of the
4 individual who made these complaints?

5 A. No, ma'am, I don't.

6 Q. And there isn't a name or an address that is
7 included in the affidavit?

8 A. No, ma'am, there's not.

9 Q. So you can't tell this Court whether those
10 complaints were made by someone that is reliable, can
11 you?

12 A. I cannot, no, ma'am.

13 Q. And you can't tell whether or not, in fact, what
14 the basis of knowledge of those people who made those
15 complaints were, can you?

16 A. No, ma'am, I cannot.

17 Q. And, in fact, Officer, I served you with a
18 subpoena to provide me with any documentation, whether
19 you had any written documentation in regards to those
20 complaints, and I didn't receive any, so --

21 A. Okay.

22 Q. So I would assume that none exists, correct?

23 A. I do not have any, no, ma'am.

24 Q. And did you refer to any when you put this in your
25 affidavit?

1 A. No, ma'am, I did not.

2 Q. Earlier you had told me a little bit about what
3 your role was.

4 A. Yes, ma'am.

5 Q. Can I ask you, on this day, what time did you
6 begin working on this case on January 2nd?

7 A. I was brought into this case off the -- like I
8 told you, the lead investigators for this particular case
9 are Corporal Hurteau and Corporal Costanzo. They had
10 been doing surveillance here. I couldn't tell you when
11 they started. It was, like four hours into the actual
12 incident before I was actually brought in to assist with
13 surveillance.

14 Q. So in this case you filled out a supplemental
15 report, correct?

16 A. Yes, ma'am.

17 Q. And did you fill out the supplemental report
18 before or after you did the affidavit for the search
19 warrant?

20 A. It was after.

21 Q. Okay. So your supplemental report indicates that
22 you began surveillance at approximately 1715?

23 A. That's correct.

24 Q. So at 5:15 is when you began surveillance?

25 A. No, ma'am. I couldn't tell you when I actually

1 started. I didn't keep track of the actual time I began
2 surveillance. If it's listed in there, if you got my
3 report, I don't know what time they actually started
4 physical surveillance on this case is, what I'm saying.

5 Q. I'm not asking what time they did, I'm sorry,
6 Sergeant. I'm asking you what time you began your
7 physical surveillance. If you like, I can --

8 A. Yes, ma'am, if you would, because I don't have it.

9 Q. Sure.

10 A. Yes.

11 Q. So, Officer, you began your surveillance at 1715,
12 correct?

13 A. Yes, ma'am.

14 Q. And did you do any work on this case prior to that
15 or is what when you --

16 A. No, that's when I got a call.

17 Q. That's when you got called in by Hurteau and
18 Costanzo?

19 A. Yes, ma'am.

20 Q. Could you tell me where you began your
21 surveillance, where you were positioned in regards to --

22 A. I was responsible for mobile surveillance up on
23 the north side of 17, Savannah Highway. Anything mobile
24 coming from that location I was supposed to pick up on it
25 because they had stationary surveillance on the house.

1 Q. Would you explain to me what mobile surveillance
2 means?

3 A. Mobile surveillance and any foot traffic leaving
4 from that location I was pretty much responsible for.

5 Q. So you would follow people that left the house?

6 A. Yes, ma'am.

7 Q. And is this people on foot?

8 A. Yes, for the most part because I think -- I'm
9 pretty sure there was a lot of foot traffic, so when we
10 actually got involved with the mobile surveillance, we
11 had to put myself stationed north side of Savannah
12 Highway and another surveillance going south.

13 Q. Is that Officer Deeg and Jacobson?

14 A. No, ma'am. I want to say it was Investigator
15 Bruder.

16 Q. So was this just foot traffic or was this motor
17 vehicles also?

18 A. Yeah. We had motor vehicle traffic, but my
19 responsibility was foot traffic.

20 Q. Was foot traffic?

21 A. Yes, ma'am.

22 Q. And so were you -- could you see the house in your
23 surveillance, or were you parked somewhere else?

24 A. I'm mobile, so we had a stationary unit that
25 feeds, okay? I'm in a position to pick up where they no

1 longer don't have sight on the person.

2 Q. You weren't parked in front of the house. They
3 would call you give you a description of somebody that
4 left the house, and then you would pick up that person?

5 A. Yeah, where they leave off, yes, ma'am.

6 Q. Okay. All right. Okay. Officer, if I could ask
7 you, I'm going to ask you some questions about the third
8 paragraph of the affidavit, where it says, if I may read
9 it, On approximately three to four other incidents, the
10 black male, wearing all red clothing, exited 609-A
11 Pleasant Grove Lane and met with an unknown party at the
12 north side of the duplex.

13 Corporal Costanzo and Corporal Hurteau observed a
14 quick hand-to-hand transaction between the black male
15 wearing all red and other unknown parties at the corner
16 of the residence. Corporal Hurteau and Corporal Costanzo
17 noticed that the party dressed in all red was counting
18 money after the transactions, as he walked back into the
19 residence.

20 Okay. Sergeant Walker, two of those people were
21 actually stopped, correct, by Officer Deeg and Jacobson,
22 and no drugs were found on them?

23 A. Yes, ma'am. No, I don't -- are you talking about
24 the vehicle traffic? I mean --

25 Q. No, I'm talking about the three or four incidents

1 that I just read to you.

2 A. If I'm not mistaken, like I say, and that's before
3 I got involved with the investigation, like, this is
4 dictated. Some portions of the search warrant is based
5 on their investigation. They'd be able to answer
6 questions a little more thoroughly than I am, but if I'm
7 not mistaken, those two had situations where they were
8 stopped in vehicles and I don't think anything was found,
9 but I don't think they were stopped by narcotics
10 investigators.

11 Officer Deeg and Officer Jacobson are uniformed
12 patrol officers that we have to call in as additional
13 resources, and sorry to say they're not trained in a lot
14 of the narcotics concealment and have a lot of experience
15 dealing with narcotics in general.

16 Q. Okay. But Officer Deeg and Officer Jacobson
17 stopped two people leaving the residence?

18 A. Yes.

19 MS. LINDER: Your Honor, I would object to
20 this. Sergeant Walker has repeatedly said his role
21 started X time. He did mobile surveillance. What
22 Ms. Mullaney is asking him to give further information on
23 is neither an item that -- this traffic stop she's
24 mentioning is not an affidavit.

25 Sergeant Walker said he was not present.

1 during that part of the surveillance. He himself said he
2 was not present sitting on the house watching the house.
3 How is he to know what did or did not happen with
4 something that occurred at the house? I object. She's
5 asking him to speculate.

6 MS. MULLANEY: It's in a sworn affidavit.

7 THE COURT: He signed the affidavit, right;
8 is that correct?

9 MS. LINDER: Your Honor, he did sign the
10 affidavit.

11 THE COURT: Well, then he swore he had
12 knowledge about it. I'll allow her to ask questions. Go
13 ahead.

14 BY MS. MULLANEY:

15 Q. So Hurteau and Costanzo saw what they thought to
16 be suspicious drug activity, correct?

17 A. Yes, ma'am.

18 Q. And they told you about it, correct?

19 A. Yes, ma'am.

20 Q. And, in fact, two of the people that they thought
21 were dealing drugs were stopped by Officer Deeg and
22 Officer Jacobson, and no drugs were recovered on them,
23 correct?

24 A. Yes, ma'am.

25 Q. And you didn't put that in your affidavit, did

1 you, Officer?

2 A. No, ma'am.

3 Q. Before you conclude your affidavit, Officer, did
4 you review Corporal Costanzo's incident report?

5 A. There is no incident report. This is all in the
6 field, going on realtime. There's no incident report
7 written at that point.

8 Q. Okay. So it was based on what Officer Costanzo
9 told you verbally?

10 A. Yeah. This is all field notes, yes, ma'am, field
11 notes and verbal statements from the two investigators.

12 Q. Now, Officer, if I could ask you about the portion
13 with regard to -- on the second page of the affidavit.

14 A. Yes, ma'am.

15 Q. This is the transaction that occurred with an
16 individual by the name of Redondo Burns, correct?

17 A. Yes, ma'am.

18 Q. And you, in fact, are familiar with Redondo Burns
19 because you know him to be someone involved in narcotics,
20 correct?

21 A. Yes, ma'am. I know him from previous encounters,
22 yes, ma'am.

23 Q. And this exchange that occurred in the Pizza Hut
24 between Redondo Burns and a male in a black puffy jacket?
25 You, in fact, you saw this, correct?

1 A. Yes, ma'am.

2 Q. And this exchange -- just one second. Could I
3 just get your report back? Thanks. Sergeant Walker --

4 A. Yes, ma'am.

5 Q. According to -- you filled out a police report,
6 correct?

7 A. Uh-huh.

8 Q. A supplemental report, and you were accurate in
9 this report?

10 A. Yes, ma'am.

11 Q. Tried to be thorough?

12 A. Yes, ma'am.

13 Q. Complete?

14 A. Yes, ma'am.

15 Q. And you documented, in fact, what you saw?

16 A. Yes, ma'am.

17 Q. And let me pass this up so you have it in front of
18 you. You knew that it might be a couple years, like it
19 is --

20 A. Yes, ma'am.

21 Q. -- before you were called in to court to testify?

22 A. Yes, ma'am.

23 Q. And in your report, you state that this exchange
24 that you saw occurred between an individual, Redondo
25 Burns, who you know, and a black male wearing a heavy

1 jacket with fur on the hood and a black stocking cap.

2 A. Yes, ma'am.

3 Q. Not a New York Yankee hat.

4 A. No, ma'am -- I mean, from my position, I put down
5 exactly what I see this individual wearing, so that is
6 how I document it.

7 Q. Right. So what you saw this individual was
8 wearing was clearly a black stocking cap.

9 A. Yeah. Stocking caps comes in many different
10 shapes and forms. You have baseball caps shaped like
11 stocking caps, but that is how I documented it, black
12 stocking cap, yes, ma'am.

13 Q. You also state in your supplemental report that
14 when you saw the exchange that it was an unknown object
15 that was exchanged for U.S. currency, correct?

16 A. Yes, ma'am.

17 Q. You didn't know what was exchanged. You didn't
18 see it, correct?

19 A. No, ma'am. The size of it -- contraband is
20 extremely small, and for me to say that this is drugs,
21 you know, I could physically see that that is a plastic
22 bag or drugs. From the distance I was, I could not say.
23 So that is why I documented an unknown object, because I
24 didn't make contact with him.

25 Q. Okay. All right. However, Officer, in the search

1 warrant, you swore that you did see the object, and, in
2 fact, it was a clear glassine.

3 A. Yes, ma'am.

4 Q. But, in fact, you're telling us today you didn't
5 know what was exchanged?

6 A. No, ma'am. We can't see what was in those bags.
7 Only thing we could see is it's an unknown bag, that's
8 it. It could contain anything at that moment. We don't
9 know. We haven't physically made contact with the person
10 to stop him at that time.

11 Q. And, in fact, only two people were stopped leaving
12 609 Pleasant Grove Lane, correct?

13 A. Yes, ma'am, I think.

14 Q. And no drugs were found on either of them,
15 correct?

16 A. No, ma'am.

17 MS. MULLANEY: If I could just beg the
18 Court's indulgence.

19 BY MS. MULLANEY:

20 Q. 609 Pleasant Grove Lane, in fact, is a house,
21 right?

22 A. Like, a duplex.

23 Q. And there is two sides to the duplex.

24 A. Yes.

25 Q. There is A and B.

1 A. Yes, ma'am.

2 Q. And, in fact, they're on opposite sides of the
3 house.

4 A. Yes, ma'am.

5 Q. And, in fact, the search warrant was obtained for
6 609-A, correct?

7 A. Yes, ma'am.

8 Q. But, in fact, during the surveillance, there was
9 foot traffic in and out of Apartment B also?

10 A. I wasn't part of the stationary surveillance, so I
11 couldn't say, but I'm pretty sure there was.

12 Q. And there is nothing about the foot traffic in
13 Apartment B in the affidavit, correct, Officer?

14 A. No.

15 Q. Thank you.

16 CROSS-EXAMINATION

17 BY MS. LINDER:

18 Q. Good afternoon, Sergeant Walker. Ms. Mullaney
19 brought up the time written on the search warrant, 1620
20 versus 1820. Are you the person that wrote the time on
21 the search warrant?

22 A. No, ma'am.

23 Q. Ms. Mullaney also brought up there were numerous
24 complaints. Did you personally receive any complaints on
25 the property?

1 A. No, ma'am.

2 Q. What role did you have in the investigation and
3 surveillance of this case?

4 A. My role was primarily mobile surveillance at the
5 location. Once the incident took place between Mr. Burns
6 and the unknown black male at the intersection, it was my
7 job, while we continued mobile surveillance, to go and
8 physically secure the search warrant for the residence.

9 Q. Can you please explain -- you had just mentioned
10 about Mr. Burns and the transaction. Can you explain how
11 you were brought into that, what exactly you personally
12 observed?

13 A. Well, like I say, my position was north on
14 Savannah Highway, any mobile traffic coming from
15 609-A Pleasant Grove going in that direction. The
16 stationary units, as they made contact with the black
17 male leaving that residence, I was called in to continue
18 surveillance once he reached the point where they could
19 no longer see him.

20 I picked him up from Pleasant Grove and Savannah
21 Highway, observed him walk around the building, a Pizza
22 Hut, which is across the street from the incident
23 location, and meet with Mr. Redondo Burns, who I do know
24 by name and sight.

25 After the transaction, which I believed to be a

1 transaction with Burns and an unknown black male, it was
2 my job to follow him back to that location while the
3 other units picked up on Mr. Burns, who went into the
4 BP gas station.

5 Q. With your training and experience -- well, at that
6 time as a narcotics officer, now as a sergeant with the
7 CPD, if you could explain what you saw or what you
8 believed to see occur between the male in the puffy
9 jacket and Redondo Burns.

10 A. Yes, ma'am. It was a real quick interaction when
11 the two of them met, and Redondo, who had money his hand
12 at the time, a quick hand slap. It is what we call in
13 layman's term, almost dap, is what we call it, which you
14 give him the money and grab the object out of the unknown
15 black male hand.

16 So the only thing you could really see, you can't
17 see the items within the glassine bag. We say unknown
18 item because that is what it is. You can see the
19 currency, very bold. You could see money exchange hands
20 with the two parties in between.

21 Q. And when you saw the transaction, I guess, can you
22 explain which direction, I guess, the unknown item or
23 baggie versus the money went?

24 A. Which direction?

25 Q. Like, who handed what --

1 A. Mr. Burns had the money in his hands and gave it
2 to the unknown male who actually took the money and
3 secured the money while Mr. Burns took the item and put
4 it in his pants pocket.

5 Q. Okay. With your training and experience, what did
6 you believe you just witnessed?

7 A. I believe that I witnessed a drug transaction that
8 just took place.

9 Q. The male with the puffy jacket who you just
10 testified to as received moneys and put them in his
11 pocket, where did he go next?

12 A. He went back to 609-A Pleasant Grove.

13 Q. Did he make a bunch of stops along the way?

14 A. No.

15 Q. Did he talk to a lot of people along the way?

16 A. No.

17 MS. MULLANEY: Objection. Leading.

18 THE COURT: Overruled.

19 BY MS. LINDER:

20 Q. So just making sure I understand this. I know it
21 can be kind of technical here. The black puffy jacket
22 male --

23 A. Yes, ma'am.

24 Q. The male with the puffy jacket, black puffy
25 jacket, he handed an item to Mr. Burns, retrieved money

1 from Mr. Burns, and went directly back to 609-A --

2 A. Yes, ma'am.

3 Q. -- Pleasant Grove; is that right?

4 A. Yes, ma'am.

5 Q. Back to this transaction you believe you saw, in
6 the affidavit that you swore to, to the magistrate judge,
7 do you still have a copy from Ms. Mullaney up there as
8 Court's Exhibit 1?

9 A. Yes, ma'am.

10 Q. Okay. If you can read, I guess, it's the second
11 page -- third -- it's right above your signature and the
12 judge's signature, 1820. It's the fourth page, if you
13 include the cover sheet.

14 A. Yes, ma'am.

15 Q. And it's the paragraph that Ms. Mullaney read part
16 of that had to deal with what you did then.

17 A. Yes, ma'am.

18 Q. About halfway through, Investigator Walker
19 observed the above described subject meet with an unknown
20 black male, who was later identified as Redondo Burns.
21 Investigator Walker observed the unknown subject hand
22 Burns one clear plastic bag in exchange for an
23 undetermined amount of U.S. currency. After the
24 transaction was made, Corporal Hurteau observed Burns
25 enter the BP gas station. Corporal Hurteau maintained a

1 constant visual on Burns while he was inside.

2 A short time later, Hurteau and Costanzo observed
3 Burns exit BP gas station, walk southbound. Okay. The
4 next paragraph is what I'm kind of going toward. To your
5 knowledge, in the affidavit or when you were updated, I
6 guess, from fellow officers from the case agents, that
7 unknown item that was given to Mr. Burns, was anything
8 ever recovered from Mr. Burns?

9 A. Mr. Burns, yes, ma'am. A clear plastic bag
10 containing off white powder substance was retained from
11 him.

12 Q. And was there any sort of test done on that
13 substance while in the field at that moment?

14 A. Yes, ma'am, and it field tested presumptive for
15 heroin, Corporal Hurteau.

16 Q. Corporal Hurteau tested it, and it was presumptive
17 for heroin?

18 A. Yes, ma'am.

19 MS. LINDER: I have no further questions at
20 this time.

21 THE COURT: Redirect?

22 MS. MULLANEY: Yes, just one moment, Your
23 Honor.

24 REDIRECT EXAMINATION

25 BY MS. MULLANEY:

1 Q. Sergeant Walker, there is nothing in the
2 affidavit, or the search warrant, that says that the man
3 in the puffy jacket got the drugs from Apartment 609-A
4 Pleasant Grove Lane, correct?

5 A. No, ma'am.

6 Q. And there is nothing in the affidavit that says
7 the person in the puffy jacket got the drugs from
8 apartment 609-B Pleasant Grove Lane, correct?

9 A. No.

10 Q. And, in fact, you don't know whether the person in
11 the puffy jacket -- he could have got the drugs from
12 someplace else entirely?

13 A. No, ma'am. We just followed him from 609-A, so
14 that is what is documented.

15 Q. But he was also -- at some point he was also in
16 609-B, correct?

17 A. I didn't -- I couldn't tell you that. They have
18 foot traffic at 609-B, and I didn't physically see him
19 come out of 609-B. He was followed from 609-A at the
20 time. He was followed making contact with Mr. Burns.

21 Q. You don't know whether he had those drugs on him
22 before he left 609-A, correct?

23 A. No, I couldn't say that, no, ma'am.

24 Q. In fact, Redondo Burns, according to the
25 affidavit, he was never in 609-A Pleasant Grove Lane,

1 correct?

2 A. Mr. Burns, no, ma'am.

3 Q. There is no connection between Mr. Burns and 609-A
4 Pleasant Grove Lane?

5 A. No, ma'am, other than following the unknown male
6 from 609-A.

7 Q. That is, if you make the assumption that the
8 individual that left 609-A --

9 A. Uh-huh.

10 Q. -- had drugs and gave them to Redondo Burns?

11 A. Yes, ma'am.

12 Q. And that is the assumption that y'all made,
13 correct?

14 A. That's the -- what the investigation led to, yes,
15 ma'am.

16 Q. Did you follow the man with the stocking cap back
17 to the house?

18 A. I followed the guy in the puffy jacket back to the
19 house, yes, ma'am.

20 Q. And you followed him from the Pizza Hut?

21 A. We followed him after he left. They met beside
22 the Pizza Hut, which is located across the street from
23 the BP. It's at the intersection of Wappoo Road and
24 Savannah Highway.

25 Q. And the Pizza Hut is about what, a fourth of a

1 mile --

2 A. It's across the street. It's directly across the
3 street from that intersection. Wappoo is Pleasant Grove,
4 so it's directly across the street.

5 Q. 609-A is not directly on Savannah Highway?

6 A. No. It's right behind the businesses on -- you
7 can probably throw a rock and hit Pizza Hut, in layman's
8 terms, yes, ma'am.

9 Q. So you have to walk down Pleasant Grove and cross
10 Savannah Highway?

11 A. Yes, across Savannah Highway.

12 Q. Savannah Highway is three, four lanes?

13 A. I'm not sure at that particular junction, it's a
14 four-lane highway. Four lane goes either direction and
15 Pizza Hut sits, like I said, right on that intersection.

16 Q. And the BP is, what, about 100 yards, 150 yards?

17 A. Directly across the street, probably -- it's not
18 100 yards from the Pizza Hut?

19 Q. Right, 50 yards? What would you estimate?

20 A. Probably across the street -- probably 50 yards.

21 Q. Okay.

22 A. Give or take.

23 Q. So you followed the person in the black stocking
24 cap back to 609-A?

25 A. Yeah. I followed the black male with the puffy

1 jacket back to 609-A.

2 Q. From the Pizza Hut?

3 A. From meeting with Mr. Burns at Pizza Hut.

4 Q. And, in fact, he had a pizza, right?

5 A. No, ma'am. No.

6 Q. According to you, he didn't carry a pizza back to
7 the house?

8 A. No, ma'am. I don't recall.

9 Q. So you don't recall or you don't know?

10 A. No. He did not have a pizza.

11 Q. And you're sure about that?

12 A. Yes, ma'am.

13 Q. And this unknown male in the puffy jacket, he was
14 not stopped, was he?

15 A. No.

16 Q. He wasn't detained?

17 A. No.

18 Q. You don't know who he was?

19 A. No.

20 Q. And Sergeant Walker, the man in the puffy jacket
21 and the stocking cap, you don't know where he was before
22 he got to 609-A that day, correct?

23 A. No, ma'am, I do not.

24 Q. And, in fact, in the affidavit, the affidavit does
25 not state that the black male in the puffy jacket went

1 directly back to 609-A Pleasant Grove Lane, correct?

2 A. No, ma'am. I don't think it does, but I'm reading
3 through it. Very last sentence, before the second
4 paragraph, it reads, After the transaction with
5 Mr. Burns, Investigator Bruder, who was the additional
6 investigator, observed unknown black male walk back.
7 There is a typo here --

8 Q. There is a typo. It says 690?

9 A. 690-A Pleasant Grove Lane.

10 Q. Okay. Just one second.

11 MS. MULLANEY: Thank you, Sergeant Walker.

12 MS. LINDER: I promise this will be brief.

13 RECROSS-EXAMINATION

14 BY MS. LINDER:

15 Q. Based upon your sworn affidavit in a search
16 warrant that you brought to Judge Gosnell back on January
17 2, 2008, was the guy wearing the puffy jacket, was he
18 seen exiting 609-A just prior to what you personally
19 observed?

20 A. Yes, ma'am.

21 Q. Was there visual surveillance constantly
22 maintained on the male with the puffy jacket from
23 609-A to the hand-to-hand with Mr. Burns?

24 A. Yes, ma'am.

25 Q. After viewing what you believed to be a

1 hand-to-hand transaction with Mr. Burns, where Mr. Burns
2 purchased drugs from the guy in the puffy jacket, was
3 Mr. Burns stopped? Were drugs found?

4 A. Yes, ma'am.

5 Q. After doing that hand-to-hand transaction, the
6 male with the puffy jacket, did he go back to
7 609-A Pleasant Grove?

8 A. Yes, ma'am.

9 Q. Was there a constant visual on him when he went
10 back to that right after the hand-to-hand transaction?

11 A. Yes, ma'am.

12 MS. LINDER: I have nothing further, Your
13 Honor.

14 REDIRECT EXAMINATION

15 BY MS. MULLANEY:

16 Q. Just briefly. Sergeant Walker, you didn't see the
17 man with the puffy jacket leave 609-A Pleasant Grove,
18 correct?

19 A. No.

20 Q. Because you were doing mobile?

21 A. Mobile surveillance, yes, ma'am.

22 Q. And somebody told you -- whether it was Hurteau or
23 Costanzo, another officer told you to pick him up?

24 A. Yes, ma'am.

25 Q. So at what point did you first spot the man in the

1 puffy jacket?

2 A. On Pleasant Grove, Pleasant Grove, leading up to
3 Savannah Highway.

4 Q. So you saw him before he crossed the street?

5 A. Yes, ma'am.

6 Q. Before he crossed Savannah Highway.

7 A. Yes, ma'am.

8 MS. MULLANEY: Thank you.

9 THE WITNESS: Yes, ma'am.

10 THE COURT: Do you want to ask any follow-up?

11 MS. LINDER: No, Your Honor.

12 THE COURT: You can step down. Thank you.

13 Okay. Next witness.

14 MS. MULLANEY: At this time, Your Honor, I
15 call Corporal Chris Costanzo.

16 CHRISTOPHER PAUL COSTANZO,

17 having been first duly sworn,

18 was examined and testified as follows:

19 DIRECT EXAMINATION

20 BY MS. MULLANEY:

21 Q. Is it Corporal?

22 A. Yes, ma'am.

23 Q. Hello, Corporal Costanzo. On January 2 of '08,
24 were you involved in a narcotics investigation?

25 A. He was.

1 Q. And that is as 609-A Pleasant Grove Lane?

2 A. Correct.

3 Q. And if you could tell me a little bit about what
4 your role in that investigation was, please.

5 A. On that date, about 12:30 in the afternoon, I
6 received a call. I was in the office. Our secretary
7 said someone was on the phone who wanted to give us some
8 information, spoke to a gentleman on the phone who wanted
9 to tell me about a heroin operation in West Ashley behind
10 Bender's Bar off Highway 17 involving a black male by the
11 name of Little B, is who he referred to him as.

12 Q. Let me ask you about your role. What were you
13 assigned to do?

14 A. I wasn't assigned to do anything necessarily I was
15 supervisor in the unit. You want me to just walk you
16 through what I did in the case?

17 Q. Let me ask you this. What I want to know is this:
18 You completed a very detailed report, a supplemental
19 report, correct? So on that report, you documented what
20 did you that day, correct?

21 A. I sent some notes and put them into -- I didn't
22 document everything I did that day, but some of the
23 things I did I put into report form.

24 Q. And do you have additional notes besides what I've
25 been provided in the supplemental report?

1 A. You would have to show me what you have. This is
2 the same thing I have.

3 Q. Okay. I just want to make sure we have the same.
4 And in your report, you documented what you saw, correct,
5 during your surveillance?

6 A. Some of the things I saw. Basically, we have
7 different responsibilities. Everybody involved, so I
8 documented what I was responsible for.

9 Q. Tell me what you were responsible for.

10 A. Documenting? Is that what you're referring to.

11 Q. Yes.

12 A. I'm sorry.

13 Q. So you're telling me that you documents some
14 things and you didn't document others. Why is that?

15 A. Because I couldn't document everything that was
16 happening in the entire case. There is several people
17 involved. It's a very fluid situation, so different
18 people had different responsibilities to document
19 different things.

20 Q. Right. So your responsibilities were to document
21 what you saw, correct?

22 A. Correct.

23 Q. And that is -- and so you documented the people
24 that you saw enter and leave the residence.

25 A. I was responsible for documenting what we talked

1 to the concerned citizen about, about when we got to 609
2 Pleasant Grove, what we saw as it transpired, and
3 specifically the vehicle traffic that was coming in and
4 out.

5 Q. And could you tell me where were you stationed in
6 relation to 609-A Pleasant Grove Lane.

7 A. Probably about 100 feet away. I had a very clear
8 and unobstructed view of the residence. So it would be
9 the south side of the residence, in front of the
10 residence.

11 Q. And were you in a car alone or were you in a car
12 with a fellow officer?

13 A. I was with Corporal Hurteau. He was in the
14 driver's seat. I was in the passenger seat, and we were
15 pulled into the parking lot of Bender's Bar, which is
16 right next to the residence.

17 Q. I know that Sergeant Walker testified that he was
18 doing mobile surveillance. So then would it follow that
19 you were doing stationary surveillance?

20 A. Most of the time. I did do some mobile
21 surveillances as things transpired, but mostly I was
22 doing -- sitting.

23 Q. Approximately how long were you surveilling 609
24 Pleasant Grove Lane?

25 A. Several hours. I think we got there at about

1 2:00, and I was -- myself and Hurteau sat there until
2 right around 5:00.

3 Q. Okay. And, in fact, you documented two people
4 that entered and left the residence in your supplemental
5 report, correct?

6 A. Two vehicles that pulled up and people got out of
7 the car and went into the house and came back out.

8 Q. Okay. And there was somebody in a burgundy SUV,
9 correct?

10 A. Correct, a GMC Tahoe.

11 Q. And at times the person in the GMC Tahoe, he went
12 into Apartment B and he went into Apartment B, correct?

13 A. Yes.

14 Q. And you were pretty detailed. You documented his
15 approximate height and weight?

16 A. Yes.

17 Q. And, in fact, you -- this individual, you
18 suspected them of drug activity, right?

19 A. We were basically conducting dual surveillance on
20 Mr. Kinloch and the residence.

21 Q. And you were conducting surveillance because you
22 thought somebody was selling drugs out of that house,
23 right?

24 A. Yes, ma'am.

25 Q. And that is why you were writing all this

1 information down, because this person in the SUV, you
2 thought they were up to no good?

3 A. I didn't know what they were up to.

4 Q. It was suspicious?

5 A. Their activity in and of itself was not
6 suspicious. The occurrences that happened over that
7 three-hour period certainly did raise my suspicion. I
8 didn't know why that person was there.

9 Q. And you actually -- you asked one of your fellow
10 officers to stop that person, correct?

11 A. The vehicle.

12 Q. To stop that vehicle?

13 A. Correct.

14 Q. And I believe it was Officer Jacobson that stopped
15 that vehicle?

16 A. Officer Deeg and Jacobson. They're patrol
17 officers. They're not in our unit. They're narcotics
18 officers, but they were detailed to us that day to
19 assist.

20 Q. And they were asked to stop this individual
21 because you believed this individual may have been
22 engaged in illegal drug activity, correct?

23 A. Correct.

24 Q. And, in fact, when they stopped that person, you
25 didn't find any drugs on them.

1 A. I didn't go there. I didn't stop them. Officer
2 Deeg and Jacobson -- I stayed at that house the entire
3 time. I never left that house until it was almost 5:00,
4 I think.

5 Q. But you know that nothing was recovered, right,
6 because you put negative results, so I assume that that
7 meant no drugs?

8 A. I know now no drugs were found. Negative results
9 mean I don't know what happened out there at the traffic
10 stop. I didn't get details of the traffic stop. I
11 wasn't sure if they searched the vehicle at time what
12 they found. Negative results to me means they didn't get
13 anything. He would have told me if he they got drugs.

14 Q. Exactly. He would have told if you they found
15 something, but he didn't find anything, correct?

16 A. Correct.

17 Q. And there was also somebody in a white BMW by the
18 name of Tyrone Green and you all suspected him of
19 possibly being engaged in illegal drug activity, right?

20 A. The white BMW that they stopped also? IS that
21 you're referring to?

22 Q. Yes, sir.

23 A. Yes, ma'am.

24 Q. And that individual was stopped, correct?

25 A. Correct, the car was, and the traffic stop was

1 conducted again by Jacobson and Deeg.

2 Q. Right. And you didn't find any contraband?

3 A. I didn't search the vehicle.

4 Q. Well, you know --

5 A. I stayed at the location the entire time. I never
6 left until the very end. These traffic stops were
7 conducted by a couple young uniformed patrol officers.

8 Q. But you know that those young uniformed patrol
9 officers didn't find anything, correct?

10 A. Correct.

11 Q. Because if they did, certainly they would have
12 told you, right?

13 A. Absolutely.

14 Q. And, in fact, they would have told -- they told
15 that you they didn't?

16 A. Correct.

17 Q. With the exception of Redondo Burns, Tyrone Green,
18 and an individual in a burgundy SUV, was anyone else
19 stopped with regards to this investigation?

20 A. Not that I'm aware of, no. Oh, well, later -- are
21 you talking pre-search warrant? Is that what we're
22 referring to?

23 Q. Yes.

24 A. Pre execution of the search warrant?

25 Q. Yes.

1 A. Correct. No one else was stopped, no, ma'am.

2 Later in the investigation --

3 Q. I'm not talking about executing the search
4 warrant, but I'm talking about prior to that, no one else
5 was stopped.

6 A. No.

7 Q. So two of the three people that were stopped, you
8 didn't find contraband. Contraband wasn't found on them
9 by your fellow officers?

10 A. Correct.

11 Q. And you conducted surveillance and stationary
12 surveillance, for the most part, in front of 609, but
13 never saw Redondo Burns go into 609, correct?

14 A. No, ma'am.

15 Q. And, in fact, did you see Redondo Burns at all
16 that day?

17 A. I did.

18 Q. And was this after he was arrested or did you see
19 the exchange?

20 A. I did not see the exchange. I saw when he met
21 with Mr. Kinloch, and then we broke away with our
22 surveillance. We were not stationary at that point. We
23 were mobile, and then I saw him when he went into --
24 Mr. Burns now -- went into the BP gas station, stood at
25 the front desk for a couple minutes, and then he ran out

1 of the gas station. There had been a patrol officer
2 circling around the BP. It was Deeg and Jacobson again.
3 One they left, he ran out, and I saw him throw a package
4 on the ground. He was stopped by the patrol officers,
5 and --

6 Q. So correct me if I'm wrong, Officer. You were
7 stationed there as surveillance, and then at some point
8 after the exchange that occurred between Redondo Burns
9 and an unknown male in the Pizza Hut, you left your
10 stationary surveillance and picked up Redondo Burns
11 somewhere in between the Pizza Hut and the BP?

12 A. No, ma'am.

13 Q. Okay. Please explain.

14 A. Okay. There was a gentleman who left 609 Pleasant
15 Grove, 609-A. He had a black puffy coat, New York
16 Yankees hat, fur around the back of the coat. We saw him
17 leave. At that point in the surveillance, we had another
18 officer who had set up surveillance with us. He had a
19 good eye on the house from a different location.

20 Q. Which officer was that?

21 A. Bruder. So at that point myself and Hurteau were
22 able to leave the residence. We followed him, the black
23 male in the puffy coat, watched him go across 17 to the
24 Pizza Hut, to the side of the Pizza Hut, and meet with
25 Mr. Burns.

1 At that point Officer Walker told us on the
2 radio -- he had a different vantage point. I see the guy
3 in the puffy coat, and he's meeting with Redondo Burns.

4 Q. So at that point you left the Pizza Hut?

5 A. Correct. We weren't actually in the Pizza Hut.
6 We were out on the roadway, but yes, since he had an eye
7 ball, he had a visual, we went to the other side of the
8 BP, the South Side of the BP which would have been where
9 the Sofa Super Store used to be, and we set up there.

10 Q. So if I could be clear, the person that you saw
11 leaving 609-A, the unidentified male, was wearing a black
12 puffy jacket, a New York Yankee hat --

13 A. Yes, and he had, like, a brown fur-lined hood.

14 Q. Okay. And so at some point, according to your
15 report, the black male with the New York Yankee hat
16 leaves the Pizza Hut with a pizza and comes back to 609
17 Pleasant Grove, correct?

18 A. Let me check my notes real quick. I didn't see
19 him walking with the pizza. I did put that he had a
20 pizza. He walked back with a pizza. I never saw him
21 walk -- I was just keeping notes of what was transpiring
22 on the radio. That is not something I saw, I guess I'm
23 trying to say.

24 Q. You did write in your report that at 1732, a black
25 male, New York Yankee hat, leaves Pizza Hut with pizza

1 and walks back to residence on Pleasant Grove, enters
2 Apartment A.

3 A. Correct.

4 Q. And it's your testimony that you heard over the
5 radio that he had had a pizza. You wouldn't have just
6 made that up?

7 A. I certainly wouldn't have made it up. I might
8 have misheard something. There were a lot of things
9 transpiring at that point, and we were busy with Redondo
10 Burns. So there were a lot of things. Basically,
11 Jacobson and Hurteau were in charge of the investigation,
12 so him carrying a pizza or not, I'm not absolutely
13 positive of that, but I definitely wrote it.

14 Q. And if I may, a confidential informant was used in
15 this case?

16 A. A concerned citizen.

17 Q. A concerned citizen. In fact, that concerned
18 citizen got money, right?

19 A. He was given money at a later date and time.

20 Q. And how much money was he given?

21 A. I can't recall.

22 Q. Is there anything that would refresh your
23 recollection?

24 A. I mean, if I had some documentation, I guess, but
25 I really don't know.

1 Q. So the police department doesn't document how much
2 money --

3 A. The police department does. I didn't pay them,
4 though.

5 Q. Who would know how much money he was paid?

6 A. I don't know. We would have to look through the
7 files.

8 Q. And this concerned citizen, you used him that day,
9 but you've never used him since, correct?

10 A. Not prior to that day or after that day.

11 Q. If I could have just one moment. I believe I may
12 have already asked you this, but I just want to
13 double-check to make sure.

14 During the time of your surveillance, you still
15 had seen people enter and exit Apartment B, you also saw
16 people enter and exit Apartment B, 609 Pleasant Grove
17 Road?

18 A. Correct.

19 Q. If I could, just one more quick question.

20 A. No problem.

21 Q. According to your supplemental report, at 1501 the
22 white male, Little B, and the black male, wearing the New
23 York Yankee hat, all exited Apartment B?

24 A. Correct.

25 Q. And entered Apartment A?

1 A. Correct.

2 Q. Utilizing a key.

3 A. Correct.

4 Q. So the male with the New York Yankee hat was in
5 both Apartment A and Apartment B.

6 A. At different times, correct.

7 Q. And this individual was never apprehended,
8 correct?

9 A. No, he was not.

10 Q. So you don't know where he lived.

11 A. No. Mr. Kinloch actually had the key to go into
12 Apartment A.

13 Q. Right. But you don't know whether the male with
14 the New York Yankee hat lived in Apartment B, do you?

15 A. I don't know who he is.

16 Q. All right. Thanks.

17 CROSS-EXAMINATION

18 BY MS. LINDER:

19 Q. I'd like to talk about this tip you received a
20 little bit more. Can you explain -- back on January 2nd,
21 you said about 12:30 you received a call. You received a
22 tip. Can you tell us about that tip, how you received
23 it, what you heard?

24 A. Yes, ma'am. Our secretary said that there was
25 someone on the phone who wanted to give us some

1 information. I talked to gentleman on the phone. I was
2 in my office, myself and Detective Hurteau shared an
3 office at the time, and he started to tell me about a
4 major heroin operation in West Ashley behind Bender's Bar
5 and it involved a black male by the name of Little B.

6 Q. Okay. Once you heard this kind of information,
7 did you then say, Hey, maybe I should go meet with him?
8 Did you and Corporal Hurteau ever meet with him face to
9 face or did the phone call end?

10 A. I put him on speakerphone so Corporal Hurteau
11 could hear what was going on. The conversation was
12 somewhat brief, but I wanted to meet with him in person
13 so I could more information. I wanted to meet him face
14 to face to get more detailed information, so he did agree
15 to meet with me down in Hampton Park.

16 Q. When you met with -- when you and Corporal Hurteau
17 met with this gentleman down at Hampton Park, what
18 information did he tell you? What did you learn?

19 A. Well, he told us Little B's name was actually
20 Bryant Kinloch. He just got out of prison, had a 25-year
21 sentence.

22 MS. MULLANEY: Objection. Confrontation
23 clause.

24 MS. LINDER: I believe we had the previous
25 hearing to where the tip was in front of Judge Harrington

1 to where we did not even reveal the identity of the
2 CI because the information was corroborated; however, I
3 believe that if Ms. Mullaney is trying to say the tip was
4 not valid, I think we still need to say what the tip was,
5 why the police gave it credence, and then why it led to
6 them doing surveillance that day, why this tip was
7 different from tips they had received previously.

8 THE COURT: Say that again?

9 MS. LINDER: I believe Ms. Mullaney is
10 questioning the tip, as far as saying, you know,
11 specifics weren't received and so on and so forth, and I
12 believe that the police -- and we can get into that.
13 Earlier she had asked about numerous complaints and they
14 have received other call-ins, which I believe was said
15 and we'll get to with this officer and I believe the next
16 one as well; however, with numerous calls, information
17 may not have been specific, and it was over the phone or
18 it was anonymous whereas this person met in person. I
19 believe the content of his tip, which the police then
20 corroborated, aided them in setting up their surveillance
21 in this entire investigation.

22 THE COURT: Well, first of all, this isn't in
23 front of the jury, and it's for a suppression hearing. I
24 don't know that I would let it in front of the jury, but
25 it's presumably trying to avoid a hearsay problem, but

1 he's not stating -- he's not offering it for the proof of
2 the truth of the matter asserted, but, rather, why they
3 set up an observation of this gentleman's house.

4 So for this purpose, the motion is denied, or
5 the objection is denied. Overruled.

6 BY MS. LINDER:

7 Q. Thank you. Corporal Costanzo, could you please
8 explain what you were told by this citizen, specifically?

9 A. That Bryant Kinloch, who is a black male, about 5
10 foot seven, 140 pounds, had actually a major heroin
11 distribution operation going out of the house behind
12 Bender's Bar on Highway 17, that currently he had two
13 ounces of heroin and an ounce of cocaine in the
14 residence.

15 Q. And did this citizen -- didn't he also mention
16 something about Mr. Kinloch's criminal history?

17 A. He did. I'm sorry. I didn't get through that
18 before, that he had had a 25-year sentence, prison
19 sentence. He had just got out.

20 Q. Do he know what those convictions were for, or
21 what did the citizen tell you the convictions were for?

22 A. He said drugs.

23 Q. What is the procedure when you typically receive
24 information on a location or on a person? Do you verify
25 that? What do you normally do?

1 A. We do verify it and try to corroborate anything
2 that we can. So in this instance, we -- I actually
3 called the office, had someone run a rap sheet for this
4 individual. Come to find out that he had been convicted
5 of a 25 year trafficking sentence and the -- actually, we
6 talked to the citizen who agreed to take us to the house
7 and show us where the house was.

8 Q. So the citizen told you that he would show you
9 where this information he gave you, what location that
10 was in reference to?

11 A. Yes, ma'am, he did.

12 Q. And did you take him up on that offer?

13 A. Absolutely.

14 Q. What did you do?

15 A. He had his own transportation. He said that he
16 would follow us -- we could follow him over there, but if
17 Mr. Kinloch was outside, he would have to get out and
18 talk to him, so we followed him over there. He pulled up
19 to 609 Pleasant Grove. Mr. Kinloch was standing out
20 front. That's when myself and Hurteau set up
21 surveillance in the parking lot adjacent to the
22 residence.

23 Q. This person who gave you the information, when you
24 just said that he had to get out of the car and go talk
25 to him, what happened?

1 A. He greeted Mr. Bryant, Mr. Bryant greeted him,
2 shook hands, and they started to talk.

3 Q. Okay. And after that was completed and the
4 informant got back in his vehicle to leave, did you have
5 any other contact with that informant calling you,
6 talking to you, anything?

7 A. He did actually call and stated that Little B,
8 that that was Bryant Kinloch in the red that he was
9 talking to, and while we were there -- he was there
10 approximately ten minutes talking to him. In that time
11 period, a vehicle had pulled up, two white males had
12 exited the vehicle and gone inside the residence, and
13 they were inside probably two minutes.

14 They walked out along with another black male.
15 That is the first time they saw the black male with the
16 puffy coat and the fur-lined hood. They all three walked
17 out together. The white males got back in the car and
18 left, but he had told us that the white males were there
19 to buy heroin.

20 He said, Did you see the white guys there? Yeah.
21 They were there to buy heroin.

22 Q. Was the location where the informant brought you
23 or showed you, was it the same as what he described to
24 you?

25 A. Yes. The physical features of the building were

1 the same.

2 Q. The person that the informant told you was
3 Mr. Kinloch, was that the same person that he had
4 described to you?

5 A. Yes.

6 Q. So when you were parked, watching the informant
7 approach the residence and talk with Mr. Kinloch, did you
8 move from that location to do your surveillance or did
9 you remain in the same location?

10 A. No. We had a perfect spot. There was no reason
11 for us to move.

12 Q. Did the informant tell you anything about -- you
13 keep saying residence.

14 MS. MULLANEY: Objection, Judge. Again, what
15 the informant told him. I think this is a proper issue,
16 and this is exactly why I asked for the informant's
17 identification. I'm at a real disadvantage here because
18 I haven't had the opportunity to investigate this or, you
19 note, to cross examine the officer or --

20 MS. LINDER: Your Honor, I'm happy to move
21 on.

22 THE COURT: Okay. Please do. Thank you.

23 BY MS. LINDER:

24 Q. After seeing the informant -- and I am moving
25 along -- after receiving this information, calling your

1 office, I believe you said, and all of that, you then set
2 up surveillance. Can you explain what you set up
3 surveillance on and what exactly setting up surveillance
4 means.

5 A. Sure. Basically, at this point the information
6 that we received was corroborated, so it was time for us
7 to start kind of moving forward with it, see what else we
8 could see, basically just an observation time. We wanted
9 to do surveillance on not only Mr. Kinloch but the
10 residence also, so basically at this point it was a dual
11 surveillance.

12 I contacted our supervisor to let him know there
13 was something that actually looked pretty good, might go
14 somewhere, let the other officers on the unit know to be
15 on standby and need their assistance if it goes this
16 direction, utilizing telephones, two-way walkies, things
17 of that nature.

18 Q. What did you observe when were you doing
19 surveillance?

20 A. We saw a lot of foot traffic coming up to the
21 residence. Saw basically Mr. Kinloch and the black male
22 with the puffy coat -- I hate to keep saying that -- fur
23 lined hat, saw them in and out of the apartment several
24 times standing out front of the apartment, going into
25 Apartment B, kind of bouncing back and forth, kind of

1 hanging out.

2 A lot of foot traffic came up, saw what appeared
3 to be some hand to hand transactions, saw a couple
4 vehicles pull up that I touched base with earlier, people
5 going in the house, people coming out, so, basically, a
6 lot of traffic coming in and out of the house.

7 Q. While you were there doing surveillance on 609-A,
8 did you see hand-to-hands occur out -- just outside of
9 that residence on that property?

10 A. I did. It would appear to be hand-to-hand drug
11 transactions. It was consistent with what I've seen in
12 hand-to-hand drug transactions. I've been involved in
13 approximately over 1,000 narcotic transactions, so I
14 didn't actually see a bag of heroin from one hand to
15 another hand. I did see money being exchanged and money
16 being counted and something being passed.

17 Q. Was Mr. Kinloch part of these hand-to-hands?

18 A. He was.

19 Q. You had mentioned counting money. Who was
20 counting money?

21 A. I saw Mr. Kinloch counting money.

22 Q. Did Mr. Kinloch gain entry or access into
23 Apartment A?

24 A. He did.

25 Q. And how did he do that?

1 A. Several times he just walked in and out. One time
2 in particular he went over to Apartment B. When he came
3 back from B, I think I actually talked about this a
4 minute ago, he was talking -- came out of a B with the
5 white male in the puffy coat, and he had a key to go back
6 and use the key to get into the residence.

7 Q. Okay. When you say he, who do you mean?

8 A. Mr. Kinloch.

9 Q. So he had the key to Apartment A and utilized that
10 to gain entry?

11 A. Yes, ma'am.

12 Q. And Mr. Kinloch, you saw, based on your training
13 and experience, involved in multiple hand-to-hand
14 transactions?

15 A. Yes, ma'am.

16 Q. And you also saw Mr. Kinloch counting money.

17 A. Correct.

18 Q. Just to hit on a couple things Ms. Mullaney
19 brought up about these two cars that were stopped with
20 negative results, are there other reasons why there could
21 be negative results?

22 MS. MULLANEY: Objection. This wasn't the
23 officer. They haven't laid the foundation this was the
24 officer that did the stops.

25 MS. LINDER: I believe Ms. Mullaney asked him

1 on direct --

2 THE COURT: Go ahead. Overruled. Go ahead.

3 BY MS. LINDER:

4 Q. Do you know if -- the two officers who stopped the
5 two vehicles you had mentioned in your surveillance
6 notes, do you know if they received consent to search the
7 vehicle and the people inside the car?

8 A. No, ma'am. I have no idea what transpired.

9 Q. Do you know that the two officers who stopped the
10 two vehicles marked in your report who had negative
11 results, do you know if they went in the trunk of the
12 car?

13 A. No, ma'am.

14 Q. Do you know if they looked through any potential
15 hidden panels in the two cars that were stopped?

16 A. No, ma'am.

17 Q. Do you know if they did a sweep of the driver's
18 mouth? Is it possible to hide narcotics in your mouth?

19 A. Absolutely, especially heroin. It's sold in such
20 small quantities for usage so it could be hidden mouth --
21 I mean, anywhere, very small.

22 MS. MULLANEY: Objection. Calls for
23 speculation.

24 THE COURT: Overruled. Go ahead.

25 BY MS. LINDER:

1 Q. Do you know if those two officers who stopped
2 these vehicles searched in every area of the car, in
3 every area of the people in the car?

4 A. No, ma'am.

5 Q. So your knowledge is just the two -- I believe you
6 referred to them as, fortunately, a little newer at that
7 time, officers told you negative results and you just
8 continued on your work because so much else was
9 happening; is that correct?

10 A. Correct.

11 Q. Ms. Mullaney also brought up that how come no one
12 else was stopped? You mentioned there was a lot of foot
13 traffic, but everybody on foot traffic, they weren't
14 stopped. The only person really watched, that we know
15 based on reports, is the guy with the puffy jacket who
16 then did the hand-to-hand with Mr. Burns and then
17 reentered. We know all that. How come every other
18 person where you noted there was foot traffic, how come
19 those people weren't all stopped?

20 A. I could explain it. If you have people on foot in
21 the area walking around like we sent a patrol officer in
22 there or plainclothes officer to stop them, that is going
23 to happen much closer to where this happens, the drug
24 deal was going on, at 609. So if we sent uniforms in, we
25 didn't want to spook them. The reason we stopped the

1 vehicles that left is because they're out of the area.
2 The officers made sure they stopped them away from the
3 location, and this is probably the best way to explain
4 it, want to let them know that we are on to what is going
5 on around there.

6 Q. Would it be accurate to say it would potentially
7 compromise your ongoing investigation had you stopped
8 people one house or two houses away with a marked
9 cruiser?

10 A. It would have made a very strong possibility, yes,
11 of compromising what we were doing. It just wasn't the
12 smart thing to do, prudent thing to do, based on what we
13 were watching.

14 MS. LINDER: Beg the Court's indulgence.

15 I have nothing further at this time. Thank
16 you, Corporal.

17 THE WITNESS: Yes, ma'am.

18 REDIRECT EXAMINATION

19 BY MS. MULLANEY:

20 Q. I do. Officer, you testified that the informant
21 told you that the two white males left the house, and you
22 saw these two white males leave the house.

23 A. Yes, ma'am.

24 Q. And they got into cars and they drove away,
25 correct?

1 A. Yes.

2 Q. Away from 17?

3 A. I don't know --

4 Q. Away on 17. They drove away from 609 Pleasant
5 Grove Lane?

6 A. Yes, ma'am.

7 Q. And there were two individuals?

8 A. Yes, ma'am.

9 Q. And you had information from this unknown CI that
10 they were there to buy heroin?

11 A. Correct.

12 Q. But you didn't stop those individuals, did you?

13 A. He called us about five minutes after the white
14 males had left the residence, so they had five minutes to
15 get wherever they were going, not to mention, we didn't
16 have any other assistance at that point so it wouldn't
17 have been very prudent for us to break from our
18 surveillance and follow them --

19 Q. So you made a decision not to stop them.

20 A. Well, we wouldn't have had the opportunity to
21 stop. We didn't find the information out until after
22 they had already left five minutes. I didn't send a
23 search party out for them.

24 Q. You didn't write down their license plate?

25 A. No, ma'am. Let me double-check. I don't think I

1 did. No, ma'am.

2 Q. You testified earlier that you saw several
3 hand-to-hands, correct, during your surveillance?

4 A. Correct. And let me clarify hand-to-hand. I
5 think it's kind of used a little loosely. We saw people
6 exchanging money for something. I don't know what was
7 given, but it was consistent with what I've seen in the
8 past with narcotics transactions.

9 Q. Okay. And you're saying that that is what you
10 saw, right?

11 A. Correct.

12 Q. And you filled out a police report, correct?

13 A. Yes.

14 Q. A supplemental report?

15 A. Correct.

16 Q. And in your report you try to be accurate?

17 A. Yes.

18 Q. Try to be thorough?

19 A. Yes.

20 Q. You try to be complete?

21 A. Correct.

22 Q. Because you know, like in this case, it may be
23 years before you are actually called to testify.

24 A. Correct, and basically the report I fill out
25 basically is my notes as we were going along with this,

1 while I was sitting in the car.

2 Q. Right. So you took notes about what you saw and
3 what happened?

4 A. Correct.

5 Q. And you took detailed notes. White male leaves
6 the residence, black bag in left hand?

7 A. Correct.

8 Q. You put down approximate weights of people,
9 heights of people, what they were carrying in their
10 hands, correct?

11 A. Correct.

12 Q. What they were wearing?

13 A. Yes.

14 Q. The make and model of their car?

15 A. Yes.

16 Q. It was very detailed.

17 A. Yes, ma'am.

18 Q. But, Officer, other than the exchange that
19 occurred with Redondo Burns, you don't mention any
20 hand-to-hands or money exchanged in your supplemental
21 report, do you?

22 A. I documented the vehicles. That was part of my
23 responsibilities to keep note of the vehicles that were
24 leaving from the residence.

25 Q. So you documented the vehicles of the people that

1 did these alleged hand-to-hands?

2 A. No, ma'am.

3 Q. Loosely called where money was exchanged?

4 A. No, ma'am. Let me clarify that for you. The
5 people that pulled up in the cars that I documented
6 actually went into the residence. I never saw them
7 except -- none of them, actually, do any kind of
8 hand-to-hand with anybody. Those people pulled up, went
9 inside the residence, came out a short time later, and
10 left.

11 Q. So it's your testimony that you only documented
12 the people that went in the residence and left, but you
13 didn't document the people that did alleged hand to
14 handed?

15 A. People who arrived in vehicles and left the
16 vehicles. That is what I documented.

17 Q. But you didn't document any of the hand-to-hands?

18 A. No, ma'am, with the pedestrians that walked up?
19 No, I did not.

20 Q. But, Officer, you were investigating narcotics,
21 right? You thought somebody was exchanging drugs in this
22 house?

23 A. Yes, ma'am.

24 Q. Right? Someone was selling heroin out of this
25 house?

1 A. Correct.

2 Q. And, in fact, you're telling us that you saw what
3 you thought was drug sales, money being exchanged, and
4 you didn't put down any description of what those -- you
5 didn't document that at all.

6 A. I think I clarified that at the beginning that my
7 responsibility is to document the vehicles coming in and
8 out.

9 Q. So the answer to my question is then you didn't
10 document the people that you saw do hand-to-hands.

11 A. Correct.

12 Q. You didn't write down their weight or their height
13 or what they were wearing or what you saw exchanged?

14 A. Correct.

15 Q. There is nothing in this report about any
16 hand-to-hands happening, other than the one that occurred
17 with Redondo Burns, correct?

18 A. Correct.

19 Q. And the two people that you wrote down, that you
20 documented, their make and model of the car, you
21 documented that because you thought possibly something
22 was going on in the house. They were engaged in
23 narcotics.

24 A. It was possible, yes, ma'am.

25 Q. And Officer Deeg and Officer Jacobson were on

1 patrol, correct?

2 A. No, ma'am.

3 Q. Well, they were uniformed officers?

4 A. They were uniformed officers detailed to us for
5 that day.

6 Q. And they were in patrol cars?

7 A. Yes, ma'am.

8 Q. And they were in uniforms?

9 A. Yes, ma'am.

10 Q. You testified earlier that you didn't want anyone
11 stopped. That you didn't stop anyone because you didn't
12 want to speak to people near the house, correct?

13 A. No, ma'am. What I testified to is, what I meant
14 to, at least, that we didn't stop pedestrians in that
15 that immediate area when this was taking place because,
16 again, we don't want to speak them. We don't want to
17 alert anybody that we were there.

18 Q. You stopped Redondo Burns, correct, and he was a
19 pedestrian, right, Officer?

20 A. We did stop him because Officer Bruder set up
21 surveillance so we now had someone else to watch the
22 house. Officer Hurteau and myself actually watched the
23 gentleman with the puffy coat leave the residence, a
24 couple hours into the surveillance, watch him meet with
25 somebody. Officer Walker watches him actually exchange

1 money. We watched Mr. Burns exit the BP afterwards, and
2 I actually saw him throw the heroin on to the ground.

3 Q. Right. But you approached him, Officer Deeg and
4 Officer Jacobson approached him, and then he threw the
5 heroin to the ground, correct?

6 A. As they saw their patrol vehicle drive up, he
7 threw it on to the ground. It's basically a decision I
8 had to make and Hurteau that it was time to pull the
9 trigger. We had seen enough that day. We had seen
10 enough things consistent with drug dealing that we
11 decided that when this one went down let's go ahead and
12 take it to the next step.

13 Q. Right. You approach Redondo Burns. You had
14 uniformed officers approach Redondo Burns because you saw
15 what you thought was a drug exchange?

16 A. No, ma'am. Officer Walker saw that.

17 Q. You had information?

18 A. Correct.

19 Q. You saw a hand-to-hand?

20 A. No, ma'am. I didn't see that.

21 Q. You had information that a hand-to-hand had
22 occurred, right?

23 A. Yes, ma'am, with Redondo Burns and the gentleman
24 with the puffy coat.

25 Q. So you thought there possibly could have been a

1 drug transaction?

2 A. Yes, ma'am.

3 Q. So that is why you had two uniformed patrol
4 officers approach Redondo Burns?

5 A. Correct.

6 Q. And he was approached just across the street from
7 609-A Pleasant Grove Lane --

8 A. I'm sorry. Go ahead.

9 Q. -- by the BP.

10 A. Let's clarify that. Definitely not within sight
11 of 609. It was up on the road on 17 a little further off
12 and that was part of our decision to stop then. Officer
13 Walker said the guy in the puffy coat was out of sight.
14 We decided it was time for us to go and we could make
15 this stop without alerting anybody else at the house as
16 to what we were doing.

17 Q. Now, these two individuals that were stopped in
18 the cars, you don't know if they alerted anyone else in
19 the house, right?

20 A. I sure don't.

21 Q. And they were stopped by uniformed patrol
22 officers?

23 A. Out of area, yes, ma'am.

24 Q. And they were stopped shortly without range of the
25 house?

1 A. I don't think so. I think one was at 526, if I
2 recall correctly. The other one was in the other
3 direction, north on 17. They were definitely not near
4 the house.

5 Q. But you don't know if they had cell phones. You
6 don't know whether they alerted someone.

7 A. No, I have no idea. It's kind of the chance you
8 take sometimes. It's just part of doing the
9 investigation.

10 MS. MULLANEY: Thank you, Corporal.

11 MS. LINDER: Just briefly.

12 RE CROSS-EXAMINATION

13 BY MS. LINDER:

14 Q. Corporal Costanzo, Ms. Mullaney kept saying it's
15 not in your surveillance notes that after three to four
16 hand-to-hand transactions seen in front of the residence;
17 however, didn't you tell Officer Walker that he later
18 swore to that, quote, on approximately three to four
19 incidents, the black male wearing all red clothing exited
20 609-A Pleasant Grove Lane and met with unknown parties at
21 the north side of the duplex. Corporal Hurteau and
22 Corporal Costanzo observed a quick hand-to-hand
23 transaction between a black male wearing all red and
24 other unknown parties at the corner of this residence.

25 Corporal Hurteau and Corporal Costanzo noted the

1 party dressed in all red was counting money after the
2 transactions as he walked back into the residence.

3 A. Yes, ma'am.

4 Q. Furthermore, you also swore that Corporal Costanzo
5 and Corporal Hurteau observed this subject, meaning the
6 gentleman in all red clothing, walking in --

7 MS. MULLANEY: I don't know if they swore. I
8 think that is Officer Walker.

9 THE WITNESS: I just relayed the information
10 to Officer Walker.

11 BY MS. LINDER:

12 Q. That this suspect was walking into and out of
13 609-A Pleasant Grove Lane on several occasions; is that
14 correct?

15 A. That is correct.

16 Q. Just to make sure we're clear here, did you see
17 three to four hand-to-hand transactions occur outside of
18 609-A Pleasant Grove?

19 A. Yes, ma'am.

20 Q. Did any or all of those include the defendant,
21 Bryant Kinloch?

22 A. Yes, ma'am.

23 Q. Did you ever see Bryant Kinloch counting money
24 immediately after these hand-to-hand transactions?

25 A. Yes, ma'am.

1 Q. Did you see Bryant Kinloch, the defendant, enter
2 Apartment A with a key?

3 A. Yes, ma'am.

4 Q. As far as right before the time when you had to --
5 when you had Bruder take over the stationary surveillance
6 and you left to go down the road or across the street,
7 however you want to word it, for the gentleman in the
8 puffy jacket and the Redondo Burns hand-to-hand, did you
9 see the guy in the puffy jacket enter apartment 609-A
10 Pleasant Grove?

11 A. Yes, I did.

12 Q. And then did you radio to another officer to keep
13 eyes on the guy wearing the puffy jacket?

14 A. Yes, ma'am.

15 Q. After you were radioed by another officer that he
16 believed with his training and experience a hand-to-hand
17 transaction occurred with Redondo Burns, did you then
18 keep your eye on Redondo Burns?

19 A. Yes, ma'am.

20 Q. Was Redondo Burns ever stopped? Did you ever see
21 him with, near, throwing drugs?

22 A. Yes, ma'am.

23 Q. Were those drugs field tested?

24 A. Yes, ma'am.

25 Q. Were they presumptive?

1 A. For heroin, yes, ma'am.

2 Q. After this occurred, was there constant visual
3 surveillance of the guy in the puffy jacket going back to
4 609-A Pleasant Grove?

5 A. Yes, ma'am. Not by myself, by Officer Walker.

6 MS. LINDER: Thank you.

7 MS. MULLANEY: No further questions, Your
8 Honor.

9 THE COURT: All right. You got to clean up
10 this puffy jacket thing for me, because I'm stuck with
11 this mental image of Jerry Seinfeld with the puffy shirt.
12 What is it about?

13 THE WITNESS: I would call it, like, a
14 quilted -- big, puffy jacket, like a down filled jacket.

15 THE COURT: Okay. Thanks. Anything else?

16 MS. MULLANEY: Not from me, Your Honor.

17 THE COURT: Okay. You can step down.

18 MS. MULLANEY: I don't have any other
19 witnesses I would like to call for purposes of the search
20 warrant.

21 THE COURT: Do you have any witnesses you
22 would like to call, Ms. Linder?

23 MS. LINDER: Beg the Court's indulgence.

24 We're fine, Your Honor, with just those two
25 witnesses.

1 THE COURT: All right. Do you want to make
2 an argument?

3 MS. MULLANEY: Yes, Your Honor, if I could
4 just have one minute.

5 I'll be brief because I did file a motion, so
6 the bulk of my argument, I would ask for Your Honor to
7 rely on the motion and the arguments and the facts that I
8 set forth in the motion. However, just briefly, I would
9 like to summarize my position, and I think our strongest
10 argument is under State v. Gentile where there is
11 absolutely no nexus between the probable cause in the
12 search warrant and the incident location.

13 The Court of Appeals held in Gentile where
14 someone leaves the house and they get arrested directly
15 leaving the house with marijuana, and they smell
16 marijuana, there is a tip that they smell marijuana in
17 the house, and, additionally, that there is heavy foot
18 traffic as in Gentile. And in Gentile, the Court of
19 Appeals held that that wasn't enough and that that wasn't
20 probable cause.

21 And this case is even weaker than Gentile,
22 because in Gentile we have someone that directly left the
23 house, gets pulled over, and gets arrested with
24 marijuana, and the Court said that's not sufficient
25 because we don't know where that individual could have

1 gotten that marijuana, whether they had it before or
2 after they left the house.

3 Additionally, the Court in Gentile found that
4 the heavy foot traffic and the smell of marijuana wasn't
5 enough to establish probable cause in that case. In this
6 case, there was even less than what the Court had before
7 in Gentile, because the exchange occurs -- first of all,
8 I think there's an issue with the exchange because
9 Officer Walker testifies that he's absolutely positive,
10 and he's the one that saw the exchange, all the officers
11 are clear about that, and the exchange that he saw was
12 with Redondo Burns and somebody in a stocking cap.

13 Well, Officer Costanzo testified that the
14 individual that left the hat -- that left the house had a
15 New York Yankees baseball hat on, so it's our position
16 that that exchange may not have even been the same
17 individual that left the house, that somewhere between
18 one officer's leaving off their surveillance and asking
19 another officer to pick up that it got confused as to who
20 was the individual that actually left 609.

21 But, regardless, even if -- it's our position
22 that they haven't established that it was the person that
23 left 609, but assuming, even if it is that same person
24 that left 609, that leaves the house and does a
25 hand-to-hand with Redondo Burns in the Pizza Hut and then

1 Redondo Burns goes to the BP and then he goes walking
2 down the street and that is where they recover the drugs,
3 there is no direct connection between Redondo Burns and
4 609 Pleasant Grove Lane, none at all.

5 And, in fact, the individual in the New York
6 Yankees hat goes into Apartment B several times. We
7 don't know who he is or where he lives, and when Gentile
8 held that somebody who directly leaves the house has
9 drugs on them isn't sufficient, it's our position that
10 someone who directly leaves the house and communicates
11 with somebody else who is never in the house and that
12 person is found to have drugs on them is -- that it's too
13 tenuous to establish probable cause here.

14 Now, with regard to the informant, you know,
15 all of that is well and good, but, you know, they
16 testified. Bryant Kinloch, he gave a name, but that is
17 not in the affidavit, and that is not the evidence that
18 was presented to the magistrate. And so what Your Honor
19 has to decide here is what is within the four corners of
20 the documents, and it was clear that there was no
21 additional evidence that was presented to the magistrate,
22 so the only thing that Your Honor can consider is the
23 probable cause within the four corners, and I don't think
24 it's there.

25 Now, if Your Honor chooses to distinguish, to

1 say, well, there were these three or four hand-to-hands
2 that Officer Costanzo says that he saw and which are in
3 the search warrant, it's interesting enough because these
4 hand-to-hands aren't anywhere in any of Costanzo's
5 report. He doesn't mention any of that, even though he
6 goes to great pains to document in detail everything else
7 that occurred, but even if you're going to credit that
8 testimony, I think that you are still -- that still is
9 not probable cause.

10 Officer Costanzo himself said they didn't
11 even stop those people. They weren't sure exactly what
12 the transactions were, what was occurring, that money
13 wasn't exchanged, and they didn't feel it was enough for
14 them to stop those individuals. And I think you
15 certainly cannot overlook that the two stops that they
16 did make, that they knew occurred, no drugs, negative
17 results were found.

18 Nothing occurred, and, you know, they could
19 say, well, it was new or inexperienced officers.
20 Obviously, they asked those officers to stop people
21 because they thought there was something suspicious.

22 THE COURT: You don't get to stop somebody
23 just because you think you see something suspicious. You
24 don't get to pat them down and search them for drugs and
25 search their cars just because you saw them leave a

1 house. The way you connect it up is when somebody drops
2 something on the ground, like Burns did, and it tests for
3 heroin.

4 MS. MULLANEY: Right, but then you're asking
5 to make assumptions that Burns definitely got those
6 drugs, and they did -- for whatever reason, I don't know
7 why, these individuals were stopped. That may be an
8 issue. Maybe these individuals were stopped for no
9 probable cause, but these individuals were stopped
10 leaving the house and no drugs were recovered either
11 time, and that information was left out of the search
12 warrant.

13 THE COURT: It's really -- I'm troubled how
14 the lack of something goes to the lack of probable cause
15 in that, because if everybody, including Burns, had
16 nothing on them, then I would agree with you. There is
17 no probable cause. You can't just say well, I saw people
18 walking in and out of a place and slapping hands or doing
19 anything. If nobody has got any drugs on them, then you
20 don't have probable cause to get back into that building,
21 but one of them had drugs on them when they connect up
22 those dots.

23 So if Redondo Burns hadn't had anything on
24 him, I would say there is no probable cause, but the
25 other two not having anything, that doesn't, really, cut

1 one way or the other.

2 MS. MULLANEY: But we can't establish Redondo
3 Burns got those drugs from 609 Pleasant Grove A.

4 THE COURT: You could make an argument,
5 circumstantially, that he got it from the guy wearing the
6 puffy jacket.

7 MS. MULLANEY: That's correct. That is the
8 assumption they're asking to you make.

9 THE COURT: That it was activity that looked
10 like drug activity going on. That, in and of itself, is
11 not enough, but you saw the defendant doing what looked
12 like a drug transaction. You saw a puffy shirt, or puffy
13 jacket walking out, going down the street. He looks like
14 he's doing a drug transaction, and then it turns out
15 Burns had drugs on him, or he threw it down.

16 Now, if Burns hadn't have done a throw down,
17 I don't think you got probable cause because you had no
18 drugs, but because Burns had drugs on him, then you can
19 connect it up to the guy with the puffy jacket.

20 MS. MULLANEY: I think you're asking to make
21 a lot of assumptions.

22 THE COURT: It's circumstantial.

23 MS. MULLANEY: But I also think Officer
24 Walker testified that Burns is known to deal in
25 narcotics, so how do we know that Burns didn't already

1 have those drugs on him, or, in fact, that Burns
2 wasn't -- that, you know, the seller instead of the
3 buyer? We don't know that. We're asking to make a lot
4 of assumptions that somehow those drugs that he has, you
5 know, down the street came from someone who left 609
6 Pleasant Grove A.

7 And even if we do, Gentile says that is not
8 enough. You know, Gentile says that somebody leaving,
9 directly leaving, Gentile says --

10 THE COURT: I don't have Gentile in front of
11 me, but did they find drugs on somebody in Gentile or was
12 it just the aroma of --

13 MS. MULLANEY: They found drugs on the person
14 that was found leaving the house.

15 THE COURT: Let me take a look at this.

16 MS. LINDER: Your Honor, at the appropriate
17 time, I'm happy to respond to the Gentile case and
18 others.

19 THE COURT: Were you finished?

20 MS. MULLANEY: I just wanted to add real
21 briefly, and, Judge, I also think there is a Franks issue
22 here also, in that they recklessly omitted -- that
23 nothing was found, those negative car stops. In fact,
24 they don't put anything at all about those negative car
25 stops, but yet they do lead the magistrate to believe on

1 those three separate hand-to-hands that something was
2 occurring when they knew, on two prior occasions, that
3 they left that information out, that those individuals
4 were stopped and there was negative results.

5 And, I mean, they can try to say, Oh, wow,
6 you know, nothing was found because they were new
7 officers. Well, you better believe if during that stop
8 they found something, it would be front and center, and
9 it would be in the search warrant, but then they can't
10 have it both ways.

11 If they pulled two people over leaving the
12 house because they suspected illegal drug activity, then
13 they need to put that in the warrant and they need to
14 explain that nothing was found in those situations, and
15 if that information had been included in the search
16 warrant, I don't think that magistrate would have signed
17 it or found probable cause.

18 THE COURT: All right. Ms. Linder?

19 MS. LINDER: Thank you, Your Honor. May it
20 please the Court. First I want to address the Franks
21 issue. Ms. Mullaney is contending more or less that
22 Sergeant Walker was reckless by omitting facts in the
23 affidavit. Sergeant Walker relayed information that was
24 given to him by case agents in this case, and those car
25 stops were not related to him; therefore, they were not

1 placed in there. You know, they are -- since this is
2 done -- since search warrants are done kind of hastily in
3 the midst of an investigation, we have to remember. They
4 are not written by fellow attorneys, and Ms. Mullaney
5 trying to say that they were leading the magistrate to
6 believe that every one of those three to four
7 hand-to-hand transactions occurred had drugs and then
8 kind of bolstering that idea by leaving out the two car
9 stops with negative results, I would state that the car
10 lists, the two cars were noted by Corporal Costanzo
11 because the cars came, the people went in and out of the
12 residence and went back into the car.

13 I would say, if anything, that is more like
14 Gentile; however, the three or four instances which are
15 in the sworn affidavit of the hand-to-hand that are seen
16 by Hurteau and Costanzo were not the members in the car.
17 Those were the people who were on foot that they did not
18 want to spook as Corporal Costanzo stated.

19 The people in and out of the car, we don't
20 know why they were there. We don't know what they did,
21 if anything, so I think to try to say if those three to
22 four hand-to-hands that the officers observed in front of
23 that residence, to try to correlate that to the two
24 traffic stops, I think it is, quite frankly, misleading
25 this Court because those are two completely separate

1 things. They never said a hand-to-hand occurred from the
2 people in the car because they don't know, because they
3 were in the residence. They were in 609-A.

4 So I believe with regards to the Franks
5 hearing that they did not recklessly omit anything and
6 with the two car stops with negative results, again, they
7 never said they knew what was there. What they saw were
8 cars, negative results. They didn't go any further.

9 What they did see, with their training and
10 experience, were hand-to-hand transactions at the
11 location and then that one hand-to-hand transaction
12 further down, and all of those were noted within the four
13 corners of the sworn affidavit to Judge Gosnell.

14 As far as the Gentile case, you know, in that
15 case, you just read it, Your Honor. A citizen said they
16 smelled marijuana. A citizen, I would argue, has no
17 training, no experience. They don't know necessarily
18 what marijuana smells like. They have not had the
19 education and experience that in this case that narcotics
20 officers had.

21 Also, it was a citizen complaint of heavy
22 traffic. The officers in that case did note heavy
23 traffic; however, that is not necessarily indicative of
24 illegal drug transactions and illegal drug activity.
25 That is why the cars that we previously mentioned, we

1 don't know why they were there. That doesn't mean every
2 vehicle, every person, every interaction with that
3 resident does not have to be drug related. We're not
4 stating that.

5 Also, in the Gentile case, the officers
6 observed a person drive up, go in, go out, pulled over
7 and there is personal use of marijuana. That person did
8 not say it came from the house. That person did not
9 think anything about who was in the house, who was not in
10 the house, if he got it from the house, if it was already
11 in his car. We don't know any of that, whereas in this
12 case, we have a specific tip coming in from -- we have an
13 informant who meets face to face, which increases
14 reliability. We also have an informant who gives --

15 THE COURT: Yeah, but he didn't say he
16 attempted to buy drugs from him. All he did was ID this
17 guy, so that doesn't prove there were drugs in the house.
18 What leads anyone, a reasonable magistrate, to believe
19 there were drugs in that house?

20 MS. LINDER: What leads a magistrate to
21 believe there were drugs in the house is that the tip
22 came in, it was specific. The officers corroborated it
23 by pulling her out. They themselves, with their years of
24 train and experience -- I believe Corporal Costanzo said
25 he had over 1,000 investigations under his belt. With

1 all their years, they sat there, and they are specialized
2 in that and they themselves saw hand-to-hands. The
3 people they saw hands-to-hands with were not stopped.

4 THE COURT: Where did they see the
5 hands-to-hands?

6 MS. LINDER: Standing in front of the
7 residence, in front of 609-A. Corporal Costanzo
8 testified that both he and Corporal Hurteau, and that is
9 in the affidavit for the search warrant, saw the
10 defendant, Bryant Kinloch, wearing all red, do
11 hand-to-hand transactions with people who were on foot,
12 who came in, did hand-to-hands, they left. They
13 immediately then were counting money and then entered
14 apartment A, and at least one of those times utilized a
15 key to enter Apartment A, which ties it even more to that
16 location.

17 Judge, I would say with this specific tip on
18 the location and the defendant, because it was
19 information on the defendant, plus at that location there
20 were drugs being sold, they corroborated some of that
21 information, they saw the hand-to-hands. The counting
22 money, the use of the key which talks about his access,
23 and all of that together, with them watching the puffy
24 jacket guy, who is also infamous now, leave the residence
25 while he was accompanying Mr. Kinloch during the other

1 hand-to-hand they observed. They saw him exit the
2 residence, not make any stops, not talk to other people.
3 They kept a constant visual on him. He did a
4 hand-to-hand transaction with, again, based on their
5 training and experience as specialized narcotics
6 officers.

7 They believed it to be that. They saw a bag
8 he traded for money. They then saw the guy in the puffy
9 jacket counting the money, and then right there they
10 caught the other guy, throw down the drugs, and, indeed,
11 it was heroin. Heroin was one of the drugs that was the
12 initial tip on the house.

13 All of that, put together leads the police to
14 believe there are drugs and/or drug proceeds occurring
15 there at 609-A Pleasant Grove.

16 THE COURT: Do you want to respond?

17 MS. MULLANEY: I just want to point out there
18 is still no nexus between the puffy jacket guy and 609-A.
19 That, in fact, the testimony was puffy jacket also was in
20 609-B, so there is no nexus between the drugs recovered
21 on Redondo Burns and the incident location, 609-A.

22 And if I could just have one moment. And,
23 Judge, I would just point out, anything about the CI and
24 them meeting the CI face to face, that is not on the
25 warrant. Their experience is not listed in the warrant.

1 609-A, and the fact they went into 609-B several times,
2 is also not in the warrant, and the warrant says that the
3 puffy jacket went to 609-A. I would argue that that is
4 not a typo, that, in fact, that could be another
5 location. That wasn't clear.

6 THE COURT: All right. Well, I'll tell you
7 what: I'm going to think about this one a little bit.
8 Since I got to go, I'll let y'all know in the morning
9 what I decide. It's a close call, really.

10 You know, if it was enough -- the question at
11 this point is if there was enough evidence to arrest
12 Mr. Kinloch, but whether or not there was enough evidence
13 to search that residence, and, you know, there is no
14 question there was a lot of suspicious activity going on
15 and we saw Mr. Kinloch, apparently, doing some
16 hand-to-hand transactions, which I know the police
17 officers believed to be drug sales, and then you saw
18 puffy jacket guy making what appeared to be a drug
19 transaction down the street and then go straight back
20 into the house and you -- and then they stop the
21 recipient of that drug sale, he dropped drugs and, it
22 turned out to be positive.

23 So you got a link there, so the question is
24 whether or not there is reasonable suspicion to believe
25 there was drug activity going back on or whether or not

1 there were drugs back in 609.

2 I'm going to sleep on that one, so I'll let
3 y'all know about that in the morning. You got any -- you
4 filed some other motions. Do we need any more testimony?

5 MS. MULLANEY: Yes, with regards to the
6 statement, Your Honor, if they seek to introduce the
7 statement.

8 MS. LINDER: Your Honor, there was a verbal
9 statement given post Miranda where the defendant admits
10 all the drugs, so yes.

11 THE COURT: We'll resume then in the morning.
12 I know there was talk about a plea or two in the morning
13 with Mr. Voigt.

14 I told them 9:30, I believe, so let's resume
15 at 10:00 tomorrow on your motion to suppress. I'll let
16 you know what I decide on this. Okay? All right.

17 (Whereupon, the proceedings were recessed.)

18 (January 12, 2010.)

19 (In open court, jury not present.)

20 THE COURT: All right. Is there anything
21 y'all want to bring to my attention before I rule on this
22 motion to suppress?

23 MS. LINDER: Your Honor, the state believes
24 that we were not able to stay in our entirety or legal
25 warrant to keep the search warrant in. If you would like

1 to hear more we would like to address the Court briefly.

2 THE COURT: Why weren't you able to state
3 your argument?

4 MS. LINDER: Your Honor, it was my
5 impression, and it could be on me, that the time that I
6 addressed the Court I believed that I was narrowly just
7 discussing the Gentile case which Ms. Mullaney had
8 brought up and you had taken a moment to go over.

9 THE COURT: All right. Go ahead, if you want
10 to make more argument, go ahead. I was just wondering,
11 did you think I cut you off or something?

12 MS. LINDER: No, Your Honor. I addressed
13 just the point she did and, like I said --

14 THE COURT: That is the main point, but go
15 ahead.

16 MS. LINDER: Your Honor, I would just like to
17 say that according to State vs. Cope, great deference is
18 given to the magistrate who signs it. In this case, it's
19 Judge Gosnell who handles PC cases every day while in
20 prelim court.

21 As far as the tip is concerned, according to
22 State vs. Fudge, Rogers and US vs. Gagnon it was not
23 anonymous which gives greater credibility to that tip.
24 There was face-to-face meetings. There was specific
25 information about his name, nickname, where he lived,

1 what kind of drugs, how much drugs, that he just got out
2 of prison, the length of that prison sentence, and that
3 he was there for drugs.

4 THE COURT: Wait a minute. Unless I
5 misunderstood, the officer that first testified yesterday
6 was Walker. He's the one that signed the affidavit. He
7 said he gave no oral testimony to the magistrate. So
8 we're dealing with the four corners of the search warrant
9 affidavit, right?

10 MS. LINDER: With respect --

11 THE COURT: All that testimony yesterday,
12 while it was enlightening, I really can't consider when I
13 talk about the sufficiency of the search warrant.

14 MS. LINDER: Yes, Your Honor.

15 THE COURT: Because he said he didn't tell
16 anything different to Judge Gosnell.

17 MS. LINDER: And within those four corners of
18 the search warrant itself, Your Honor, in here, it is
19 sworn in here and sworn to the judge that they maintain
20 visual surveillance on the location, and it says that
21 both Corporal Hurteau and Corporal Costanzo identified --
22 or witnessed three to four hand-to-hand transactions that
23 were on foot traffic, that were on foot, they were not
24 stopped because they would compromise the
25 investigation and they would spook the current people.

1 THE COURT: These are all transactions that
2 took place outside of the house, right?

3 MS. LINDER: Yes, Your Honor. They were on
4 the property of the residence. The hand-to-hands
5 occurred. The officer said that the hand-to-hands
6 occurred, that Mr. Kinloch was -- exited the property,
7 did a hand-to-hand, and then was going back and forth in
8 the property, in the residence itself, in Apartment A,
9 and he was going in and out of the residence of Apartment
10 A, that he did hand-to-hands and counted money and went
11 back in.

12 We believe that according to Edwards v.
13 State, Rebels and League, all three of those cases show
14 that the officers seeing the hand-to-hands and the person
15 going in and out of the residence is enough.

16 Also, Mr. Kinloch utilized a key to access
17 that Apartment A that the search warrant was executed on.
18 That also shows -- so along with just within the four
19 corners of this, the numerous complaints, the foot
20 traffic, the witnessing of the hand-to-hand transactions,
21 the counting money, entering and exiting Apartment A, and
22 then the whole hand-to-hand with the other gentlemen, the
23 guy in the puffy jacket who exited the residence, did not
24 interact with anyone else, did a hand-to-hand witnessed
25 by police, the drugs were identified from that person and

1 then he went back into 609-A.

2 We believe that Keith also supports that
3 idea. Along with that, which was all in the four corners
4 of this search warrant, the police believe that there
5 were drugs and/or drug proceeds going in and out of
6 Apartment A, and for those reasons, we would argue that
7 the search warrant -- there was enough probable cause for
8 the magistrate to sign the search warrant, and we would
9 ask that you allow it in.

10 THE COURT: Ms. Mullaney, you were arguing
11 the motion yesterday?

12 MS. MULLANEY: Yes. Your Honor, I think
13 that -- whether -- the information that Officer Walker
14 stated that he had regarding the CI, as you stated, is
15 not in the affidavit. You can't consider the affidavit.

16 It's our position here that Gentile controls,
17 that this case has even less evidence than the evidence
18 in Gentile because it's far removed. The drugs were
19 found on somebody who had an interaction with somebody
20 who left the house.

21 So given that there is no nexus between the
22 drugs recovered on Redondo Burns and the property, 609-A,
23 that we would ask you to suppress. We also think it's
24 relevant that the two stops that did occur of Tyrone
25 White and another individual in a burgundy SUV had

1 negative result. That information should have been
2 included in the warrant. That is a Franks violation, and
3 also the information that there was foot traffic, not
4 only in Apartment A, but also in Apartment B; which
5 further weakens the probable cause for 609-A and that
6 that information is also a Franks violation that was
7 recklessly admitted and that they intentionally misled
8 the magistrate, and we would ask Your Honor to suppress,
9 and also for all of the reasons I've cited in my written
10 motion.

11 THE COURT: All right. Well, I'm looking at
12 the quotes from the body of the search warrant affidavit,
13 which was presented to Judge Gosnell, which is really all
14 I can consider, since, as I said, Officer Walker
15 yesterday said he did not give any oral testimony to the
16 judge. Basically, we're looking at they said, you know,
17 they had got complaints about drug transactions taking
18 place. That certainly is the basis for why they began
19 their transaction, but, obviously -- or why they put that
20 house under surveillance, but, obviously, that is not in
21 and of itself enough to be the basis for a search
22 warrant.

23 If you look at the next paragraph, and it
24 says they observed two white males meet with a black
25 male, they entered the residence for a minute and then

1 the white males left. There is no evidence of any sort
2 of transaction whatsoever of that, other than two white
3 guys went into the house and left a minute later. For
4 all I know they could have been a couple of people, you
5 know, couple Mormon guys wanting to come into the house
6 and they got thrown out.

7 It could have been anything, but there is
8 nothing on this that even said that there were any kind
9 of drugs involved, or even an alleged transaction, a
10 hand-to-hand that he talked about in his oral testimony
11 yesterday.

12 Let's see. Then we go to the next paragraph,
13 and we say, let's see. We got three to four instances of
14 a black man wearing all red clothing leaving the house,
15 meeting with some unknown parties. They observe quick
16 hand-to-hand transactions between the guy wearing red and
17 the unknown parties. They also noted that the guy in red
18 was counting money after transactions, during each
19 transaction. The guy wearing red was accompanied by a
20 black guy wearing a puffy jacket, and he saw this subject
21 walk in and out of 609-A Pleasant Grove apartment on
22 several occasions.

23 That is, again, evidence of some kind of a
24 transaction taking place, but there is nothing yet that
25 links drugs to the inside of that house.

1 Then we go on down, it says about 1700 hours
2 Costanzo and Hurteau observed the black guy wearing the
3 black puffy jacket exited 609, went down the road towards
4 the BP and observed one man, unknown black male interact.
5 That guy was later identified as Redondo Burns, and he
6 observed the guy in the black puffy jacket transact some
7 kind of transaction with Burns who then entered a BP gas
8 station and then a short time later Hurteau and Costanzo
9 observed Burns leave the BP gas station and walk down
10 17-A.

11 A couple other officers, Jacobson and Deeg,
12 approached Burns on foot and he dropped a bag that field
13 tested positive for heroin, and after the transaction,
14 Investigator Bruder observed the unknown black male walk
15 back into 609-A.

16 So the only thing we got is that we have this
17 drug transaction that took place down the street. We
18 don't have significantly Burns saying, I got the drugs
19 from the guy in the black puffy jacket. Don't have
20 anything that puts drugs back inside of that house. That
21 is what I think Gentile was talking about, and they said
22 there is a lot of suspicious activity going on around
23 this whole place, and yeah, there is a lot for people to
24 believe there may be drug transactions going on there,
25 but nobody has been able to put drugs inside of that

1 house, and, in this case, nobody has able to put any
2 drugs inside of that house.

3 There is no indication as to who owned 609-A,
4 and the guy in the black puffy jacket was never ever
5 questioned or detained, and I don't even see any
6 indication that he was in the house at the time of the
7 arrest. So I don't even know what happened to the guy in
8 the black puffy jacket after. It says he went back to
9 609-A, but he wasn't even in the house when it got -- the
10 search warrant was executed.

11 You know, I was talking to my law clerk about
12 this this morning, and I said, you know, you have people
13 go and they do buys. They search a person down, make
14 sure they don't have anything in them, they go inside of
15 a house, give them some money, they go in, they come out
16 with drugs, and they say, I bought the drugs in there,
17 and that is how you typically get the drugs, inside of
18 the house, and you can then search the house, but there
19 is nothing in this affidavit that puts drugs inside of
20 609-A.

21 There's a lot of suspicious activity going on
22 around there, but the only actual drugs that were
23 involved prior to the search warrant being issued was a
24 result of a drug transaction that took place some
25 distance from 609-A.

1 So I find it's proper to suppress the search
2 warrant, and that motion is granted. I don't think the
3 good faith exception applies because it's clear that
4 doesn't apply when the basis for dismissing the search
5 warrant is lack of probable cause, and in this case I'm
6 saying there was not sufficient probable cause for the
7 issuance of a search warrant. So the motion to suppress
8 is granted.

9 MS. LINDER: Your Honor, I would just like to
10 state for the record that the state intends to appeal
11 this matter.

12 THE COURT: Okay. That's fine.

13 All right. Well, I suppose that takes care
14 of this case for today, then. So I'm sure it sounds like
15 we need to -- we may have Mr. Kinloch back in custody,
16 since they're appealing, and then I see Mr. Voigt back
17 there. I guess we'll need to talk about what we're going
18 to do for the next case. I guess I need to bring the
19 jury in.

20 - - -

21 (Whereupon, the proceedings were concluded.)

22 - - -

23

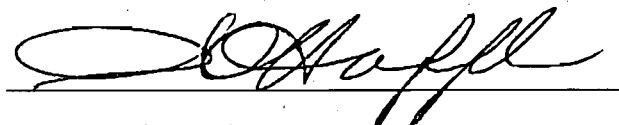
24

25

I, the undersigned Amanda K. Haffenden, RPR, CRR, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 11th and 12th of January 2010.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

February 16, 2010

A handwritten signature in black ink, appearing to read 'A. Haffenden', written over a horizontal line.

Circuit Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

SEARCH WARRANT AFFIDAVIT

TO ANY BONDED LAW ENFORCEMENT OFFICER OF THIS STATE OR COUNTY OR OF THE MUNICIPALITY OF CHARLESTON:

It appears from the attached affidavit that there are reasonable grounds to believe that certain property subject to seizure under provisions of Section 17-13-140, Code of Laws of South Carolina, as amended, is located on the following premises:

DESCRIPTION OF PREMISES (PERSON, PLACE, OR THING)
TO BE SEARCHED

- See Attached Affidavit -

Now, therefore, you are hereby authorized to search the subject premises for the property described below, and to seize such property if found:

DESCRIPTION OF PROPERTY

See Exhibit A

- See Attached Affidavit -

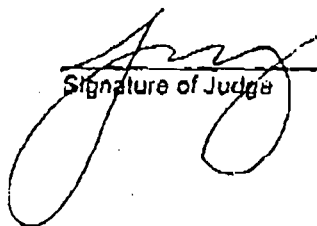
This Search Warrant shall not be valid for more than ten days from the date of issuance.

A written inventory of all property seized pursuant to this Search Warrant shall be made to the issuing Magistrate within ten days of this warrant, such inventory to be signed by the officer executing the warrant, and a copy of such inventory shall be furnished to the person whose premises are searched if demand for such copy is made.

A copy of this Search Warrant shall be delivered to the person in charge of the premises searched at the time of such search if practicable, and, if not, to such person as soon thereafter as is practicable; in the event the identity of the person in charge is not known or if such person cannot be found after reasonable diligence in attempting to locate the person, a copy shall be attached to a prominent place on such premises.

Charleston, South Carolina

23 May, 2008
16:20


Signature of Judge (LS)

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

AFFIDAVIT

Personally appeared before me, one Inv. Chico Walker, who, being duly sworn, says that it is probable cause to believe that certain property subject to seizure under provisions of Section 17-13-140, 1978 Code of Laws of South Carolina, as amended, is located in the following premises in this County:

DESCRIPTION OF PROPERTY SOUGHT

See exhibit A

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
TO BE SEARCHED

The residence is a one story white wood sided duplex located at 609 A Pleasant Grove Lane, Charleston South Carolina 29403. The residence has green trim with a green front door that faces Hwy 17. The number 609 A is in black lettering located to the left hand side of the front door. There is a second apartment attached to the right hand side of the building from Hwy 17. The apartment to be searched is only 609 A Pleasant Grove Lane, Charleston South Carolina

REASON FOR AFFIANT'S BELIEF THAT THE
PROPERTY SOUGHT IS ON THE SUBJECT PREMISES

That on January 2, 2008, the Charleston Police Narcotics Unit conducted surveillance at 609 A Pleasant Grove Lane, Charleston South Carolina 29407 which is located in the city and county of Charleston, South Carolina. Over the past several months the CPD Narcotics unit has received numerous complaints about heroin and cocaine transactions taking place at the above mentioned residence.

On January 2, 2008, at approximately 2:00 P.M. CPD narcotics officers Cpl. C. Costanzo and Cpl. Todd Hurteau were conducting stationary surveillance at 609 apt A, Pleasant Grove Lane. CPD Officers observed two white males meet with a black male wearing a red shirt, red pants and red hat. All parties entered the residence for approximately one minute. The white males exited the residence and walked in the direction of Hwy 17.

On approximately three to four other incidences the black male wearing all red clothing exited 609 A Pleasant Grove Lane and met with unknown parties at the north side of the duplex. Cpl. Hurteau and Cpl. Costanzo observed a quick hand-to-hand transaction between the the black male wearing all red and other unknown parties at the corner of this residence. Cpl. Hurteau and Cpl. Costanzo testified that the party dressed in all red was counting money after the

[Signature]
2 Jan 08

transactions as he walked back into the residence. During each transaction the subject wearing all red clothing was accompanied by a black male wearing a black puffy jacket with fur around the hood and dark blue jeans. Cpl. Costanzo and Cpl. Hurteau observed this subject walking into and out of 609 A Pleasant Grove Lane, Apt A on several occasions.

On January 2, 2008, at approximately 1700 hours Cpl. Costanzo and Cpl. Hurteau observed a black male wearing a black puffy jacket with fur around the hood and dark pants exited the residence at 609 A Pleasant Grove Lane. Investigators followed the above described subject, who was walking toward the B.P gas station located at Hwy 17 and Wapoo Road. Inv. Walker observed the above described subject meet with a an unknown black male, who was later identified as Redondo Burns. Inv. Walker observed the unknown subject hand Burns one clear plastic wrapping in exchange for an undetermined amount of U.S. currency. After the transaction was made Cpl. Hurteau observed Burns enter the B.P gas station. Cpl. Hurteau maintained a constant visual on Burn while he was inside the gas station. A short time later Cpl. Hurteau and Cpl. Costanzo observed Burns exit the B.P gas Station and walk south bound on Hwy 17.

Patrol officers Jacobson and Deeg approached Burns on foot at which time he discarded a clear plastic baggy containing an off-white powdered substance and a white glassine bag onto the ground between two parked cars. Cpl. Hurteau immediately retrieved the substance that field-tested positive for heroin. After the transaction with burns, Inv Bruder observed the unknown black male walk back to and enters 690 A Pleasant Grove Lane, Charleston, South Carolina 29407.

Based on the above fact there is probable cause to believe that heroin and the proceeds of heroin are stored inside 609 A Pleasant Grove Lane, Charleston, South Carolina 29407.

Sworn to and Subscribed before me

this 2 day of January, 2008

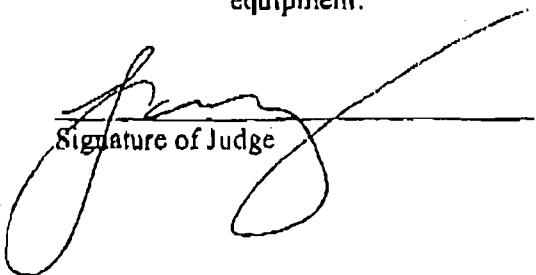
[Signature]
Signature of Judge 18:20

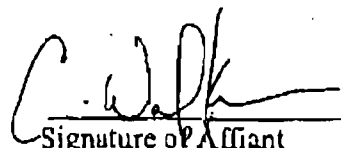
[Signature]

Affiant
180 Lockwood Boulevard
Charleston, SC 29403
(843) 577-7434

EXHIBIT A**PROPERTY TO BE SEIZED**

1. Books, records, receipts, notes, ledgers (both electronic and paper) relating to the transportation, ordering, purchase and distribution of controlled substances, in particular, heroin, a controlled dangerous substance.
2. Papers, tickets, notes, schedules, receipts, and other items relating to domestic and international travel.
3. Books, records, receipts, bank statements and records, money drafts, letters of credit, money orders and cashier's check, receipts, passbooks, bank checks, safe deposit box keys, and other items evidencing the obtaining, secreting, transfer, and/or concealment of assets and the obtaining, secreting, transfer, concealment and/or expenditure of money.
4. United States Currency, precious metals, jewelry, and financial instruments, including stocks and bonds in amounts indicative of the proceeds of illegal narcotics trafficking.
5. Photographs, in particular, photographs of co-conspirators, of assets and/or controlled substances, in particular, heroin.
6. Indicia of occupancy, residency, and/or ownership of the premises described above, including, but not limited to, utility and telephone bills, canceled envelopes, and keys.
7. Weapons.
8. Controlled Dangerous Substances, namely, heroin and related paraphernalia.
9. Receipt for items evidencing the expenditure of the proceeds of drug distribution, including, but not limited to, clothing furniture and electronic equipment.



Signature of Judge

Signature of Affiant

16120

RETURN

I received the attached Search Warrant 1/2, 2006.

and have executed it as follows:

On 1/2, 2008, at 1945 o'clock M, I searched

(the person) described in the warrant and (the premises)

I left a copy of the warrant with BRIANT KINLOCH

Name of person searched or "at the place of search" with.

Together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

- More papers with name of Bryant Kinloch found in Bedroom #2 by Cpl. Costanzo
- One clear baggie containing approximately 10 grams of off-white powder found in kitchen by Inv. Springmeyer
- Two ripped plastic baggies with residue found in kitchen by Inv. Springmeyer
- One clear baggie containing approximately 5 grams of off-white powder found in small right pocket of 16 Hagerman by Inv. Walker
- One spoon with powder residue found in kitchen by Inv. Springmeyer
- One Black Motorola cell phone found in kitchen by Inv. Seabrook
- One \$2 (one dollar bill) containing a brown powder substance found in kitchen by Inv. Springmeyer
- Two plastic baggies containing rice found in kitchen by Inv. Springmeyer
- One silver pocket knife found in pants pocket of B. Kinloch by Inv. Hall in kitchen
- One gray in color digital scale found in kitchen by Inv. Springmeyer Epl. Hartman
- One open box of Sundown baggies found in kitchen by Inv. Springmeyer
- One clear baggie containing approximately 20 grams of off-white/brown substance found in front right pants pocket of B. Kinloch in kitchen by Inv. Cr. 71
- One clear baggie containing approximately 10 grams of white powder found in kitchen by Inv. Springmeyer
- One clear off hearts playing card with white powder residue found in kitchen by Inv. Springmeyer

This inventory was made in the presence of INV. WALKER and

GRILL, COSTANZO, HUATEAU, SEABROOK, SPRINGMEYER, BLAKE, JENKINS, JACOBSEN

I swear that this inventory is a true and detailed account of all the property taken by me on the warrant.

SWORN to before me this 10

day of Jan, 2008.

Signature of Officer

Signature of Judge

RETURN
(continued)

- One \$10 (ten) dollar bill with white powder residue found in kitchen by J. Springmeyer
- One open jar of Marmite found in kitchen by J. Springmeyer
- One brown wrapper containing a green leafy substance found in kitchen by J. Springmeyer
- One open box of cigarettes found in kitchen by J. Springmeyer
- One clear baggie with powder residue found in kitchen by J. Springmeyer
- Several pieces of cocaine base found on kitchen island counter J. Springmeyer
- \$700 (seven hundred dollars) of US currency found on the person of Bryant Mitchell by J. Gr. II
- One two page statement of Michael Collazo

I swear that this inventory is a true and detailed account of all the property taken by me on the warrant.

SWORN to before me this 10

day of May, 2008

[Signature]
Signature of Judge

[Signature]
Signature of Officer

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
STATE OF SOUTH CAROLINA)

-versus-

BRYANT KINLOCH,
Defendant.

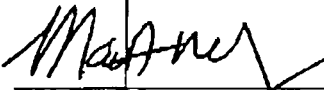
IN THE COURT OF GENERAL SESSIONS
FOR THE NINTH JUDICIAL CIRCUIT

Warrant No.: K-153296, K-298044-46
Charge(s): Trafficking Heroin, PWID
Drug Prx School, Trafficking Cocaine and

MOTION TO SUPPRESS EVIDENCE

YOU WILL PLEASE TAKE NOTICE that the Defendant, by and through the undersigned attorney, will move before the Presiding Judge of the Court of General Sessions at the Charleston County Judicial Center, 100 Broad Street, Charleston, South Carolina, as soon as the matter can be heard, for a hearing prior to trial to suppress the evidence discovered during the search of the defendant's home. The search of Mr. Kinloch's home violated his rights under the Fourth Amendment of the United States Constitution, as made applicable to the State of South Carolina, and under Article I section 10 of the South Carolina Constitution because the search warrant lacked probable cause.

Respectfully submitted,


Marybeth Mullaney
Attorney for Defendant

Charleston, South Carolina

Dated: 12/30, 2009.

SLB20080100093

WITNESSES

TODD HURTEAU

Charleston City Police Department

AGENCY CASE NUMBER

0800123

ARREST WARRANT NUMBER

K298044

DATE OF ARREST

2008-01-02

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date: APR 07 2008

VERDICT

Foreperson of Petit Jury

Date:

INDICT

DOCKET NO. 2008GS1003017

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

April Term 2008

THE STATE

vs.

08-035-1

BRYANT JEROME KINLOCH

DOB: 1968-12-11

B/M

Indictment for

Trafficking Heroin

FILED
2008 APR 11 PM 4:09
CLERK OF COURT

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

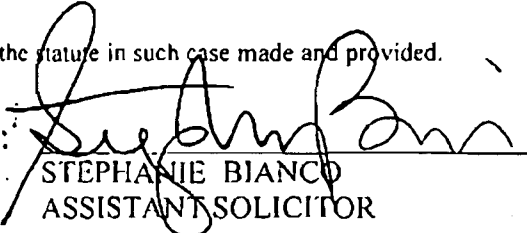
INDICTMENT

At a Court of General Sessions, convened on April 7, 2008 the Grand Jurors of Charleston County present upon their oath:

Trafficking Heroin

That in Charleston County, South Carolina, on or about January 2, 2008, the Defendant, BRYANT JEROME KINLOCH, unlawfully and knowingly did sell, manufacture, cultivate, deliver, purchase, or bring into this State; or did provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, cultivate, deliver, purchase, or bring into this State; or did possess or attempt to possess a controlled substance or a controlled substance analogue, to wit: Heroin, in excess of 14 grams; in violation of 44-53-370 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


STEPHANIE BIANCO
ASSISTANT SOLICITOR

SLB20080100093

WITNESSES

TODD HURTEAU

Charleston City Police Department

AGENCY CASE NUMBER

0800123

ARREST WARRANT NUMBER

K298045

DATE OF ARREST

2008-01-02

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date: APR 07 2008

VERDICT

Foreperson of Petit Jury

Date:

INDICT

DOCKET NO. 2008GS1003018

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

April Term 2008

THE STATE

VS.

BRYANT JEROME KINLOCH

DOB: 1968-12-11

B/M

Indictment for

Possession with Intent to Distribute Heroin
within Proximity of a Park

FILED
2008 APR 11 PM 4:09
CLERK OF COURT
BY

08-035-2

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

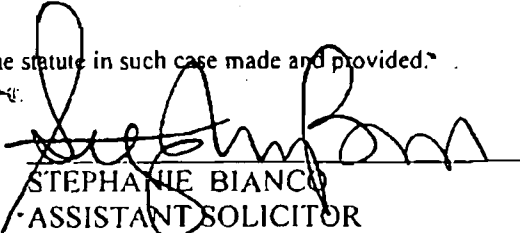
INDICTMENT

At a Court of General Sessions, convened on April 7, 2008 the Grand Jurors of Charleston County present upon their oath:

Possession with Intent to Distribute Heroin within Proximity of a Park

That in Charleston County, South Carolina, on or about January 2, 2008, the Defendant, BRYANT JEROME KINLOCH, knowingly manufacture, distribute, dispense, deliver, purchase or did aid, abet, attempt or conspire with others to manufacture, distribute, possess with intent to distribute, dispense, deliver, or purchase or did possess with intent to distribute, dispense, or deliver a controlled substance, to Wit: Heroin, within proximity of West Ashley Greenway Park. This is in violation of §44-53-445 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


STEPHANIE BIANCO
ASSISTANT SOLICITOR

SLB20080100093

WITNESSES

TODD HURTEAU

Charleston City Police Department

AGENCY CASE NUMBER

0800123

ARREST WARRANT NUMBER

K298046

DATE OF ARREST

2008-01-02

ACTION OF GRAND JURY

RUE BILL

Foreperson of Grand Jury

Date: APR 07 2008

VERDICT

Foreperson of Petit Jury

Date:

INDICT

DOCKET NO. 2008GS1003019

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

April Term 2008

THE STATE

VS.

08-035-3

BRYANT JEROME KINLOCH

DOB: 1968-12-11

B/M

Indictment for

Trafficking Cocaine

FILED
CLERK OF COURT

2008 APR 11 PM 4:09

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

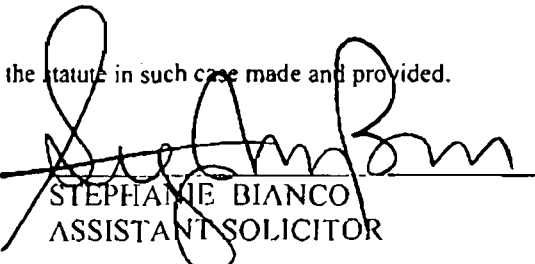
INDICTMENT

At a Court of General Sessions, convened on April 7, 2008 the Grand Jurors of Charleston County present upon their oath:

Trafficking Cocaine

That in Charleston County, South Carolina, on or about January 2, 2008, the Defendant, BRYANT JEROME KINLOCH, unlawfully and knowingly did sell, manufacture, cultivate, deliver, purchase, or bring into this State; or did provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, cultivate, deliver, purchase, or bring into this State; or did possess or attempt to possess a controlled substance or a controlled substance analogue, to wit: Cocaine, in excess of 10 grams; in violation of 44-53-370 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


STEPHANIE BIANCO
ASSISTANT SOLICITOR

CERTIFICATE OF COUNSEL

Counsel for Appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

By: 

WILLIAM M. BLITCH, JR.
Assistant Attorney General

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR APPELLANT

February 18, 2011

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Charleston County
Roger M. Young, Circuit Court Judge

THE STATE,

Appellant,

vs.

BRYANT KINLOCH,

Respondent.

PROOF OF SERVICE

I, Ellen DuBois, certify that I have served the within Record on Appeal on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

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

This 18th day of February, 2011.



ELLEN DUBOIS
Legal Assistant

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Charleston County
Roger M. Young, Sr., Circuit Court Judge

RECEIVED

OCT 29 2012

S.C. Supreme Court

THE STATE,

Appellant,

vs.

BRYANT KINLOCH,

Respondent.

SUPPLEMENTAL RECORD ON APPEAL

ALAN WILSON
Attorney General

Kathrine H. Hudgins

JOHN W. McINTOSH
Chief Deputy Attorney General

South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589
(803) 734-1343

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

ATTORNEY FOR RESPONDENT

WILLIAM M. BLITCH, JR.
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

101 Meeting Street, Suite 400
Charleston, South Carolina 29401
(843) 958-1900

ATTORNEYS FOR APPELLANT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Charleston County
Roger M. Young, Sr., Circuit Court Judge

THE STATE,

Appellant,

vs.

BRYANT KINLOCH,

Respondent.

SUPPLEMENTAL RECORD ON APPEAL

ALAN WILSON
Attorney General

Kathrine H. Hudgins

JOHN W. McINTOSH
Chief Deputy Attorney General

South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589
(803) 734-1343

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

ATTORNEY FOR RESPONDENT

WILLIAM M. BLITCH, JR.
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

101 Meeting Street, Suite 400
Charleston, South Carolina 29401
(843) 958-1900

ATTORNEYS FOR APPELLANT

INDEX

Motion to Suppress	1
--------------------------	---

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF CHARLESTON	)	FOR THE NINTH JUDICIAL CIRCUIT
	)	Indictment No(s): 2008 GS 10 3017 19
STATE OF SOUTH CAROLINA	)	Charge(s): Trafficking Heroin, Trafficking
	)	Cocaine, PWID Heroin w/ Prox of Park
vs.	)	
BRYANT JEROME KINLOCH,	)	MOTION TO SURPRESS
Defendant	)	

- I. Because the affidavit does not establish probable cause for the search of the residence the search warrant is insufficient on its face. Therefore, the search violated the Fourth Amendment of the United States Constitution, Article 1 § 10 of the South Carolina Constitution, and S.C. Code Ann. § 17-13-140. As a result, the defendant hereby moves to suppress all evidence seized from the residence.
- II. The police intentionally omitted exculpatory information from the affidavit which, when included, would defeat probable cause. Therefore the search of the residence violated the Fourth Amendment of the United States Constitution, Article 1 § 10 of the South Carolina Constitution, and S.C. Code Ann. § 17-13-140. As a result, the defendant hereby moves to suppress all evidence seized from his residence.
- III. The good faith exception to the exclusionary rule in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405 (1984) does not apply to the facts set forth in this case. Therefore the search of the residence violated the Fourth

Amendment of the United States Constitution, Article 1 § 10 of the South Carolina Constitution, and S.C. Code Ann. § 17-13-140. As a result, the defendant hereby moves to suppress all evidence seized from his residence.

Facts

According to the discovery materials provided by the State, on January 2, 2008 at 7:45 p.m., the Charleston Police Department executed a search warrant for 609 Pleasant Grove Lane Apartment A, Charleston, South Carolina 29407 (Defendant's residence). The Charleston Narcotics Unit along with several patrol officers made a forced entry into the residence and detained the only parties present during the search, Bryant Kinloch and Kevin Hagerson. In the residence officers found one plastic bag which contained 20 grams of heroin inside Kinloch's pocket, baggies containing 10 grams of a white powder on the kitchen counter, and baggies containing 10 grams of a white powder in a kitchen drawer, \$1 bill containing a brown powder substance on the kitchen counter, several pieces of cocaine base on the kitchen counter, brown wrapper containing a green leafy substance on the kitchen counter. Officers also seized various other items throughout the house which would suggest that the house was used in the manufacture or distribution of narcotics.

The search warrant in this case was signed by the magistrate on January 2, 2008 at 1820 hours according to the 2nd page of the warrant (however on page 3 and 4 of the search warrant it states that the magistrate signed it at 1620 hours) The affidavit in support of the search warrant sets forth the probable cause for the search warrant as follows: (emphasis added)

That on January 2, 2008, the Charleston Police Narcotics Unit conducted surveillance at 609A Pleasant Grove Lane, Charleston South Carolina 29407 which is located in the city and county of Charleston, SC. Over the past several months the CPD Narcotics unit has received numerous complaints about heroin and cocaine transactions taking place at the above mentioned residence.

On January 2, 2008 at approximately 2:00 PM CPD narcotics officers Cpl C Costanzo and Cpl Todd Hurteau were conducting stationary surveillance at 609 apt A Pleasant Grove Lane. CPD Officers observed two white males meet with a black male wearing a red shirt, red pants and a red hat. All parties entered the residence for approximately one minute. The white males exited the residence and walked in the direction of Hwy 17.

On approximately three to four other incidences the black male wearing all red clothing exited 609 A Pleasant Grove Lane and met with unknown parties at the north side of the duplex. Cpl. Hurteau and Cpl. Costanzo observed a quick hand-to-hand transaction between the black male wearing all red and other unknown parties at the corner of this residence. Cpl. Hurteau and Cpl. Costanzo noticed that the party dressed in all red was counting money after the transactions as he walked back into the residence. During each transaction the subject wearing all red clothing was accompanied by a black male wearing a black puffy jacket with fur around the hood and dark blue jeans. Cpl Costanzo and Cpl. Hurteau observed this subject walking into and out of 609 A Pleasant Grove Lane, Apt A on several occasions.

On January 2, 2008 at approximately 1700 hours Cpl Costanzo and Cpl Hurteau observed a black male wearing a black puffy jacket with fur around the hood and dark pants exited the residence at 609 A Pleasant Grove Lane. Investigators followed the above described subject, who was walking toward the BP gas station located at Hwy 17 and Wapoo Road. Inv Walker observed the above described subject meet with an unknown black male, who was later identified as Redondo Burns. Inv Walker observed the unknown subject hand Burns one clear plastic wrapping in exchange for an undetermined amount of US currency. After the transaction was made Cpl. Hurteau observed Burns enter the BP gas station. Cpl Hurteau maintained a constant visual on Burn while he was inside the gas station. A short time later Cpl Hurteau and Cpl. Costanzo observed Burns exit the BP Gas Station and walk south bound on Hwy 17.

Patrol officers Jacobson and Deeg approached Burns on foot at which time he discarded a clear plastic baggy onto the ground between two parked cars. Cpl Hurteau immediately retrieved the substance that field tested positive for heroin. After the transaction with Burns, Inv Bruder observed the unknown black male walk back to and enter 690[sic] A Pleasant Grove Lane, Charleston, South Carolina 29407.

Based on the above fact there is probable cause to believe that heroin and the proceeds of heroin are stored inside 609 A Pleasant Lane, Charleston, South Carolina 29407.

The defendant was arrested wearing red pants. The individual in the affidavit that was wearing a black puffy jacket with fur around the hood and dark blue jeans does not live at 609A Pleasant Grove Lane. This individual is never identified by name in the police reports and according to the police reports this individual was never questioned or detained.

Not all facts known by the police at the time of obtaining the search warrant were included in the affidavit. The police failed to tell the magistrate about two "negative result traffic stops". According to Cpl Costanzo's supplemental incident report, at 1522 hours the white male driving a burgundy GMC left the residence and drove away. According to Cpl Costanzo's supplemental report, a traffic stop was conducted on the burgundy GMC on Hwy 17 with negative results. The report also states that 1558 hours Tyrone Green a black male driving a white BMW pulls up to the residence. At 1600 hours Mr. Green left the residence and enters the white BMW and a traffic stop was conducted with negative results. Neither traffic stop was included in the affidavit in support of probable cause. The police also did not disclose to the magistrate, that during their surveillance they observed foot traffic in and out of Apartment B and that the individual wearing all red and the individual with the black puffy jacket and fur around the hood entered and exited apartment B several times.

I. Lack of Probable Cause

A search warrant may be issued only upon a finding of probable cause. *State v. Owen*, 275 S.C. 586, 274 S.E. 2d 510 (1981). Our legislature has likewise mandated that

search warrants may be issued "only upon affidavit sworn before the magistrate . . . establishing grounds for the warrant." S.C. Code Ann. § 17-13-140. An affidavit in support of a search warrant must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause. *State v. Dupree*, 354 S.C. 676, 684, 583 S.E.2d 437, 441 (Ct. App. 2003).

Probable cause should be determined based on the totality of the circumstances. *State v. Gentile*, 373 S.C. 506, 514, 646, S.E.2d 171, 174 (Ct. App. 2007). Our Supreme Court has described probable cause as "a fair probability that contraband or evidence of a crime will be found in a particular place." See *State v. Bellamy*, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999) (citing *Illinois v. Gates*, 462 U.S. 213 (1983)). In reviewing a magistrate's decision, the court must insure that the magistrate had a "substantial basis" for finding probable cause. *State v. Baccus*, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006). Here probable cause was based upon the scant observations made by the officers, an unrelated arrest, and the unwarranted assumptions that followed. In order to find probable cause for the warrant one must assume, because Burns was observed dropping drugs on the ground after engaging in a hand to hand transaction with an unknown person at a location other than the subject of the search warrant, and this observation occurred after the unknown person was at the location with the defendant that the narcotics Burn threw to the ground came from 609 A Pleasant Lane. What is missing in this series of assumptions is any transaction between the defendant and Redondo Burns. Consequently, the only issues are whether those observations and the unrelated arrest constitute probable cause.

According to the affidavit in this case, "Over the past several months the CPD narcotics unit has received numerous complaints about heroin and cocaine transactions taking place at the above mentioned residence". Nothing in the affidavit speaks to when these complaints were made. The magistrate is not told whether these complaints were made 6 days ago or 6 months ago. There has been no showing that the information that the officers relied on was credible or that the source of that information was reliable. The affidavit contains boiler plate language stating that the officer had received complaints of narcotic activity at the residence. The affidavit fails to address the credibility or reliability of the person or persons providing such information and specifically fails to allege any firsthand knowledge about the activities in the defendant's home therefore that part of the affidavit fails to establish probable cause. The Courts have repeatedly recognized that a proven, reliable informant is entitled to far more credence than an unknown, anonymous tipster. See, e.g. *Florida v. J.L.*, U.S. 266, 270, 1200 S.Ct 1375, (2000); *Adams v. Williams*, 407 U.S. 143, 146-147, 92 S.Ct. 1921. (1972) see also *United States v. Miller*, 925 F.2d 695, 698 (4th Cir) (an informant's tip is rarely adequate on its own to support a finding of probable cause).

The drugs recovered near Redondo Burns are in no way connected unless one assumes they came from the defendant's residence by way of the man in the black puffy jacket and NY hat. The affidavit in this case indicates that a black male wearing a black puffy jacket with fur around the hood and dark pants exited the residence and met with another individual identified as Redondo Burns and allegedly conducted a hand-to-hand transaction in the parking lot of a Pizza Hut. Mr. Burns later entered a BP Gas Station and then a short time later is apprehended walking south bound on Hwy 17 where he discarded

a clear glassine of heroin in between two parked cars. The officer used an unrelated arrest to corroborate the necessity of a search warrant for the defendant's residence. There is no indication that the drugs in the unrelated arrest can in any way be associated with the defendant's residence. In fact according to Cpl Costanzo's supplemental report the individual in the NY baseball hat that allegedly did the hand to hand with Redondo Burns entered and exited Apt B (not the defendant's apartment or the subject of the warrant) several times during the time the surveillance was conducted. Additionally, according to Walker's supplemental report the individual that allegedly did the hand to hand with Redondo Burns was wearing a "black stocking cap" not a NY baseball hat. There is a possibility that the individual that allegedly did a hand to hand with Redondo Burns in the parking lot of the Pizza Hut is not the same individual that left the defendant's residence. It is important to note that according to Officer Deeg's Incident Report, Redondo Burns discarded a clear plastic baggie containing a light brown substance and a blue bindle also containing a light brown substance and no blue bindles were recovered from the defendant's residence. *See Search Warrant Return and Cpl Hurteau's supplemental report.*

The facts here are nearly identical to those found insufficient to establish probable cause in *State v. Gentile*, 373 S.C. 506, 646 S.E.2d 171 (Ct App 2007). There the police arrested the appellant after finding marijuana during the execution on a search warrant for the appellant's house. The police began surveillance on the house after receiving tips that the occupants were selling marijuana. The tipster smelled marijuana in the area. *Id.* at 175. The police observed heavy foot traffic in and out of the house. *Id.* at 175. The police observed behavior which indicated that the occupants were selling narcotics. *Id.* at 176.

The police seized marijuana from a person who had just left the house. *Id. at 176*. The Court of Appeals found that these facts were not enough to support a finding of probable cause. *Id. at 175-6*. Specifically the court stated “[W]e find the warrant to search Gentile’s home was not supported by probable cause. The narcotics officers’ decision to obtain the search warrant was based on citizens’ tips regarding high volume at Gentile’s residence, which was not necessarily indicative of illegal activity at the residence. Additionally, the citizen claim regarding the smell of marijuana in the vicinity of Gentile’s residence was vague and not corroborated by the officers’ surveillance. Finally, as previously discussed, the officers’ arrest of a visitor to Gentile’s residence adds nothing to the probable cause determination. Without more, we find the evidence in the affidavit and the oral testimony was insufficient to support a finding of probable cause.” *Id. at 177*.

In the present case, the magistrate had essentially the same evidence in *Gentile*. In defendant’s case, like in *Gentile*, there had been complaints of suspected drug transactions occurring at the residence. In both cases the police witnessed heavy foot traffic in and out of the residence. In the present case, the police observe hand-to-hand transactions and a man counting money outside the residence. Similarly in *Gentile* the police witnessed behavior which to them “indicate[d] the presence of drug activity.” *See id. at 511-2, 173*. In *Gentile* the police recovered drugs from someone who had left the defendant’s residence. In this case the drugs are found on Redonda Burns who was never in the defendant’s residence.

Here the magistrate had even less support for a finding of probable cause than the magistrate had in *Gentile*. The link between the seized narcotics and Kinloch’s residence

is even weaker than the link in *Gentile*. In *Gentile*, the police found the drugs in the possession of a person who had just left the residence. In the present case, the police find heroin after it is dropped by Redondo Burns. The police never saw Redondo at the defendant's residence. The magistrate might have assumed Redondo received the narcotics from the man who left defendant's residence. But, even if that assumption was correct, it would merely prove that someone who left the residence had narcotics in their possession. Under *Gentile*, this sort of link between seized narcotics and the property searched is not sufficient to establish probable cause.

The Court of Appeals has already determined that no probable cause existed on nearly identical facts to those before this court. The present case is only distinguishable from *Gentile* in that the present case has less evidence to support a finding of probable cause. Because this warrant was not based on probable cause, the search was illegal under the Fourth Amendment to the United States Constitution, Article I § 10. of the South Carolina Constitution, and S.C. Code § 17-13-140. As such, the defense hereby moves that all evidence seized as a result of and derived from the search be suppressed.

II. Omitted Exculpatory Evidence and Misleading Evidence

A defendant may challenge the veracity of a warrant after the warrant has been issued and executed. *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674 (1978). *Franks* outlined the following two-part test for challenging a warrant:

“(1) to mandate an evidentiary hearing, the challengers’ attacks must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless

disregard for the truth, and those allegations must be accompanied by an offer of proof; and

(2) If these requirements are met, and if, when material that is subject of the alleged falsity or recklessness disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause no hearing is required.”

State v. Missouri, 337 S.C. 548, 554, 534 S.E.2d 394, 397 (1999). The *Franks* test also applies to acts of omission in which exculpatory material is left out of the affidavit. See *United States v. Colkley*, 899 F.2d 297(4th Cir 1990), *United States v. Vasquez*, 605 F. 2d 1269 (2nd Cir 1979), *State v Missouri* 337 S.C. 548, 524 S.E. 2d 394 (1999) When exculpatory information is kept from magistrate the issue becomes whether there would still be a basis for probable cause if the information were included. *Id. at* 337. Thus, there will be a *Franks* violation if the affidavit, including the omitted data, does not contain sufficient information to establish probable cause. See *id.* When a *Franks* violation occurs evidence obtained from the warrant should be excluded.

The police omitted exculpatory evidence regarding the “negative results” of two traffic stops from the affidavit. This omission was made either deliberately or with reckless disregard for the truth. The police prepared a very detailed affidavit. The affidavit mentions the first suspected drug transaction. The police also describe “three to four other incidences” where the officers observed “a quick hand-to-hand transaction between the black male wearing all red and other unknown parties are the corner of the residence.” The police also write detailed supplemental reports regarding the surveillance that took place at the defendant’s residence. In the reports turned over to

defense counsel, only one hand to hand transaction is described and that is the transaction between the individual wearing a black jacket with fur on the hood and Redondo Burns at the Pizza Hut. The other entries in the reports refer to the white male in the burgundy Tahoe and the black male in the white BMW. Both of these vehicles were pulled over after leaving defendant's residence. The police did not find drugs in either vehicle. The affidavit mentioned "hand-to-hand transactions" with "unknown parties", but failed to mention that the police did not find any drugs when they stopped the unknown parties. This omitted information goes to the core of the affidavit's purpose. It illustrates a reckless disregard for the truth and the officers attempt to mislead the magistrate. By leaving out the two negative car stops the police are essentially making a making a false statement to the magistrate because the affidavit leads the magistrate to the believe that the defendant conducted drug sales at the corner of his residence however the two negative car stops disprove this theory because these individuals that allegedly conducted a drug sale are stopped and searched and no contraband is found either time. At worst the police are knowingly and intentionally providing false information or at best they are intentionally misleading the magistrate, either way when the two negative car stops are inserted the affidavits would no longer support a finding of probable cause to search the defendant's apartment.

The police also failed to tell the magistrate that the man that allegedly conducted the hand to hand with Redondo Burns was not only in the defendant's residence but according to the Cpl Costanzo's supplement report he also entered and exited Apt. B several times while the surveillance was being conducted and that individual dressed in red also went in and out of Apt B. This makes it just as likely that there are drugs in Apt.

B and not the defendant's Apt. A. Excluding this information shows a pattern of deliberate falsity and a reckless disregard for the truth by these officers. If the affidavit included the two negative traffic stops along with the heavy foot traffic in and out of Apt. B this information would have eroded the magistrate's finding of probable cause.

In *State v. Missouri*, 337 S.C. 548, 524 S.E. 2d 394, (1999) the defendant argued the affidavit supporting the search warrant contained false information and further omitted critical, exculpatory information. The Court of Appeals held that the omitted information was necessary for the magistrate's finding of probable cause and the South Carolina Supreme Court agreed stating "the omitted information goes to the very heart of the affidavit's purpose" *Id* at 556. The court found that when the omitted information was inserted in the search warrant, the probable cause was defeated. *Id* at 556. In *State v. Jones*, 331 S.C. 228, 500 S.E.2d 499 (Ct App 1999,) the officer wrote in the affidavit that an agent of the narcotics unit observed a quantity of cocaine on the premise. However the officer orally supplement the affidavit by telling the truthful information to the magistrate which was that that the drugs were not observed by an agent of the police but rather by a confidential informant. *Id* at 228. The court stated "It is self evident that a magistrate must have truthful information in order to evaluate the veracity of the informant." *Id* at 502. The Court applied the *Franks* test and held that the affidavits remaining contents were insufficient to establish probable cause. *Id*.

Federal Courts have rendered search warrant invalid based upon omissions. "For an omission to serve as the basis for a hearing under *Franks*, it must be such that its inclusion in the affidavit would defeat probable cause for arrest." *United States v. Colkley*, 899 F.2d 297(4th Cir 1990) (citing *United States v. Reivich* 793 F.2d 957,961

(8th Cir 1986)). In *United States v. Jacobs*, 986 F.2d 1231 (8th Cir 1993) the court held that search warrant affidavit, stating that drug sniffing dog had shown interest in package without disclosing that no "official alert" had occurred, rendered the warrant invalid. "Any reasonable person would have known that this was the kind of thing the judge would wish to know" *Id at 1235*. The omission in this case is similar to the one in *Jacobs*. In both cases the police were deliberately misleading the magistrate by depriving him of key information necessary to a determination of probable cause. *Id at 1234*. If the warrant affidavit was rewritten it would read something like this:

On approximately three to four other incidences the black male wearing all red clothing exited 609 Apartment A several times and Apartment B several times of 609 Pleasant Grove Lane and met with unknown parties at the north side of the duplex. Cpl. Hurteau and Cpl. Costanzo observed a quick hand-to-hand transaction between the black male wearing all red and other unknown parties at the corner of this residence. Cpl. Hurteau and Cpl. Costanzo noticed that the party dressed in all red was counting money after the transactions as he walked back into the residence. During each transaction the subject wearing all red clothing was accompanied by a black male wearing a black puffy jacket with fur around the hood and dark blue jeans. Officer Deeg and Officer Jacobsen conducted traffic stops on 2 of the individuals that engaged in quick hand-to-hand transactions at the corner of the yard. Searches were conducted on these individuals and their vehicles shortly after they left the residence with negative results both times.

The affidavit on its face would not support probable cause. If the magistrate had been aware that on two occasions the officers were wrong about their assumptions that drug transactions were taking place at the defendant's residence than he would not have found probable cause for the search. Therefore the search warrant is invalid and the evidence obtain from the warrant should be suppressed.

III. The Good Faith Exception does not apply

The South Carolina Supreme Court has recently recognized in *State v. Herring*--*SE2d --, 2009 WL 4893656, S.C., December 21 2009) (No. 26750)* that there is a "good faith" exception to search warrant requirements of SC Code Ann §17-13-140 where the officers make a good faith attempt to comply with the statute's affidavit procedures. See *State v. Herring, 2009 WL 4893656, S.C., December 21 2009) (No. 26750), State v. Covert, 382 S.C. 205, 675 S.E. 2d 740 (2009.)* In *Herring* the defendant asserts that the warrant was defective because a different officer's name was on the warrant than the officer that appeared before the magistrate. However the officer that appeared before the magistrate stated that he did not have a search warrant form on his computer so he used another officer's computer and that officer's name was automatically inserted. The officer admitted that he simply forgot to change the name on the form. The court applied the good faith exception outlined in *Leon* and held a different officer's name at the top of the affidavit did not vitiate the validity of the warrant. *Id at 6. See State v. Shupper 263 S.C. 53, 207 S.E.2d 799 (1974)* (typographical error did not affect validity of the search warrant). The facts in this case are very different than those presented in the *Herring* case. In *Herring* the officers acted with good faith and made a scrivener's error however in this case the police intentionally mislead the magistrate by purposefully omitting exculpatory facts from the affidavit.

In *United States v. Leon, 468 U.S. 897, 104 S. Ct 3405(1984)* the Supreme Court held that evidence obtained by officers reasonably relying on a warrant issued by a detached and neutral magistrate is admissible. *Id at 897.* "The good faith exception does not apply in four situations: first when the warrant is based on an affidavit containing

'knowing or reckless falsity': second, when the magistrate has simply acted as a 'rubber stamp' for the police; third, when the affidavit does not 'provide the magistrate with substantial basis for determining the existence of probable cause'; and finally when the warrant is so 'facially deficient' that an officer could not reasonably rely on it." *State v. Wilhelm* 80 F3d 116, 121(4th Cir 1995) (citing *United States v. Leon*, 468 U.S. 897, 104 S. Ct 3405(1984.)) In *Wilhelm*, the State police obtained a warrant based only upon a vague tip from an anonymous, unproven informant. The court held that the *Leon* good faith exception did not apply because the officer "could not reasonably rely on an unknown, unavailable informant without significant corroboration," *Id* at 123 and the magistrate thus acted only as a "rubber stamp" in approving a "bare bones" affidavit. *United States v. Bynum* 293 F3d 192 (4th Cir 2001) (citing *State v. Wilhelm* 80 F3d 116,121(4th Cir 1995)).

The good faith exception is not applicable to the facts presented in this case. *Leon* outlines 4 situations where the good faith exceptions to the exclusionary rule do not apply and 3 of those exceptions are applicable here. The first *Leon* exception is when the warrant is based on affidavit containing knowing or reckless falsity. *Id* at 914. The officers in this case knowingly presented false information to the magistrate. The sworn affidavit states, "**On approximately three to four other incidences the black male wearing all red clothing exited 609 A Pleasant Grove Lane and met with unknown parties at the north side of the duplex. Cpl. Hurteau and Cpl. Costanzo observed a quick hand-to-hand transaction between the black male wearing all red and other unknown parties at the corner of this residence**". The police knew that 2 of those hand to hand transactions were not drug sales because they detained and searched two of

those individuals that they suspected of buying drugs and no drugs were recovered. The officers knowingly omitted that information from the sworn affidavit. The officer also allowed the magistrate to believe that all the foot traffic involved Apt A however according to their police reports the individuals suspected of selling drug also exited Apt B several times during their surveillance. By excluding this information the police were purposefully misleading the magistrate. See *United States v. Vigrant* 176 F3d 565, 573 (1st Cir 1999) (holding *Leon* good faith exception inapplicable when affiant recklessly omitted numerous material facts undermining affidavits persuasiveness, including indicia of confidential informant's unreliability); *United States v. Reilly*, 76 F3d 1271, 1280 (2^d Cir 1996)(holding that *Leon* good faith exception does not protect searches by officers who fail to provide all potentially adverse information to the issuing judge, and for that reason, it does not apply here).

In this case the affidavit fell far short of providing probable cause for a search warrant for the reason stated in subsection 1 of this memo discussing *State v. Gentile* 373 S.C. 506, 514, 646, S.E.2d 171, 174 (Ct. App. 2007). Therefore the third exception (when affidavit does not provide magistrate with substantial basis for determining existence of probable cause) and the forth exception (when warrant is so facially deficient that officer could not reasonably rely on it) also are applicable here for the reasons discussed earlier. The search of Mr. Kinloch's home was unconstitutional because it was based upon a warrant unsupported by probable cause and furthermore the police did not act in good faith in relying upon the warrant. "[T]he exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates". *United States v.*

Leon, 468 U.S. 897, 915, 104 S. Ct 3405, 3417(1984.) For those reason the evidence obtained pursuant to this search warrant should be suppressed.

Conclusion

For the foregoing reasons and in light of the mandates of the Fourth Amendment to the United States Constitution, Article I, § 10 of the South Carolina Constitution, and S.C. Code Ann. § 17-13-140, the defendant hereby moves to suppress all evidence seized from his residence.

Respectfully submitted,

Marybeth Mullaney
Attorney for the Defendant
Ninth Circuit Public Defenders Office
101 Meeting St
Charleston, South Carolina
January 4, 2010.

CERTIFICATE OF COUNSEL

Counsel for Appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

By:



WILLIAM M. BLITCH, JR.
Assistant Attorney General

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR APPELLANT

June 22, 2012

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Charleston County
Roger M. Young, Sr., Circuit Court Judge

THE STATE,

Appellant,

vs.

BRYANT KINLOCH,

Respondent.

PROOF OF SERVICE

I, Ellen DuBois, certify that I have served the within Supplemental Record on Appeal on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

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

This 22nd day of June, 2012.



ELLEN DUBOIS
Legal Assistant

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

OCT 29 2012

Appeal From Charleston County S.C. Supreme Court
Hon. Roger M. Young, Sr., Circuit Court Judge

The State,

Appellant,

v.

Bryant Kinloch,

Respondent.

FINAL BRIEF OF APPELLANT

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

101 Meeting Street, Suite 400
Charleston, South Carolina 29401
(843) 958-1900

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
ARGUMENT	6
I. The circuit court erred in finding probable cause did not exist to support issuance of a search warrant and in granting Respondent's motion to suppress evidence. The search warrant affidavit supported the magistrate's finding of probable cause and the issuance of the search warrant, and the circuit court erred in the standard it applied in reviewing the magistrate's determination.	6
II. The circuit court erred in finding the <u>Leon</u> good faith exception does not apply. The circuit court used the wrong standard in determining the exception does not apply.	12
CONCLUSION	16

TABLE OF AUTHORITIES

Cases:

<u>Illinois v. Gates</u> , 462 U.S. 213 (1983)	7
<u>State v. Baccus</u> , 367 S.C. 41, 625 S.E.2d 216 (2006)	7
<u>State v. Bellamy</u> , 336 S.C. 140, 519 S.E.2d 347 (1999)	6
<u>State v. Dupree</u> , 354 S.C. 676, 583 S.E.2d 437 (Ct. App. 2003)	7, 8
<u>State v. Gentile</u> , 373 S.C. 506, 646 S.E.2d 171 (Ct. App. 2007)	10
<u>State v. Herring</u> , ____ S.C. ____, 692 S.E.2d 490 (2009)	15
<u>State v. Keith</u> , 356 S.C. 219, 588 S.E.2d 145 (Ct. App. 2003)	7, 8
<u>State v. King</u> , 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002)	6
<u>State v. Rutledge</u> , 373 S.C. 312, 644 S.E.2d 789 (Ct. App. 2007)	7
<u>State v. Scott</u> , 303 S.C. 360, 400 S.E.2d 784 (Ct. App. 1991)	8
<u>State v. Thompson</u> , 363 S.C. 192, 609 S.E.2d 556 (Ct. App. 2005)	15
<u>State v. Weston</u> , 329 S.C. 287, 494 S.E.2d 801 (1997)	14
<u>U.S. v. Anderson</u> , 851 F.2d 727 (4 th Cir. 1988)	8
<u>U.S. v. Bynum</u> , 293 F.3d 192 (4 th Cir. 2002)	7, 13, 14
<u>United States v. Angulo-Lopez</u> , 791 F.2d 1394 (9 th Cir. 1986)	8
<u>United States v. Grossman</u> , 400 F.3d 212 (4 th Cir. 2005)	8
<u>United States v. Leon</u> , 468 U.S. 897 (1984)	12-15
<u>United States v. Servance</u> , 394 F.3d 222 (4 th Cir.)	8
<u>United States v. Williams</u> , 974 F.2d 480 (4 th Cir. 1992)	8

Other Authorities:

S.C. Const. art. I. § 10. 6

U.S. Const. amend. IV 6

STATEMENT OF ISSUES ON APPEAL

- I. The circuit court erred in finding probable cause did not exist to support issuance of a search warrant and in granting Respondent's motion to suppress evidence. The search warrant affidavit supported the magistrate's finding of probable cause and the issuance of the search warrant, and the circuit court erred in the standard it applied in reviewing the magistrate's determination.
- II. The circuit court erred in finding the Leon good faith exception does not apply. The circuit court used the wrong standard in determining the exception does not apply.

STATEMENT OF THE CASE

In April 2008, the Charleston County Grand Jury indicted Respondent on charges of trafficking in heroin, trafficking in cocaine, and possession with intent to distribute heroin within proximity of a park. The Honorable Roger M. Young, Sr., held a suppression hearing January 11-12, 2010, to determine whether to suppress evidence seized as a result of the execution of a search warrant the Honorable James B. Gosnell, Jr., signed on January 2, 2008. Judge Young granted the motion to suppress.

On January 12, 2010, the State served and filed a Notice of Appeal pursuant to State v. McKnight, 287 S.C. 167, 168, 337 S.E.2d 208, 209 (1985), because the circuit court's ruling effectively precluded further prosecution of the charges against Respondent. This appeal follows.

STATEMENT OF FACTS

On January 2, 2008, after receiving anonymous tips regarding heroin and cocaine transactions at 609A Pleasant Grove Lane, narcotics officers Investigators Hurteau and Costanzo began surveillance of the property. (T.9-11; 38-39; 55; Court Exhibit 1, Search Warrant Affidavit; R.9-11; 38-39; 55; 98). During the investigation, Investigators Hurteau and Costanzo witnessed several individuals approach Respondent outside the residence under surveillance. The parties engaged in hand-to-hand transactions in which Respondent exchanged something for money. (T.55-57; 69-70; Ct. Exhibit 1, Affidavit; R.55-57; 69-70; 99). After each of the exchanges, Respondent was seen counting money and entering and exiting the residence, 609A. (T.56-57; Ct. Exhibit 1, Affidavit; R.56-57; 98). Respondent had and used a key to gain access to the residence at 609A. (T.57; 71; Ct. Exhibit 1, Affidavit; R.57; 71; 99).

During surveillance, another individual was seen with Respondent in front of the residence at 609A during the transactions. The other individual was seen entering and exiting the residence at 609A with Respondent. (T.55-57; R.55-57). Later during the surveillance, Investigators Costanzo and Hurteau saw this individual leave the residence at 609A and head to between a Pizza Hut and BP gas station. (T.44-45; R.44-45). Investigator Walker then picked up surveillance of the individual and witnessed him meeting with Redondo Burns, whom Investigator Walker knew by name and sight. (T.24; R.24).

Investigator Walker witnessed a hand-to-hand transaction between Burns and the individual who left the residence at 609A just prior to the meeting. (T.19-20; 25; R.19-20; 25). Investigator Walker knew Burns was involved in narcotics based on prior encounters.

(T.19; R.19). The individual from the residence at 609A gave Burns something in a clear plastic bag in exchange for cash. (T.21-22; 25; Court Exhibit I, Affidavit; R.21-22; 25; 99). Burns took the item wrapped in plastic and put it in his pocket. (T.26; R.26). Investigator Walker then followed the individual back to the residence at 609A after other officers took over surveillance of Burns. (T.31-32; R.31-32).

After Investigator Walker radioed them about the transaction, Investigators Costanzo and Hurteau watched Burns near the BP gas station. (T.44; R.44). When he exited the BP patrol officers Jacobson and Deeg approached Burns. Burns then threw a bag containing a powdered substance onto the ground. The bag was retrieved and field tested positive for heroin. (T. 27-28; 44; 67; 71-72; Court Exhibit I, Affidavit; R.27-28; 44; 67; 71-72; 99).

As a result, Investigator Walker completed an affidavit for a search warrant and obtained a search warrant to search the residence at 609A. (Court Exhibit I; R.98). The affidavit relayed the results of the surveillance and detailed the hand-to-hand transactions in front of the residence at 609A, the transaction between Burns and the other individual after he left the residence at 609A, and the fact the bag thrown to the ground by Burns tested positive for heroin. (Ct. Exhibit I, Affidavit; R.99). The search of the residence produced several bags containing powdery substances. (Ct. Exhibit I, Return; R.102).

As a result of the search of the residence at 609A, Respondent was charged with trafficking in heroin and cocaine, and with possession with intent to distribute heroin in proximity to a park. Prior to trial, Respondent moved to suppress the evidence seized on the grounds the magistrate lacked probable cause to issue the search warrant based on the affidavit provided. (T.5; Motion to Suppress Evidence; R.5; 104).

The trial court found the magistrate lacked probable cause to issue the search warrant. He concluded based on the affidavit provided for the search warrant, there was insufficient evidence establishing a nexus between the residence at 609A and drugs. (T.92-96; R.92-96). He acknowledged the evidence of transactions taking place in front of the residence, but indicated there is nothing to link drugs to the inside of the residence. (T.93; R.93). Further, the court discussed the transaction between Burns and the other individual seen exiting the residence at 609A. (T.94-95; R.94-95). He found there was no information in the affidavit directly linking the drugs to the residence at 609A.

ARGUMENT

- I. The circuit court erred in finding probable cause did not exist to support issuance of a search warrant and in granting Respondent's motion to suppress evidence. The search warrant affidavit supported the magistrate's finding of probable cause and the issuance of the search warrant, and the circuit court erred in the standard it applied in reviewing the magistrate's determination.**

The circuit court erred in suppressing evidence seized based on the execution of a search warrant obtained on Respondent's property. Based on a totality of the circumstances the affidavit provided to the magistrate demonstrated probable cause for issuance of the search warrant. The circuit court erred in the standard it applied to a review of the affidavit and search warrant, requiring near certainty as opposed to a practical, common sense determination of whether a fair probability existed that additional evidence of Respondent's drug activities could be found in his home.

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, ..." U.S. Const. amend. IV. In parallel with the protection of the Fourth Amendment, the South Carolina Constitution also provides a safeguard against unlawful searches and seizures: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, ..." S.C. Const. art. I. § 10.

A search warrant may issue only upon a finding of probable cause. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999); State v. King, 349 S.C. 142, 150, 561 S.E.2d 640, 644 (Ct. App. 2002). “An appellate court reviewing the decision to issue a search warrant should decide whether the magistrate had a substantial basis for concluding probable cause existed.” State v. Dupree, 354 S.C. 676, 683, 583 S.E.2d 437, 441 (Ct. App. 2003); see also, State v. Baccus, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006) (“The duty of the reviewing court is to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed.”). The United States Supreme Court adopted a “totality-of-the-circumstances” test for probable cause determinations:

The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the “veracity” and “basis of knowledge” of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983) (emphasis added); see also, State v. Keith, 356 S.C. 219, 223-224, 588 S.E.2d 145, 147 (Ct. App. 2003).

A reviewing court should give great deference to a magistrate’s determination of probable cause. State v. Rutledge, 373 S.C. 312, 316, 644 S.E.2d 789, 791 (Ct. App. 2007) (citing State v. Davis, 354 S.C. 348, 355, 580 S.E.2d 778, 782 (Ct. App. 2003)). The United States Supreme Court has expressly recognized “affidavits in support of search warrants should not be subject to ‘[t]echnical requirements of elaborate specificity,’ and that a magistrate has the ‘authority . . . to draw such reasonable inferences as he will from the material supplied to him by applicants for a warrant.’” U.S. v. Bynum, 293 F.3d 192, 197

(4th Cir. 2002) (quoting Gates, 462 U.S. at 235, 240). “The term ‘probable cause’ does not import absolute certainty.” Dupree, 354 S.C. at 683, 583 S.E.2d at 441 (internal citations omitted). “Rather, in determining whether a search warrant should be issued, magistrates are concerned with probabilities and not certainties.” Id.

“[T]he nexus between the place to be searched and the items to be seized may be established by the nature of the item and the normal inferences of where one would likely keep such evidence.” U.S. v. Anderson, 851 F.2d 727, 729 (4th Cir. 1988); see also, United States v. Grossman, 400 F.3d 212, 217-18 (4th Cir. 2005); United States v. Servance, 394 F.3d 222, 230 (4th Cir.), *vacated on other grounds*, 544 U.S. 1047, 125 S.Ct. 2308, 161 L.Ed.2d 1086 (2005); United States v. Williams, 974 F.2d 480, 481-82 (4th Cir. 1992). The Fourth Circuit Court of Appeals held “a sufficient nexus may be present even if the affidavit contains no factual assertions directly linking the items sought to the defendant’s residence.” See Anderson, 851 F.2d at 729 (upholding search warrant for residence after defendant attempted to sell firearm even though affidavit did not link firearm to residence); Williams, 974 F.2d at 481-82 (upholding search warrant for motel room of known drug dealer where motel receipt was sole connection to defendant).

This Court has also discussed the required evidentiary standard to establish a nexus between drugs and the residence of a person suspected of dealing or possessing drugs. In State v. Keith, this Court articulated the existence of probable cause to search a residence is a common-sense determination based on a totality of the circumstances. Keith, 356 S.C. 219, 225, 588 S.E.2d 145, 148. This Court explained: “In the case of drug dealers, evidence is likely to be found where the dealers live.” Id. (citing United States v. Angulo-Lopez, 791

F.2d 1394, 1399 (9th Cir. 1986); State v. Scott, 303 S.C. 360, 362, 400 S.E.2d 784, 786 (Ct. App. 1991)).

The trial court in this case found the State failed to establish a nexus between the drugs and the residence at 609A. (T.92-96; R.92-96). The affidavit, however, provided ample evidence to support the magistrate's determination probable cause existed to believe drugs would be found in the residence at 609A. In making its decision, the circuit court erred as a matter of law utilizing an incorrect standard for determining probable cause by requiring near certainty and not a "fair probability" based on a practical, common-sense determination viewing the totality of the circumstances including reasonable inferences that can be made from the affidavit.

The officers received numerous tips, albeit from unidentified sources, indicating drug activities took place at the residence. As a result, the officers conducted surveillance at the location and witnessed activities consistent with the drug transactions reported in the complaints. First, the officers indicated two individuals arrived on scene, entered the residence at 609A with Respondent, and then left approximately one minute later. Next, the officers witnessed three to four quick hand-to-hand transactions between Respondent and other individuals at the corner of the residence at 609A. After each transaction, Respondent counted money as he re-entered the residence.

The officers also conducted surveillance on another individual seen with Respondent during the quick hand-to-hand transactions. This individual was seen entering and leaving the residence at 609A with Respondent. Later during their surveillance, this individual left the residence, went straight to a hand-to-hand transaction away from the residence, and then

returned to the residence after the hand-to-hand transaction. During the hand-to-hand transaction, one officer witnessed a “clear plastic wrapping” being exchanged for U.S. currency. The individual receiving the “clear plastic wrapping” was stopped and threw down a clear plastic bag containing an off-white powdered substance which tested positive for heroin.

Clearly, the tips coupled with the officers’ surveillance supported a “practical, common sense” conclusion Respondent and the other individual with him were involved in narcotics dealing. Further, the dealings generally took place in front of the residence at 609A, which Respondent and the other individual were seen exiting before each transaction and re-entering with money after each transaction. Finally, all of the observations detailed in the affidavit for the search warrant took place mere hours before the search warrant was obtained and not days or weeks, so the recent nature of the activities would heighten the likelihood drugs would be discovered in the residence at 609A.

This case is distinguishable from State v. Gentile, 373 S.C. 506, 646 S.E.2d 171 (Ct. App. 2007), relied on by the circuit court. In Gentile, all the affidavit provided the court were unconfirmed tips and the drug bust of a visitor to the residence. Further, there was no surveillance prior to the drug bust to determine whether the visitor received the drugs prior to coming to the residence. Id. at 515-516; 646 S.E.2d at 175-176. In this case, however, several hand-to-hand transactions involving Respondent were witnessed occurring directly in front of the residence. The magistrate could and did clearly infer drug transactions were taking place outside the residence, and because Respondent continuously entered and exited the residence around the time of the transactions, there is a clear nexus established.

The circuit court in this case utilized an incorrect standard in reviewing the magistrate's determination of probable cause. The court required near certainty as opposed to determining whether the totality of the circumstances created a "fair probability" evidence would be found in the residence at 609A. The affidavit established the requisite nexus between the residence at 609A and Respondent's drug dealing. As a result, the circuit court's suppression of the evidence should be reversed and the case remanded for the State to present its evidence, including all evidence seized from the residence at 609A, at trial.

II. The circuit court erred in finding the Leon good faith exception does not apply. The circuit court used the wrong standard in determining the exception does not apply.

The circuit court erred in finding the Leon¹ good faith exception does not apply because the affidavit failed to provide probable cause for the search warrant. Even assuming for the sake of argument the affidavit was insufficient to establish probable cause, the circuit court used the wrong standard in determining the Leon exception does not apply. In this case, the good faith exception should apply and the evidence should not have been suppressed. Further, if the trial court's determination was made under the South Carolina Constitution and not the Fourth Amendment, the same good faith exception should apply.

The United States Supreme Court in Leon articulates that a court should not suppress the fruits of a search conducted under the authority of a warrant, even a "subsequently invalidated" warrant, unless "a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." Leon, 468 U.S. at 922 n. 23. The Supreme Court explained the limited circumstances in which an officer could not be found to have acted with "objective reasonableness," thereby excluding application of this good faith exception:

- (1) "the magistrate ... was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth";
- (2) the magistrate acted as a rubber stamp for the officers and so "wholly abandoned" his detached and neutral "judicial role";

¹United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

(3) “an affidavit [is] so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable”;
or

(4) “a warrant [is] so facially deficient- i.e., in failing to particularize the place to be searched or the things to be seized-that the executing officers cannot reasonably presume it to be valid.”

U.S. v. Bynum, 293 F.3d 192, 195 (4th Cir. 2002) (citing Leon, 468 U.S. at 923) (internal quotation marks omitted).

The circuit court in this case misapplied the bars to application of the Leon good faith exception, just as the trial court did in Bynum. The Bynum Court noted:

In holding that the third circumstance described by the Leon Court barred application of the good faith exception in this case, the district court misidentified when this circumstance occurs. Thus, the court stated that “[t]he good faith exception . . . does not apply” when the affidavit fails to provide “a substantial basis for determining the existence of probable cause.”

Bynum, 293 F.3d at 195. The circuit court in the instant case made the same incorrect determination: “I don’t think the good faith exception applies because it’s clear that doesn’t apply when the basis for dismissing the search warrant is lack of probable cause.” (T.96; R.96).

The Fourth Circuit Court of Appeals explained:

“Substantial basis” provides the measure for determination of whether probable cause exists in the first instance. If a lack of a substantial basis also prevented application of the Leon objective good faith exception, the exception would be devoid of substance. In fact, Leon states that the third circumstance prevents a finding of objective good faith only when an officer’s affidavit is “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.” This is a less demanding showing than the

“substantial basis” threshold required to prove the existence of probable cause in the first place.

Bynum, 293 F.3d at 195 (internal citations omitted) (emphasis added).

The South Carolina Supreme Court explained the application of the Leon good faith exception: “Suppression is appropriate in only a few situations, including when an affidavit is ‘so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.’ State v. Weston, 329 S.C. 287, 293, 494 S.E.2d 801, 804 (1997) (emphasis added) (quoting Leon, 468 U.S. at 923). “[W]hen an officer acting in objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope, a reviewing court should not order a suppression of the evidence based on a lack of probable cause.” Id. at 292, 494 S.E.2d at 803-804.

In this case, even if the affidavit does not provide a substantial basis for determining the existence of probable cause under the proper Gates standard, it is not “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.” The affidavit cannot be described as so bare-boned that the magistrate’s issuance of the warrant could be viewed as a mere rubber-stamping of the warrant application, nor is the affidavit so lacking in indicia of probable cause that it was unreasonable for the officers or the magistrate to conclude that probable cause existed. Accordingly, the circuit court erred in failing to find the Leon good faith exception applied in this case to admit the evidence even if the affidavit did not support a determination of probable cause.

In addition, even if the circuit court’s determination of a lack of probable cause was based on application of the South Carolina Constitution’s protection in Article I, section 10, and not the Fourth Amendment to the United States Constitution, a good faith exception to

the South Carolina Constitution would allow admission of the evidence in this case. The South Carolina Supreme Court recently acknowledged it would recognize a Leon style “good faith exception” when “the officers reasonably believe the warrant is valid when the search is made, but is subsequently determined to be invalid” under the South Carolina Constitution. State v. Herring, ____ S.C. ____, 692 S.E.2d 490, 497 n.6 (2009); see also, State v. Thompson, 363 S.C. 192, 205 n.3, 609 S.E.2d 556, 563 n.3 (Ct. App. 2005) (acknowledging Leon good faith exception). The officers in this case reasonably believed the search warrant was valid, and they acted in good faith in executing the search warrant. As a result, the evidence seized as a result of the execution of the search warrant based on Investigator Walker’s affidavit, should have been admitted by the circuit court. If this Court finds the affidavit failed to provide the magistrate with probable cause to authorize the search warrant for the residence at 609A, the good faith exception under Leon or Herring should apply to allow admission of the evidence at trial. The decision of the circuit court should be reversed and the case remanded to the court for trial.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the decision of the trial court suppressing the evidence seized as a result of the execution of the search warrant should be reversed and the case remanded for trial.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

101 Meeting Street, Suite 400
Charleston, South Carolina 29401
(843) 958-1900

BY: 
William M. Blitch, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR APPELLANT

February 25, 2011

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Charleston County
Hon. Roger M. Young, Sr., Circuit Court Judge

The State,

Appellant,

v.

Bryant Kinloch,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

101 Meeting Street, Suite 400
Charleston, South Carolina 29401
(843) 958-1900

By: 
WILLIAM M. BLITCH, JR.

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR APPELLANT

February 25, 2011

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Charleston County
Hon. Roger M. Young, Sr., Circuit Court Judge

The State,

Appellant,

v.

Bryant Kinloch,

Respondent.

PROOF OF SERVICE

I, ELLEN DuBOIS, certify that I have served the within Final Brief of Appellant on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.
This 25th day of February, 2011.

Ellen DuBois

ELLEN DuBOIS
Legal Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

OCT 28 2012

S.C. SUPREME COURT

Appeal from Charleston County
Roger M. Young, Circuit Court Judge

THE STATE,

APPELLANT,

V.

BRYANT J. KINLOCH,

RESPONDENT

FINAL BRIEF OF RESPONDENT

KATHRINE H. HUDGINS
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 RESPONDENT.

TABLE OF CONTENTS

TABLE OF CONTENTS.....	1
TABLE OF AUTHORITIES.....	2
STATEMENT OF ISSUES ON APPEAL.....	3
STATEMENT OF THE CASE	4
STANDARD OF REVIEW	8
ARGUMENT.....	9
CONCLUSION.....	18

TABLE OF AUTHORITIES

Cases

<u>Franks v. Delaware</u> , 438 U.S. 154, 98 S.Ct. 2674 (1978)	14
<u>State v. Baccus</u> , 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006).....	10
<u>State v. Bellamy</u> , 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999).....	9
<u>State v. Dupree</u> , 354 S.C. 676, 684, 583 S.E.2d 437, 441 (Ct.App.2003).....	10
<u>State v. Gentile</u> , 373 S.C. 506, 646 S.E.2d 171 (Ct.App. 2008).....	11, 12
<u>State v. Herring</u> , 387 S.C. 201, 215, 692 S.E.2d 490, 497 n. 6 ((2009)	16, 17
<u>State v. Johnson</u> , 302 S.C. 243, 395 S.E.2d 167, (1990)	16
<u>State v. Keith</u> , 356 S.C. 219, 588 S.E.2d 145 (Ct. App. 2003).....	12
<u>State v. King</u> , 349 S.C. 142, 150, 561 S.E.2d 640, 644 (Ct.App.2002).....	10
<u>State v. Missouri</u> , 337 S.C. 548, 554, 534 S.E.2d 394, 397 (1999).....	14
<u>State v. Philpot</u> , 317 S.C. 458, 454 S.E.2d 905, 907 (Ct. App. 1995)	9
<u>State v. Scott</u> , 303 S.C. 360, 400 S.E.2d 784 (Ct. App. 1991)	12
<u>State v. Smith</u> , 301 S.C. 371, 392 S.E.2d 182 (1990)	9
<u>State v. Thompson</u> , 363 S.C. 192, 200, 609 S.E.2d 556, 560 (Ct.App.2005)	10, 11, 16
<u>State v. Weston</u> , 329 S.C. 287, 494 S.E.2d 801 (1997).....	9
<u>United States v. Colkley</u> , 299 F.2d 297 (4 th Cir 1990)	14
<u>United States v. Leon</u> , 468 U.S. 897, 104 S.Ct. 3405 (1984).....	15, 16
<u>United States v. Reilly</u> , 76 F.3d 1271, 1280 (2d Cir., 1996)	16
<u>United States v. Vasquez</u> , 605 F.2d 1269 (2 nd Cir 1979).....	14
<u>United States v. Vigrant</u> , 176 F.3d 565, 573 (1 st Cir. 1999).....	16

Statutes

S.C. Code §17-13-140	9, 13
----------------------------	-------

Constitutional Provisions

Art. I, §10 of the S. C. CONST.....	9
Art. I, §10 of the South Carolina Constitution.....	13
S.C. §17-13-140.....	9
U.S. CONST. amend. IV	9, 13

STATEMENT OF ISSUES ON APPEAL

1. Did the judge correctly suppress drug evidence found in appellant's apartment pursuant to a search warrant when the affidavit in support of the search warrant lacked probable cause to establish that drugs would be found inside the apartment in violation of the Fourth Amendment of the United States Constitution, Art. I, §10 of the South Carolina Constitution and S.C. Code §17-13-140?
2. Did the judge correctly suppress drug evidence found in appellant's apartment pursuant to a search warrant when police omitted exculpatory information from the affidavit in support of the search warrant and the affidavit, including the omitted exculpatory information, does not contain sufficient evidence to establish probable cause?
3. Did the judge correctly find that the Leon good faith exception did not apply?

STATEMENT OF THE CASE

In April of 2008, the Charleston County Grand Jury indicted Kinloch for trafficking in heroin, trafficking in cocaine and possession with intent to distribute heroin within the proximity of a park, indictments #2008-GS-10-3017, 3018, 3019. On January 11, 2010, Kinloch appeared before the Honorable Roger M. Young, Sr. and moved to suppress drug evidence found pursuant to the execution of a search warrant signed by the Honorable James B. Gosnell, Jr. On January 12, 2010, after hearing testimony and argument, Judge Young granted the motion to suppress the drug evidence based on the fact that there was not sufficient probable cause for the issuance of the search warrant.

On January 12, 2010, the State filed a notice of intent to appeal. On June 4, 2010, The State filed the initial brief of appellant on June 4, 2010. This initial brief of respondent follows.

STATEMENT OF FACTS

On January 2, 2008, officers with the Charleston Police Department executed a search warrant for 609 Pleasant Grove Lane Apartment A, Charleston, South Carolina 29407. During the search of the residence, officers found several bags containing powdery substances. As a result of the search, Kinloch was charged with trafficking in heroin and cocaine, and with possession with intent to distribute heroin within the proximity of a park.

The search warrant was signed by Judge Gosnell on January 2, 2008. The affidavit in support of the search warrant provides:

That on January 2, 2008, the Charleston Police Narcotics Unit conducted surveillance at 609 A Pleasant Grove Lane, Charleston, South Carolina 29407 which is located in the city and county of Charleston, South Carolina. Over the past several months the CPD Narcotics unit has received numerous complaints about heroin and cocaine transactions taking place at the above mentioned residence.

On January 2, 2008 at approximately 2:00 P.M. CPD narcotics officers Cpl. C. Costanzo and Cpl. Todd Hurteau were conducting stationary surveillance at 609 at A, Pleasant Grove Lane. CPD Officers observed two white males meet with a black male wearing a red shirt, red pants and red hat. All parties entered the residence for approximately one minute. The white males exited the residence and walked in the direction of Hwy 17.

On approximately three to four other incidences the black male wearing all red clothing exited 609 A Pleasant Grove Lane and met with unknown parties at the north side of the duplex. Cpl. Hurteau and Cpl. Costanzo observed a quick hand-to-hand transaction between the the black male wearing all red and other unknown parties at the corner f this residence. Cpl. Hurteau and Cpl. Costanzo noticed that the party dressed in all red was counting money after the transactions as he walked back into the residence. During each transaction the subject wearing all red clothing was accompanied by a black male wearing a black puffy jacket with fur around the hood and dark blue jeans. Cpl. Costanzo and Cpl. Hurteau observed this subject walking

into and out of 609 A Pleasant Grove Lane, Apt A on several occasions.

On January 2, 2008, at approximately 1700 hours Cpl. Costanzo and Cpl. Hurteau observed a black male wearing a black puffy jacket with fur around the hood and dark pants exited the residence at 609 A Pleasant Grove Lane. Investigators followed the above described subject, who was walking toward the B.P. gas station located at Hwy 17 and Wapoo Road. Inv. Walker observed the above described subject meet with a an unknown black male, who was later identified as Redondo Burns. Inv. Walker observed the unknown subject hand Burns one clear plastic wrapping in exchange for an undertermined amount of U.S. currency. After the transaction was made Cpl. Hurteau observed Burns enter the B.P. gas station. Cpl. Hurteau maintained a constant visual on Burn while he was inside the gas station. A short time later Cpl. Hurteau and Cpl. Costanzo observed Burns exit the B.P. gas Station and walk south bound on Hwy 17.

Patrol officers Jacobson and Deeg approached Burns on foot at which time he discarded a clear plastic baggy containing an off-white powdered substance and a white glassine bag onto the ground between two parked cars. Cpl. Hurteau immediately retrieved the substance that field-tested positive for heroine. After the transaction with burns, Inv Bruder observed the unknown black male walk back to and enters 690 A Pleasant Grove Lane, Charleston, South Carolina 29407.

Based on the above fact there is probable case to believe that heroine and the proceeds of heroine are stored inside 609 A Pleasant Grove Lane, Charleston, South Carolina 29407.

Prior to trial, Kinloch moved to suppress the drug evidence, filing a written motion to suppress. (R. p. 104). During the suppression hearing, Sergeant Walker, the affiant on the search warrant, testified that he presented no additional information to the magistrate other than the information provided in his affidavit. (R. p. 6, lines 15-20). Corporal Costanzo, one of the officers involved in the investigation, also testified at the

suppression hearing. Corporal Costanzo testified that two different vehicles came to the apartment during the course of their surveillance, a burgundy GMC Tahoe and a white BMW. (R. p. 39, lines 6-10; p. 41, lines 17-22). The corporal testified that the people in these vehicles pulled up, entered the apartment and then left. (R. p. 64, lines 4-10). Both vehicles were stopped upon leaving the apartment. Drugs were not found in either of the vehicles. (R. p. 40, lines 9 – p. 41, 42, lines 1-16). The information in regard to the stop of the two vehicles was not included in the affidavit presented to the magistrate.

Corporal Costanzo also testified that during the course of their surveillance he observed people entering both apartment A and apartment B at 609 Pleasant Grove Lane. (R. p. 47, lines 14 – p. 48, lines 1-16). One of the individuals seen entering both apartment A and B was a black male with a puffy jacket and a New York Yankee hat. This is the same individual referenced in the affidavit for the search warrant making an exchange with Redondo Burns near the BP station and Pizza Hut on Highway 17. The information regarding activity at apartment B was omitted from the search warrant affidavit.

Counsel for Kinloch argued that pursuant to State v. Gentile, 373 S.C. 506, 646 S.E.2d 171 (Ct.App. 2008), the drug evidence found inside the apartment pursuant to the search warrant should be suppressed. (R. pp. 73-80). The judge agreed and granted the motion to suppress. The judge found that the magistrate lacked probable cause to issue the search warrant. The judge found that the affidavit in support of the search warrant did not support a finding of probable cause to search the apartment at 609A because there was no evidence to link drugs to the inside of the apartment. (R. pp. 92-96).

STANDARD OF REVIEW

An appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000). A deferential standard of review likewise applies in the context of a Fourth Amendment challenge to a trial court's fact driven determination of probable cause. State v. Brockman, 339 S.C. 57, 65-66, 528 S.E.2d 661, 665-666 (2000) "(holding that whether a search warrant violated the parameters of the Fourth Amendment depends on 'a number of antecedent determinations, each of which is inherently fact specific' and 'entails an inquiry into the totality of the circumstances' and the appellate court must affirm if there is 'any evidence' to support the ruling)." State v. Thompson, 363 S.C. 192, 199, 609 S.E.2d 556, 560 (Ct.App. 2005).

ARGUMENT

The judge correctly suppressed drug evidence found in appellant's apartment pursuant to a search warrant when the affidavit in support of the search warrant lacked probable cause to establish that drugs would be found inside the apartment in violation of the Fourth Amendment of the United States Constitution, Art. I, §10 of the South Carolina Constitution and S.C. Code §17-13-140.

The South Carolina Legislature has imposed stricter requirements than federal law for issuing a search warrant. Both the Fourth Amendment of the United States Constitution and Article I, Section 10 of the South Carolina Constitution mandate an oath or affirmation before a neutral officer of the court before probable cause can be found and a search warrant issued. Additionally, S.C. §17-13-140 requires 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." Oral testimony may also be used in this State to supplement a search warrant affidavit which is facially insufficient to establish probable cause. State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997).

The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause. Mere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient.

State v. Philpot, 317 S.C. 458, 454 S.E.2d 905, 907 (Ct. App. 1995), citing State v. Smith, 301 S.C. 371, 392 S.E.2d 182 (1990).

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). "This determination requires the magistrate to 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). “The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause. 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) (citations omitted).

In terms of a court's review of the magistrate's decision, “[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). “In 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).

The affidavit in support of the search warrant, which was not supplemented through oral testimony, was not sufficient to provide the magistrate with a substantial basis for which to find probable cause to issue the search warrant for Kinloch's apartment. The judge used the correct totality of the circumstances standard in finding that the affidavit in support of the search warrant failed to provide information that there was a fair probability that drugs would be found inside the apartment. The judge correctly suppressed the drug evidence based on the illegal search warrant.

The first paragraph of the affidavit simply provides that, “Over the past several months the CPD Narcotics unit has received numerous complaints about heroin and cocaine transactions taking place at the above mentioned residence.” (R. p. 99-100). The issuing magistrate was not given any information in regard to the reliability of the

anonymous tips. Although Corporal Costanzo testified that a citizen told him that Kinloch had two ounces of heroin and an ounce of cocaine at a residence behind Bender's Bar on Highway 17 (R. p. 51, lines 9-14), this information was not provided to the magistrate and should not be considered. State v. Thompson, 363 S.C. 192, 200, 609 S.E.2d 556, 560 (Ct.App.2005).

The second paragraph states that two white males entered and then a minute later exited apartment A. The two white males were not stopped by police. (R. p. 60, lines 20 – p. 61, lines 1-25). As the trial judge noted, "There is no evidence of any sort of transaction whatsoever of that, other than two white guys went into the house and left a minute later. For all I know they could have been a couple of people, you know, couple Mormon guys wanting to come into the house and they got thrown out." (R. p. 93, lines 1-6).

The third paragraph states that the officers conducting surveillance observed hand to hand transactions in the yard with a man dressed in red and other unknown parties. The officers observed the man dressed in red counting money and walking in and out of apartment A. None of the individuals observed making hand to hand transactions were stopped by the police. (R. p. 59, lines 11-19). While the activity in and around the apartment may have been suspicious, without further investigation, it is insufficient to establish that narcotic activity was taking place or establish a fair probability that narcotics would be found inside the apartment. See State v. Gentile, 373 S.C. 506, 646 S.E.2d 171 (Ct.App. 2008).

The third paragraph of the affidavit also states that during the hand to hand transactions the man in red was accompanied by a black man in a black puffy jacket.

Officers also observed the man in the black puffy jacket walking in and out of apartment A. The fourth paragraph of the affidavit then states that officers observed the man in the black puffy jacket walk toward the BP station on Highway 17 and meet with an individual later identified as Redondo Burns. Officers observed the man in the puffy jacket hand Burns something in clear plastic wrapping in exchange for money. The fifth paragraph states that when officers approached Burns he threw down a plastic baggy containing an off white powder which field tested positive for heroin. According to the affidavit, the man in the puffy black jacket returned to apartment A. The man in the black puffy jacket was never identified or arrested. (R. p. 48, lines 4-16).

The exchange between Burns and the man in the black puffy jacket is not sufficient to support a finding of probable cause for the search of Kinloch's apartment A. In State v. Gentile, 373 S.C. 506, 646 S.E.2d 171 (Ct.App. 2008), the Court found that an affidavit in support of the search warrant for Gentile's house based on the police discovering marijuana on a visitor after he left Gentile's house was not sufficient to support a finding of probable cause. The present case is one step further removed from Gentile because Burns, the only individual found in possession of drugs prior to the issuance of the search warrant, was never inside the residence at 609 A.

The present case is easily distinguished from State v. Keith, 356 S.C. 219, 588 S.E.2d 145 (Ct. App. 2003), and State v. Scott, 303 S.C. 360, 400 S.E.2d 784 (Ct. App. 1991), because the defendants in both cases were arrested leaving their residences. Here, Burns was arrested and there is no evidence he was ever at Kinloch's apartment. While the man in the puffy black jacket was seen at the apartment, there is no information that he had drugs at the apartment. It is just as likely that his inventory was stored in his puffy jacket.

Under the totality of the circumstances, the judge correctly suppressed drug evidence found in appellant's apartment pursuant to a search warrant when the affidavit in support of the search warrant lacked probable cause to establish that drugs would be found inside the apartment in violation of the Fourth Amendment of the United States Constitution, Art. I, §10 of the South Carolina Constitution and S.C. Code §17-13-140.

2. The judge correctly suppressed drug evidence found in appellant's apartment pursuant to a search warrant when police omitted exculpatory information from the affidavit in support of the search warrant and the affidavit, including the omitted exculpatory information, does not contain sufficient evidence to establish probable cause.

Corporal Costanzo testified that two different vehicles came to the apartment during the course of their surveillance, a burgundy GMC Tahoe and a white BMW. (R. p. 39, lines 6-10; p. 41, lines 17-22). The corporal testified that the people in these vehicles pulled up, entered the apartment and then left. (R. p. 64, lines 4-10). Both vehicles were stopped upon leaving the apartment. Drugs were not found in either of the vehicles. (R. p. 40, lines 9 – p. 41, 42, lines 1-16). The information in regard to the stop of the two vehicles was not included in the affidavit presented to the magistrate.

Corporal Costanzo also testified that during the course of their surveillance he observed people entering both apartment A and apartment B at 609 Pleasant Grove Lane. (R. p. 47, lines 14 – p. 48, lines 1-16). One of the individuals seen entering both apartment A and apartment B was a black male with a puffy jacket and a New York Yankee hat. This is the same individual referenced in the affidavit for the search warrant making an exchange with Redondo Burns near the BP station and Pizza Hut on Highway 17. The information regarding activity at apartment B was omitted from the search warrant affidavit.

In Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674 (1978), the Court outlines the following two part test for challenging a warrant:

“(1) to mandate an evidentiary hearing, the challengers’ attacks must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof; and
(2) If these requirements are met, and if, when material that is subject of the alleged falsity or recklessness disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause no hearing is required.”

State v. Missouri, 337 S.C. 548, 554, 534 S.E.2d 394, 397 (1999). The Franks test also applies to acts of omission in which exculpatory material is left out of the affidavit. See United States v. Colkley, 299 F.2d 297 (4th Cir 1990), United States v. Vasquez, 605 F.2d 1269 (2nd Cir 1979), State v. Missouri, 337 S.C. 548, 524 S.E.2d 394 (1999) When exculpatory information is kept from magistrate the issue becomes whether there would still be a basis for probable cause if the information were included. Id. at 337. Thus, there will be a Franks violation if the affidavit, including the omitted data, does not contain sufficient information to establish probable cause. See id. When a Franks violation occurs evidence obtained from the warrant should be excluded.

As discussed in issue one, the trial judge held that the affidavit in support of the search warrant lacks probable cause without the omitted exculpatory information. If the affidavit is found to support probable cause for the search, the inclusion of the omitted exculpatory information defeats the probable cause for the search of apartment A and the drug evidence should be suppressed.

3. The judge correctly found that the Leon good faith exception did not apply.

Respondent submits that the Leon good faith exception was not argued by the State during the suppression hearing and is therefore not preserved for appellate review. The judge comment at the end of his ruling, "So I find it's proper to suppress the search warrant, and that motion is granted. I don't think the good faith exception applies because it's clear that doesn't apply when the basis for dismissing the search warrant is lack of probable cause, and in this case I'm saying there was not sufficient probable cause for the issuance of a search warrant. So the motion to suppress is granted." (Tr. p. 96, lines 1-8). The State, however, did not argue the good faith exception as a means to validate the search warrant.

If the good faith exception issue is preserved for review, the judge correctly found that it did not apply. In United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405 (1984), the Court held that evidence obtained by officers reasonably relying on a warrant issued by a detached and neutral magistrate is admissible with four exceptions:

- (1) the magistrate was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth;
- (2) the magistrate acted as a rubber stamp for the officers and so "wholly abandoned" his detached and neutral role;
- (3) an affidavit is so lacking in indicia of probable cause as to render official belief in its existence unreasonable;
- (4) a warrant is so facially deficient in failing to particularize the place to be searched or the things to be seized that the executing officers cannot reasonably presume it to be valid.

Three of the four exceptions preclude the use of the good faith exception to validate the search warrant in the present case. The officer's omission of information in

the affidavit casting doubt on the probable cause determination, as discussed in issue two, misled the magistrate. The Leon good faith exception does not apply when officers fail to provide all potentially adverse information to the issuing judge. See United States v. Reilly, 76 F.3d 1271, 1280 (2d Cir., 1996); United States v. Vigrant, 176 F.3d 565, 573 (1st Cir. 1999). By omitting the information, the magistrate unknowingly became a rubber stamp for the police. As discussed in issue one, the affidavit is so lacking in indicia of probable cause to believe that drugs would be found inside apartment A as to render official belief in its existence unreasonable.

In a footnote in State v. Herring, 387 S.C. 201, 215, 692 S.E.2d 490, 497 n. 6 ((2009), the South Carolina Supreme Court wrote:

In Covert,¹ we left open the question of whether a good faith exception applies when 'the officers reasonably believe the warrant is valid when the search is made, but is subsequently determined to be invalid.' Given our recognition of an exception for officers' good faith attempt to comply with the affidavit requirement, we find no reason not to extend such a good faith exception to a warrant reasonably believed to be valid, but later determined invalid. Accordingly, even if we were to determine the affidavit was improper, we would find the SLED agents acted in good faith and reasonably believed the warrant valid, such that the search should be upheld. (internal citation omitted).

In a footnote in State v. Thompson, 363 S.C. 192, 205 609 S.E.2d 556, 563 n. 3 (Ct.App. 2005), the South Carolina Court of Appeals wrote, "This good faith exception, however, may not be employed to validate a warrant that is based on an affidavit that 'does not provide the magistrate with a substantial basis for determining the existence of probable cause.' State v. Johnson, 302 S.C. 243, 248, 395 S.E.2d 167, 170 (1990) (quoting Leon, 468 U.S. at 915, 104 S.Ct. 3405).

If the good faith exception is extended, it still should not apply under the facts of this case. The present case is easily distinguished from Herring where the challenges made to the search warrant involved an incorrect officer name appearing on the affidavit and the procedure of swearing the officer over the phone. There was no challenge to the actual probable cause for the search warrant as in the present case. The affidavit did not provide the magistrate with a substantial basis for determining probable cause. In fact, the affidavit is so lacking in indicia of probable cause to believe that drugs would be found inside apartment A as to render official belief in its existence unreasonable.

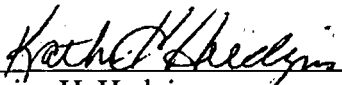
The good faith exception does not apply.

¹ State v. Covert, 382 S.C. 205, 675 S.E.2d 740 (2009).

CONCLUSION

Based on the above arguments, the suppression of drug evidence by the trial judge should be upheld.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

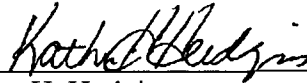
ATTORNEY FOR RESPONDENT.

This 29th day of April, 2011.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

April 29, 2011



Kathrine H. Hudgins
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Roger M. Young, Judge

THE STATE,

APPELLANT,

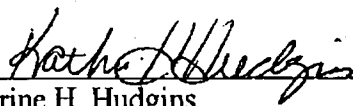
V.

BRYANT J. KINLOCH,

RESPONDENT

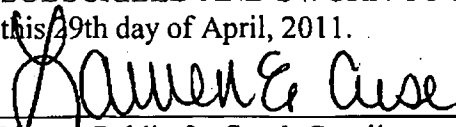
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Respondent in the above referenced case has been served upon William M. Blich, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 29th day of April, 2011.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR RESPONDENT.

SUBSCRIBED AND SWORN TO before me
this 29th day of April, 2011.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014.

ALAN WILSON
ATTORNEY GENERAL



October 29, 2012

RECEIVED

OCT 29 2012

S.C. Supreme Court

HAND-DELIVERED

The Honorable Daniel E. Shearouse
Clerk of Court, S. C. Supreme Court
1231 Gervais Street
Columbia, S. C. 29211

Re: State v. Bryant Kinloch

Dear Mr. Shearouse:

Enclosed please find two copies of the Appendix, along with Proof of Service, in the above-referenced case.

Thank you for your attention to this matter.

Sincerely,

William M. Blitch, Jr.
Assistant Attorney General

WMB/erd

Enclosures

cc: The Honorable Jenny A. Kitchings (one copy of Petition enclosed)
Kathrine H. Hudgins, Esquire (two copies of Petition and Appendix enclosed)
Victim Services (one copy of Petition enclosed)