STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

Maite Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

FELIX KOTOWSKI,

APPELLANT

APPELLATE CASE NO. 2016-000842

FINAL BRIEF OF APPELLANT

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2.

Did the court err by denying Appellant's motion to suppress evidence seized by law enforcement when officers conducted a protective sweep of a residence where Appellant was an overnight guest without exigent circumstances and without a warrant in violation of Appellant's Fourth Amendment rights?

3.

Did the court err by admitting evidence of alleged pseudoephedrine purchases obtained by law enforcement from the National Precursor Log Exchange (NPLEx) since (1) the evidence is hearsay and the state failed to establish a sufficient foundation to satisfy the business records exception to the hearsay rule, (2) the testimony violated Appellant's Sixth Amendment right to confrontation because the state failed to present testimony from a records custodian at Appriss or a representative of the pharmacy where the pseudoephedrine was allegedly purchased, and (3) the probative value of the evidence was substantially outweighed by the danger of unfair prejudice to Appellant?

STATEMENT OF THE CASE

A Dorchester County Grand Jury indicted Appellant on March 16, 2015 for manufacturing methamphetamine and possession of less than one gram of methamphetamine. R. 313. His case was called to trial on December 7, 2015 before the Honorable Maite Murphy, and a jury. R. 1. Assistant Solicitors Kyle Ward and Sheila Mims represented the state, and James Falk represented Appellant. R. 1.

On December 9, 2015, the jury found Appellant guilty. R. 291, ll. 3-11. Judge Murphy sentenced him to seven years' imprisonment for manufacturing methamphetamine and three years concurrent for the possession offense. R. 296, ll. 2-8.

On December 18, 2015, Appellant filed a Motion for a New Trial. R. 297. On January 22, 2016, the state filed a Response to Defendant's Motion for New Trial. R. 303. By order filed March 30, 2016, Judge Murphy denied the motion. R. 309.

This appeal follows.

STATEMENT OF THE FACTS

Appellant moved pretrial to suppress evidence seized in violation of his Fourth Amendment rights and his right to privacy under Article I, Section 10 of the South Carolina Constitution after the police conducted a "knock and talk" without reasonable suspicion and later conducted a protective sweep of the residence where Appellant was an overnight guest without exigent circumstances and without a warrant.

Facts Developed During the Motion to Suppress

On June 13, 2014, Sergeant Frank Thompson of the Dorchester County Sheriff's Office received an anonymous tip over the telephone from an *unknown* person who said he "heard about a possible drug house at 111 Marsh Point Drive [sic]." Thompson admitted the unknown tipster provided "very little information." The man "just overheard people talking about that address and really didn't have anything to go on." R. 25, ll. 18-24; R. 44, ll. 4-11.

As a result of the vague tip, Thompson entered the address into the National Precursor Log Exchange (NPLEx), which is a log used by pharmacies and law enforcement to track sales of pseudoephedrine. R. 25, l. 24 – 26, l. 1; R. 27, ll. 2-7. Thompson explained that, under South Carolina law, when an individual purchases pseudoephedrine, he or she is required to provide a government issued picture identification card. He continued, "The pharmacist that is filling the order runs the license through a machine or enters the information manually which captures your name, your date of birth, . . . and your address, and the log will say, yes, you can make a purchase or no, you can't make a purchase depending on if you have exceeded the amount set by the state which is nine grams in 30 days." R. 28, ll. 2-11.

When Thompson entered the address provided by the *unknown* tipster, several names "popped up," including Michelle Vining, who was the "homeowner," and Brian Edwards, who

had previously used the address.[1] According to Thompson, Vining and Edwards had purchased a "substantial amount" of pseudoephedrine in the past, which led him to believe there was possibly "something more to this complaint."[2] R. 28, l. 19 – 29, l. 7. Consequently, Thompson added a "watch" through NPLEx so that anytime Michelle Vining or someone else using that address purchased pseudoephedrine he would be alerted. R. 30, ll. 4-13.

Thompson "also did some spotty surveillance" at the residence. He said he drove by the house "a couple times." On June 26, 2014, Thompson claimed he saw a vehicle belonging to William Cherry parked at the home. Thompson said he was familiar with Cherry and knew that Cherry's father had previously been convicted of manufacturing methamphetamine. R. 30, ll. 13-25; R. 43, ll. 19-25.

On October 29, 2014, which was over four months after Thompson received the vague anonymous tip, he claimed he received an alert from the NPLEx "watch list" that Michelle Vining had attempted to purchase pseudoephedrine, but the purchase was "blocked" because she had exceeded the amount she was legally allowed to purchase that month. According to Thompson, Vining had attempted to purchase 2.4 grams of pseudoephedrine at Walgreens at 9:11 pm that night and, after that purchase was blocked, she later purchased 1.2 grams at CVS

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[1] Sergeant Thompson claimed Michelle Vining was the "homeowner" in passing during his testimony. R. 28, ll. 24-25. However, the record in unclear regarding whether she actually owned the home or was merely renting the residence.

[2] Thompson later stated Vining had made a single purchase of pseudoephedrine in March 2014, two purchases in April 2014, and two purchases in May 2014. R. 46, ll. 6-9. Without providing any explanation as to why, Thompson supposedly considered this to be a "substantial amount of purchases." R. 29, ll. 4-5.

at 9:27 pm.[3] He said she was permitted to purchase the lesser amount because it was within her nine gram monthly allowance. R. 31, ll. 12-22.

Thompson later disclosed that Vining did not purchase any pseudoephedrine during the summer months that followed the tip, specifically, June, July, and August of 2014. R. 44, l. 25 – 46, l. 25. However, she allegedly purchased pseudoephedrine multiple times in September 2014 and October 2014. R. 61, l. 23 – 62, l. 3.

Based on the extremely vague and unreliable tip containing third party information that Thompson received from the unknown caller on June 13, 2014, the fact that a car belonging to William Cherry, whose father was supposedly convicted of manufacturing methamphetamine, was parked outside the residence on June 26, 2014, and Vining's attempted purchase that was "blocked" and ultimate purchase of pseudoephedrine over four months later on October 29, 2014, Thompson decided to conduct a "knock and talk" at Vining's house at 111 Marsh Pointe Road. R. 33, ll. 8-10; R. 49, ll. 4-14.

The following day, October 30, 2014, Sergeant Thompson, Detective Brandon Allen, and Detective Daniel Lundberg, all of the Dorchester County Metro Narcotics Unit, drove to the house. All three, who are undercover officers, "were dressed out with police paraphernalia, Sheriff's Office." Thompson and Allen approached the front door while Lundberg walked around to the right side of the house where he could view the backyard in case any occupants of the home attempted to flee during the "knock and talk." After Thompson knocked on the door, he claimed he saw someone inside the home look through the blinds on a downstairs window to

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[3] Thompson consistently claimed that Vining attempted to make two separate purchases of 2.4 grams of pseudoephedrine at Walgreens at 9:11 pm and that both were blocked. However, he admitted that these attempts were made *fifteen seconds* apart, meaning it was likely that the same cashier had simply entered the information into the log twice for whatever reason. R. 31, ll. 13-18; R. 47, l. 16 – R. 48, l. 16.

the right of the door. He asked the person to come to the door. When he received no response, Thompson continued to knock on the door. Detective Lundberg, who was still standing on the right side of the house, claimed he then saw someone remove a fan from an upstairs window and close the window. Thompson continued to knock. He explained, "So I knocked on the door again and *the person* had moved to the left of the door" and looked through an upstairs window. Finally, after these three separate observations and repeated knocking, Appellant answered the door, came outside, and closed the door behind him. R. 33, l. 11 – R. 35, l. 19 (emphasis added).

Sergeant Thompson claimed that when Appellant came outside, he "was immediately overwhelmed with the odor of ammonia." According to Thompson, the smell was coming from Appellant's clothes and person. He claimed the alleged odor "set a light off for" him because he knew "methamphetamine cooks using a one pot method" create ammonia gas. He therefore suspected "there might have been a lab going on inside." R. 35, l. 20 – 36, l. 2.

Thompson explained that after Appellant identified himself, he asked Appellant "if he lived there. He said he did not. I asked if Michelle Vining was home. He said she wasn't. I asked who he was here with. He told me only his girlfriend Lisa. I asked him to have Lisa come outside." R. 35, ll. 3-13. Based on Thompson's request, Appellant called inside to Lisa several times and, when she did not respond to his calls, Appellant eventually went inside the house to get her. When Appellant reentered the house, Thompson made him leave the front door open. R. 36, ll. 13-18.

After Lisa came outside, Thompson took her to the end of the driveway. Lisa told Thompson that she lived at the home and later admitted that she was actually Michelle Vining. Thompson informed Vining that he and the other detectives "were there because of a tip of drug

activity" and that he "believed they were manufacturing methamphetamine in the house right at that moment" based on the smell of "ammonia on her boyfriend." R. 36, l. 19 – 37, l. 11. However, when asked, Vining refused to consent to a search of the residence. Thompson claimed that when he asked "her if anybody else was inside the house," Vining "was pretty deceptive about her answer" and was "kind of hem hawing." R. 37, ll. 12-21.

After Vining refused to consent to a search of her home, Thompson instructed the other detectives to conduct a protective sweep of the residence. R. 67, ll. 3-8. Thompson testified, "*I believed that something more was going on there* so I told Detective Allen and Detective Lundberg to go inside the house and do a protective sweep and make sure nobody else was inside the house because I saw three different activities at windows and we've got two people so to make sure nobody else was inside, to preserve any evidence that was inside there, and also to make sure there was no active methamphetamine lab in progress." R. 38, ll. 5-12. Despite Thompson's claim that he believed there may have been other people inside the house, he admitted the "three different activities" that took place inside the home before Appellant answered the door did not occur simultaneously and most certainly could have been done by the same person. R. 53, l. 18 – 54, l. 12. Moreover, Thompson admitted that when Appellant and Vining were detained before the protective sweep, both were patted down for weapons and no weapons were found on their persons. R. 58, ll. 2-7.

Based on evidence the detectives observed in plain view during the protective sweep, law enforcement obtained a search warrant for the house.[4] Inside, they allegedly discovered

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[4] During the "protective sweep," the detectives allegedly "encountered a heavy haze or a gaseous atmosphere" and an "overwhelming smell of ammonia" inside an upstairs bathroom. Supposedly, on top of the bathroom counter were several mason jars that had an "unknown liquid" inside. R. 68, l. 22 – 69, l. 13. They also saw some "paraphernalia laying around" in several of the other rooms and "possibly methamphetamine." R. 71, ll. 1-4; R. 78, ll. 2-16.

evidence of an active methamphetamine lab and actual methamphetamine.

Arguments by Counsel

Citing State v. Counts, 413 S.C. 153, 776 S.E.2d 59 (2015), Appellant moved to suppress the evidence discovered by law enforcement arguing Sergeant Thompson did not have reasonable articulable suspicion to conduct the "knock and talk" at Vining's residence. Appellant asserted that the South Carolina constitution offers a higher level of privacy protection than the federal constitution and that law enforcement in this case violated his state right to privacy. R. 96, l. 17 – 97, l. 1.

Counsel initially attacked the validity of the anonymous tip Sergeant Thompson received on June 13, 2014 and Thompson's efforts to corroborate it. He argued that all Thompson did was drive by the residence and that, while Thompson "made much of the fact that . . . a car owned by the son of somebody who he had arrested in the past was parked there on June 26th," this fact was insignificant. He emphasized, "Between June 26th and October 29th there is nothing else that corroborates the tip." R. 94, l. 22 – 95, l. 23.

Counsel argued the court must "consider the time of when some of these other events occurred relative to when the knock and talk happened. The anonymous tip comes on June 23rd [sic], they see the car in the driveway on June 26th, there is nothing else that happens until they get the hit from the NPLEx [on October 29, 2014]." Noting that Thompson received the tip more than three months (it was actually more than four months) before the "knock and talk," counsel argued the court must consider the "temporal relationship" between the events. He concluded that "a tip that old would be considered stale." R. 102, l. 24 – 103, l. 12.

Counsel asserted that the only "current information" Sergeant Thompson had was the information from NPLEx regarding Vining's attempt to purchase pseudoephedrine that was

"blocked" and her eventual purchase on October 29, 2014. He argued the legislature did not intend for "you to be subject to a knock and talk just because you go over the limit on the pseudoephedrine purchase." R. 103, ll. 12-16. He elaborated, "I do not believe that the intent of the statute . . . is the fact that any time somebody gets a refusal off of the NPLEx, that means that police officers knock on the door. I think that there needs to be something more than that." R. 96, ll. 12-16.

Lastly, counsel argued that the officers did not have exigent circumstances to conduct the protective sweep of the property. He maintained that the smell of ammonia and the alleged movements inside the house before Appellant answered the door were insufficient to justify a warrantless entry. R. 97, l. 2 – 99, l. 1.

Court's Ruling

The court found "the anonymous tip on its own" was not sufficient for the officers to conduct a "knock and talk." However, Judge Murphy found Sergeant Thompson "took steps to corroborate" the tip. She ruled the information Thompson learned from NPLEx in June 2014 regarding "the pseudoephedrine purchases," the fact that Thompson saw a car belonging to "an immediate family member of someone that has been convicted for manufacturing methamphetamine," "along with the subsequent activities . . . on October 29th do give rise to reasonable suspicion of illegal activity that warrants the ability to do a knock and talk." R. 103, l. 17 – 104, l. 21.

In regards to the "protective sweep of the property," the court found "there were exigent circumstances that warranted it." Judge Murphy ruled, "The overwhelming smell of ammonia certainly is a potentially dangerous type of situation that would risk not only officer safety but safety of the neighbors if there was to be an explosion and further there was activity which was

described at different windows and the officers did not know for officer safety if there were other individuals located in the residence." R. 104, l. 22 – 105, l. 5.

Motion for New Trial

On December 18, 2015, Appellant filed a Motion for a New Trial based on the violation of his state constitutional right to privacy when Sergeant Thompson conducted the "knock and talk" without reasonable suspicion and based on the violation of his Fourth Amendment rights when the officers subsequently conducted a protective sweep of the residence without exigent circumstances and without a warrant. R. 297. The grounds for Appellant's post-trial motion were the same grounds he raised pretrial. The state filed a Response to Defendant's Motion for New Trial on January 22, 2016. R. 303. Judge Murphy ultimately denied the motion by order filed March 30, 2016. R. 309.

ARGUMENT

1.

The court erred by denying Appellant's motion to suppress evidence seized by law enforcement after officers conducted a "knock and talk" without reasonable suspicion in violation of Appellant's right to privacy under Article I, Section 10 of the South Carolina Constitution and *State v. Counts*, 413 S.C. 153, 776 S.E.2d 59 (2015).

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. U.S. Cont. amend. IV. "In parallel with the protection of the Fourth Amendment, the South Carolina Constitution also provides a safeguard against unlawful searches and seizures." State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001) (citing S.C. Cont. art. I. § 10). "In addition to language which mirrors the Fourth Amendment, S.C. Cont. art. 1 § 10 contains an express right to privacy: 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." Id. at 644, 541 S.E.2d at 840-841 (emphasis in original).

In State v. Forrester, our Supreme Court concluded, "The South Carolina Constitution, with an express right to privacy provision included in the article prohibiting unreasonable searches and seizures, favors an interpretation offering a higher level of privacy protection than the Fourth Amendment." Id. at 645, 541 S.E.2d at 841. "By articulating a specific prohibition against 'unreasonable invasions of privacy,' the people of South Carolina have indicated that searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution." State v. Weaver, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007) (citing Forrester, 343 S.C. at 644-45, 541 S.E.2d at 841).

Recognizing that "the privacy interests in one's home are the most sacrosanct," our Supreme Court held in State v. Counts "that law enforcement must have reasonable suspicion of illegal activity at a targeted residence prior to approaching the residence and knocking on the door." 413 S.C. 153, 172, 776 S.E.2d 59, 69-70 (2015).

Applying this rule to the facts presented in Counts, the Supreme Court held law enforcement had reasonable suspicion of illegal activity prior to conducting the "knock and talk" at Counts' residence. Id. at 173, 776 S.E.2d at 70. The police "received two separate anonymous tips from citizens who alleged that Counts was selling drugs. These tips also identified vehicles driven by Counts, his phone number, and his use of multiple identities." Id. The police had "confirmed that Counts had two false identification cards on record and had prior drug convictions." Id. The Court held the specificity of the anonymous tips and the corroboration by law enforcement of the tips indicated "the officers were not randomly knocking on Counts' door but had reasonable suspicion to support their decision to approach Counts' residence and conduct the 'knock and talk.'" Id.

The "reasonable suspicion" language from Counts invokes the standard enunciated by the United States Supreme Court in Terry v. Ohio, 392 U.S. 1, 30 (1968), where the Court held that in the absence of probable cause for arrest, a police officer may stop and briefly detain a person for investigative purposes, so long as the officer has a reasonable suspicion supported by articulable facts that criminal activity "may be afoot."[5] "The term 'reasonable suspicion' requires a particularized and objective basis that would lead one to suspect another of criminal activity." State v. Woodruff, 344 S.C. 537, 546, 544 S.E.2d 290, 295 (Ct. App. 2001).

[5] In Reid v. Georgia, 448 U.S. 438, 440 (1980), the Court explained that before an officer can stop and frisk a citizen, the officer must have "reasonable and articulable suspicion that the person seized is engaged in criminal activity."

Recently, the Fourth Circuit Court of Appeals addressed the issue of reasonable suspicion in an unreasonable seizure case. United States v. Slocumb, 804 F.3d 677 (4th Cir. 2015). The Fourth Circuit emphasized that a seizure for a brief investigatory stop is proper only where the police observe "unusual conduct which leads [the officer] reasonably to conclude in light of his experience that criminal activity may be afoot." Id. at 681 (internal quotation marks omitted). The officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Id. at 682 (internal quotation marks omitted). "The level of suspicion must be a particularized and objective basis for suspecting the particular person stopped of criminal activity." Id. (internal quotation marks omitted).

In this case, law enforcement did not have reasonable suspicion supported by articulable facts that criminal activity was afoot prior to knocking on Vining's door. The anonymous tip Thompson received on June 13, 2014 was wholly unreliable because the tip was from an anonymous source, contained third party information, and provided no information that could be corroborated. The unknown caller told Thompson that he "heard about a possible drug house" at 111 Marsh Pointe Road. Thompson conceded the caller provided "very little information" and that the man merely "overheard people talking about that address and really didn't have anything to go on." R. 25, ll. 18-24; R. 44, ll. 4-11.

Obviously, the credibility and the reliability of the caller were unknown and unknowable.[6] The tip was vague except to the extent it provided the address of the alleged

[6] See Alabama v. White, 496 U.S. 325 (1990) (holding that in determining whether the informant's tip establishes sufficient probable cause, "the informant's veracity, reliability, and the basis of knowledge are highly relevant."); see also State v. Green, 341 S.C. 214, 532 S.E.2d 896 (Ct. App. 2000) (providing that reasonable suspicion requires that the tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person).

"drug house" or where "drug activity" was allegedly occurring.[7] The tip did *not* provide any names of individuals allegedly involved. The tip did *not* disclose the types of drugs allegedly involved or the nature of the drug activity. The tip did *not* disclose whether any cars frequented the house and if so, any information about those cars. "Drug activity" is an extremely vague term. It could refer to growing, cultivating, and harvesting marijuana plants, creating methamphetamine from raw materials, preparing drugs for sale, such as measuring and dividing cocaine or crack for individual sales, drug transactions between a buyer and a seller, or individuals using drugs inside the home.

Comparing the anonymous tip in this case with the anonymous tips in Counts illustrates the point. The tip here was devoid of ***any*** specifics unlike the tips in Counts. The police had received two anonymous complaints that Counts was selling drugs. The first tip indicated Counts was selling marijuana and crack cocaine out of two specific residences. The first "tipster provided Counts' names and aliases, the location of the alleged drug deals, Counts' girlfriend's name, a vehicle license plate number for a white Chevy Malibu, the make and model of the car used by Counts' girlfriend, and Counts' phone number." Counts, 413 S.C. at 157, 776 S.E.2d at 62. When two attempted controlled buys were unsuccessful, the police discontinued their investigation until a second anonymous tip arrived. Id.

The second tipster alleged Counts was selling drugs out of his residence, "provided Counts' name and phone number, the name and phone number of Counts' girlfriend, and identified Counts' vehicle." Id. This second tipster explained that Counts had obtained two false forms of identification through a contact at the Department of Motor Vehicles. Id.

[7] During the suppression hearing, Thompson testified that the unknown caller said he "heard about a possible drug house" at the identified address. R. 25, ll. 18-21. However, during his testimony before the jury, Thompson testified the caller said he heard "there was possibly drug activity" at the address. R. 124, ll. 7-10.

Additionally, the second tipster claimed Counts was selling drugs at a specific address and at his girlfriend's apartment. Finally, the tipster warned that Counts carried guns. Id. at 158, 776 S.E.2d at 62.

The police reviewed Counts' criminal record and learned he had two prior charges of distribution. The police also confirmed he had two identification cards on record. Id. The police then conducted surveillance on Counts' residence and observed Counts driving into and entering the residence. Id. Only then did the officers attempt a "knock and talk." Id. Our Supreme Court held that in light of the specificity of the tips and the confirmation of the tips through the investigation, "the officers were not randomly knocking on Counts' door but had reasonable suspicion to support their decision to approach Counts' residence and conduct the 'knock and talk.'" Id. at 173, 776 S.E.2d at 70.

Here, the *unknown* caller merely supplied Sergeant Thompson with an address and claimed he heard "*from other people*" "that there was possibly drug activity at" the residence. Thompson admitted, "He [the unknown caller] didn't have any names. He didn't have any specific information. He was just relaying the information that he was told." R. 124, ll. 7-14. Because of the lack of any specifics, there was little, if anything, Thompson could do to corroborate the allegation of drug activity and he admitted so during his testimony. R. 124, ll. 14-16. He claimed he "did some spotty surveillance," which he said meant he drove by the house "a couple times." R. 30, ll. 13-14. On one occasion, *more than four months* before he conducted the "knock and talk," Thompson saw a car belonging to a man whose father had been convicted of manufacturing methamphetamine parked at the home. This fact is completely inconsequential and did absolutely nothing to corroborate the allegation in the tip.

Thompson also entered the provided address into NPLEx and learned that Michelle Vining, who he stated was the "homeowner," made a single purchase of pseudoephedrine in March 2014, two purchases in April 2014, and two purchases in May 2014. R. 46, ll. 6-9; R. 28, ll. 24-25. While claiming he considered this to be a "substantial amount of purchases," Thompson provided no explanation as to why. R. 29, ll. 4-5. Besides conducting "some spotty surveillance," and checking the NPLEx log, Thompson made no further efforts to corroborate the tip and arguably could do nothing else to corroborate the tip due to its vagueness and lack of any specifics.

The tip itself was "stale" by the time law enforcement conducted the "knock and talk." Thompson received the tip alleging "drug activity" *more than four months* before he knocked on Vining's front door. Just as stale information may not be relied upon to establish probable cause to obtain a search warrant, it should not be used to establish reasonable suspicion to conduct a "knock and talk." See State v. Beckham, 334 S.C. 302, 316, 513 S.E.2d 606, 613 (1999) ("A probable cause affidavit must state facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time.").

Because of the obvious unreliability of the anonymous tip and the significant length of time that passed since Thompson received the tip and when he conducted the "knock and talk," the tip did not and could not support reasonable and articulable suspicion that the occupants at 111 Marsh Pointe Road were engaged in criminal activity.

What remains is Vining's blocked attempt to purchase pseudoephedrine and her eventual successful purchase of pseudoephedrine on October 29, 2014.[8] As defense counsel

[8] Notably, Sergeant Thompson did absolutely nothing to further investigate the case from June 26, 2014 when he drove by the house until he received the alert from NPLEx on October 29, 2014. That is more than four months with zero investigation.

argued below, a single blocked attempt to purchase pseudoephedrine is insufficient to create reasonable and articulable suspicion that the individual is engaged in criminal activity and subject the person to a "knock and talk." "[T]here needs to be something more than that" before law enforcement can go knocking on someone's door. R. 96, ll. 12-16. Once Thompson received the alert from the NPLEx "watch list" on October 29, 2014, he should have continued to investigate by either conducting additional surveillance, reviewing Vining's criminal record to determine whether she had any prior drug convictions or arrests, or any number of other options. If his attempts to further investigate were unsuccessful, then Thompson should have waited to obtain additional evidence, such as another blocked attempted purchase or a reliable tip that could be corroborated before conducting the "knock and talk." See Counts, 413 S.C. at 157-158, 776 S.E.2d at 62 (After receiving a detailed anonymous tip that Counts was selling marijuana and crack cocaine out of his mother's house and an apartment in Allen Benedict Court, the police ultimately discontinued its investigation of Counts after two controlled buys were unsuccessful. Only after law enforcement received a second detailed complaint from an anonymous tipster and corroborated that tip did they knock on Counts' door.).

Law enforcement lacked reasonable suspicion based on articulable facts to believe the occupants at 111 Marsh Pointe Road were engaged in criminal activity to approach the residence and conduct a "knock and talk." Therefore, law enforcement's conduct violated Appellant's right to privacy under Article I, Section 10 of the South Carolina Constitution. Respectfully, this Court should hold the trial court erred by denying Appellant's motion to suppress and reverse his convictions and sentence.

2.

The court erred by denying Appellant's motion to suppress evidence seized by law enforcement when officers conducted a protective sweep of a residence where Appellant was an overnight guest without exigent circumstances and without a warrant in violation of Appellant's Fourth Amendment rights.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[9] U.S. Const. amend. IV. "As the [United States] Supreme Court has recognized, the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" United States v. Jones, 667 F.3d 477, 482 (4th Cir. 2012) (quoting Welsh v. Wisconsin, 466 U.S. 740, 748 (1984)). "Thus, it is a basic principle of Fourth Amendment law that searches and seizures

[9] To claim protection under the Fourth Amendment, a defendant must show he has a legitimate expectation of privacy in the place searched. State v. Missouri, 361 S.C. 107, 112, 603 S.E.2d 594, 596 (2004) (citing Rakas v. Illinois, 439 U.S. 128, 143 (1978)). In Minnesota v. Olsen, 495 U.S. 91 (1990), the United States Supreme Court found an overnight guest had a reasonable expectation of privacy in another's home. While the Court did not articulate what constituted an overnight guest, it stated generally, "From the overnight guest's perspective, he seeks shelter in another's home precisely because it provides him with privacy, a place where he and his possessions will not be disturbed by anyone but his host and those his host allows inside." Id. at 99. In Missouri, our Supreme Court held the defendant had a reasonable expectation of privacy in the searched apartment when he (1) was good friends with the owner, (2) frequently visited the apartment, (3) occasionally spent the night, (4) at times had a key, and (5) kept a change of clothes there. Missouri, 361 S.C. at 115, 603 S.E.2d at 597-598. The Court held the defendant demonstrated a subjective expectation of privacy in the apartment and therefore was entitled to challenge the search under the Fourth Amendment. Id. at 115, 603 S.E.2d at 597-598. Here, it is clear, as Judge Murphy found, that Appellant was an overnight guest and had a reasonable expectation of privacy in Vining's home. R. 23, l. 15 – 24, l. 2; See State v. Robinson, 410 S.C. 519, 528-530, 765 S.E.2d 564, 569-570 (2014). Appellant testified pretrial that he and Vining were in "a romantic relationship," that he worked out of town, but spent the night at her house on the weekends, that he kept clothing at her house, and that he had a key to the residence. R. 12, l. 11 – 14, l. 43. Judge Murphy relied on this testimony in support of her ruling. R. 23, l. 15 – 24, l. 2.

inside a home without a warrant are presumptively unreasonable." Id. (quoting Payton v. New York, 445 U.S. 573, 586 (1980)) (internal quotation marks and alterations omitted).

"[T]he underlying command of the Fourth Amendment is always that searches and seizures be reasonable." Wilson v. Arkansas, 514 U.S. 927, 931 (1995). "Warrantless searches and seizures are unreasonable absent a recognized exception to the warrant requirement." State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 327 (2011). "[T]he burden is upon the State to justify a warrantless search." State v. Abdullah, 357 S.C. 344, 350, 592 S.E.2d 344, 348 (Ct. App. 2004) (citing State v. Bailey, 276 S.C. 32, 35, 274 S.E.2d 913, 915 (1981)).

"The exigent circumstances doctrine provides an exception to the Fourth Amendment's protection against warrantless searches, but only where, from an objective standard, a compelling need for official action and no time to secure a warrant exist." Abdullah, 357 S.C. at 351, 592 S.E.2d at 348 (citing State v. Brown, 289 S.C. 581, 587, 347 S.E.2d 882, 886 (1986)). The United States Supreme "Court has identified several exigencies that may justify a warrantless search of a home." Kentucky v. King, 563 U.S. 452, 460 (2011) (citing Brigham City v. Stuart, 547 U.S. 398, 403 (2006)). "A warrantless search is justified under the exigent circumstances doctrine to prevent a suspect from fleeing or where there is a risk of danger to police or others inside or outside a dwelling. In such circumstances, a protective sweep of the premises may be permitted." State v. Bash, 412 S.C. 420, 772 S.E.2d 537 (Ct. App. 2015) (quoting State v. Herring, 387 S.C. 201, 210, 692 S.E.2d 490, 495 (2009) (internal citation marks omitted); Minnesota v. Olsen, 495 U.S. 91, 100 (1990). "A 'protective sweep' is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others." State v. Johnson, 410 S.C. 10, 19, 763 S.E.2d 36, 41 (Ct. App. 2014) (quoting Maryland v. Buie, 494 U.S. 325, 327 (1990)) (internal quotation marks omitted).

Additionally, the United States Supreme Court has held that a warrantless search is permitted "to prevent the imminent destruction of evidence." King, 563 U.S. at 460 (quoting Brigham City, 547 U.S. at 403) (internal quotation marks omitted).

Sergeant Thompson admitted he "believed that something more was going on" inside Vining's residence, which is why he instructed Detective Allen and Detective Lundberg to enter the house without a warrant after Vining refused to consent to a search of the home. He later claimed he had Allen and Lundberg conduct the protective sweep "to make sure nobody else was inside, to preserve any evidence that was inside there, and also to make sure there was no active methamphetamine lab in progress." R. 38, ll. 5-12.

Again, "the underlying command of the Fourth Amendment is always that searches and seizures be reasonable." Wilson, 514 U.S. at 931. Further, "the subjective intentions of an officer 'play no role in ordinary, probable-cause Fourth Amendment analysis.'" State v. Corley, 383 S.C. 232, 241, 679 S.E.2d 187, 192 (Ct. App. 2009) (quoting State v. Banda, 371 S.C. 245, 252 n. 3, 639 S.E.2d 36, 40 n.3 (2006)). Here, it was objectively unreasonable for Thompson to believe there was any risk of danger to the officers that would have justified a warrantless entry or that there were any other occupants inside the home that posed a threat. Thompson admitted the three separate movements the officers observed inside the home while he was knocking on the door did not occur simultaneously. It was likely that these movements were performed by the same person who was monitoring the officers at the door while Thompson was knocking. Additionally, after Appellant answered the door, he told Sergeant Thompson that the only other person inside the home was "his girlfriend Lisa." R. 36, ll. 11-12. When Appellant went back inside the house to get "Lisa," Thompson "held the door open so [he] could see what was going on." R. 36, ll. 13-15. While the door was open, Thompson did not

see anyone else inside the house or hear any noises that would have led him to believe someone else was inside.

Additionally, while Thompson claimed Vining "was pretty deceptive about her answer and kind of hem hawing" when he asked "her if anybody else was inside the house," he earlier admitted that Vining "said she was [at the house] with her boyfriend." R. 37, ll. 1-2. Her statement was consistent with Appellant's statement that the only other person inside the house was his girlfriend. R. 36, ll. 11-12.

Moreover, Sergeant Thompson admitted that no weapons were found on either Appellant or Vining when they were detained and patted down prior to the protective sweep. Significantly, the anonymous tip Thompson received in June did not mention anything about weapons or the occupants of the residence being armed.

In State v. Counts, Counts "voluntarily opened the door" after officers knocked to investigate two anonymous tips that he was selling drugs from his home. Counts, 413 S.C. at 166, 776 S.E.2d at 67. One of the tipsters also warned that "Counts carried guns everywhere he went." Id. at 158, 776 S.E.2d at 62. When Counts opened the door, officers observed a silver automatic gun in his hand. After disarming and detaining Counts, the officers "performed a protective sweep of the residence." Id. at 158, 776 S.E.2d at 62. At trial, Counts challenged the warrantless search of his home. Emphasizing that Counts "opened the door armed with a handgun," our Supreme Court ultimately held, "Because there was a risk of danger to the officers, the officers were justified under the exigent circumstances doctrine to detain Counts and conduct a protective sweep of his residence." Id. at 166, 776 S.E.2d at 67.

In State v. Abdullah, two uniformed officers responded to a call regarding a burglary in progress at a specific apartment. Abdullah, 357 S.C. at 348, 592 S.E.2d at 346. While en route,

the officers also received a report of "shots fired" at the apartment. When the officers arrived, they found Abdullah standing in the doorway of the apartment. He refused to cooperate and instead moved towards a bedroom door where he stood in a manner such that his left side was shielded from the officers' view. Id. The officers detained him, and after observing bullet holes outside the apartment door and inside the apartment, they conducted a protective sweep of the apartment. Id. at 348-349, 592 S.E.2d at 347. During the sweep, the officers observed marijuana and drug paraphernalia. Id. at 349, 592 S.E.2d at 347. This Court held the warrantless search was justified under the exigent circumstances exception. The Court stated:

> [T]he totality of the circumstances, including Abdullah's unsettling behavior and the evidence of a violent crime and gunfire, gave the officers highly reasonable grounds from an objective standard for searching the premises with the dual goals of securing the scene against perpetrators and facilitating assistance to possible victims. Moreover, the immediate need to secure the premises and assist potential victims provided no time for the officers to obtain a warrant before conducting their sweep of the crime scene.

Id. at 352, 592 S.E.2d at 348.

In both Counts and Abdullah, law enforcement had an *immediate* need to search the premises due to concerns for officer safety and absolutely no time to secure a warrant. Counts opened the door armed with a handgun knowing the police were outside. In Abdullah, officers arrived at an apartment in response to a burglary in progress and encountered an uncooperative individual and evidence of gunfire. No such safety concerns existed in this case. Again, Thompson admitted that when Appellant and Vining were detained before the protective sweep, both were patted down for weapons and no weapons were found. R. 58, ll. 2-7. Further, the anonymous tip Thompson received in June did not mention anything about the occupants of the home being armed. The only claim Thompson made regarding fear for his safety was that he saw three movements inside the house before Appellant answered the door and that he

suspected methamphetamine was currently being manufactured inside. R. 53, l. 18 – 54, l. 12. These circumstances did not justify a warrantless entry into the home. From an objective standard, there was not "a compelling need for official action and no time to secure a warrant" as required under the exigent circumstances exception. See Abdullah, 357 S.C. at 351, 592 S.E.2d at 348 (citing Brown, 289 S.C. at 587, 347 S.E.2d at 886).

In fact, law enforcement had time to secure a search warrant. Both Appellant and Vining had been detained. There was no reason why, while the two were detained by Sergeant Thompson, that Detective Strickland, who ultimately obtained the warrant in this case, could not have attempted to get a warrant.

A comparison with Illinois v. McArthur, 531 U.S. 326 (2001) demonstrates the point. Two officers accompanied McArthur's estranged wife to the trailer where the two lived "so that they could keep the peace while she removed her belongings." Id. at 328. His wife went inside where McArthur was present, while the officers waited outside. When his wife "emerged after collecting her belongings," she told the officers that McArthur "had dope in there" and that she had seen him "slide some dope underneath the couch." Id. at 329 (internal quotation marks and alternations omitted). The officers knocked on the door, told McArthur what his wife said, and asked for consent to search the trailer. When McArthur refused, the officers told McArthur, who by now was on the front porch, that he could not reenter the trailer unless a police officer accompanied him. In less than two hours, officers obtained a search warrant and searched the premises. They found marijuana and paraphernalia inside.

The United States Supreme Court held law enforcement's temporary seizure of McArthur was reasonable under the Fourth Amendment. In so holding, the Court emphasized that "the police made reasonable efforts to reconcile their law enforcement needs with the

demands of personal privacy. They neither searched the trailer nor arrested McArthur before obtaining a warrant." Id. at 332.

Here, because there were no exigent circumstances that warranted a protective sweep of the house, the police should have merely detained Appellant and Vining and attempted to obtain a warrant from a magistrate before entering. This would have prevented any destruction of evidence, which Thompson claimed was one of his main concerns. Like in McArthur, this temporary seizure would have been reasonable under the Fourth Amendment.

Law enforcement violated Appellant's Fourth Amendment rights by conducting a protective sweep of the house where he was an overnight guest without exigent circumstances and without a warrant. Respectfully, this Court should hold the trial court erred by denying Appellant's motion to suppress and reverse his convictions and sentence.

3.

The court erred by admitting evidence of alleged pseudoephedrine purchases obtained by law enforcement from the National Precursor Log Exchange (NPLEx) since (1) the evidence is hearsay and the state failed to establish a sufficient foundation to satisfy the business records exception to the hearsay rule, (2) the testimony violated Appellant's Sixth Amendment right to confrontation because the state failed to present testimony from a records custodian at Appriss or a representative of the pharmacy where the pseudoephedrine was allegedly purchased, and (3) the probative value of the evidence was substantially outweighed by the danger of unfair prejudice to Appellant.

Arguments at Trial

Immediately before Sergeant Thompson testified before the jury, Appellant objected to Thompson being permitted to testify regarding the pseudoephedrine purchases allegedly made by Appellant and Michelle Vining that Thompson discovered through his use of NPLEx. Counsel argued Thompson had no personal knowledge of such purchases and, consequently, his testimony would be hearsay. He argued the testimony would not be admissible through the business records exception to the hearsay rule "unless the State is going to offer somebody who manages the Appriss database to come in here and testify as to the reliability of the database and say that the information that Detective Thompson was relying on is, in fact, information from the Appriss database." Defense counsel contended:

> This is a situation where somebody is going to a drugstore, they are scanning a . . . driver's license and that information is then transmitted I believe to Kentucky where the Appriss system is located, where that information is stored and that there is a computer program that's associated with that database that then sorts that information out. I should be entitled to know how reliable that information is. I should be entitled to know whether or not that there are any checks done on that database to measure the accuracy, whether or not there is any proof or any false positives on it. In effect I should be able to cross examine

> the database in the same manner as if this were a DUI case and [I] cross examine the DUI examiner who actually runs the breathalyzer. I think that the information is inadmissible, is hearsay. It is not a business record.

R. 113, l. 3 – 114, l. 13.

Appellant also challenged the admissibility of Thompson testimony regarding pseudoephedrine purchases allegedly made by Appellant under the confrontation clause. Counsel asserted,

> I believe we have a confrontation clause issue as to whether or not my client is going to be able to actually cross examine the person who is testifying against him. And what I mean is, some agent of a CVS pharmacy somewhere is going to have to testify that Mr. Kotowski [Appellant] was in there and that it was, in fact, his driver's license that was scanned. I should have the opportunity to know . . . how reliable the person is that was responsible for having that information put into the database. I think it's very reasonable to assume that there should be some checks on whether or not the person who owned the driver's license was, in fact, the person who was using it to purchase the items [pseudoephedrine]. All we really know is that a driver's license was scanned. We do not know whether Mr. Kotowski scanned the driver's license . . .

R. 114, l. 17 – 115, l. 15. Counsel also argued the information contained in the NPLEx database is testimonial. R. 115, ll. 16-20.

Finally, counsel objected to evidence of Appellant's alleged pseudoephedrine purchases under Rule 403, SCRE. He argued, "[T]here is nothing wrong with buying sudafed. If we look at the NPLEx records for Mr. Kotowski [Appellant], he buys sudafed when he's got hay fever. He buys them [pseudoephedrine pills] and he takes them about once a day. We heard Officer Thompson testify that . . . there's a pattern among smurfs I think is one of his terms or people going and buying this [pseudoephedrine] . . . [from] numerous drug stores. If we look at Mr. Kotowski's purchases . . . as reported in the database, he went to the same store about 90 percent of the time. So I mean there was certainly no intent to cover up or conceal [his purchases]." R. 115, l. 21 – 116, l. 7. Counsel concluded, "[I]t's probative value is outweighed

by the prejudicial value to my client and . . . it's gonna paint my client as being somebody who is purchasing sudafed for the wrong reason." R. 116, ll. 11-15.

The assistant solicitor argued the state was not seeking to admit evidence of Appellant and Vining's pseudoephedrine purchases as business records. He said the state planned to use Vining's records "to show the reason that Sergeant Thompson continued the investigation of the house and ultimately conducted the knock and talk." R. 117, ll. 10-14.

In regards to the confrontation clause, the solicitor argued that "other jurisdictions have found that NPLEx itself is not testimonial in nature because the actual intent of the program is to prevent people from purchasing pseudoephedrine to manufacture, not to use in actual criminal prosecution." R. 117, ll. 15-20.

Finally, the state argued that neither a records custodian nor the CVS pharmacist were necessary witnesses. The solicitor said the state was not seeking to admit the actual records. Instead, "[w]e're just having what Sergeant Thompson used to help investigate and prove or get probable cause on whether or not Mr. Kotowski [Appellant] was actually somehow involved in the manufacturing process." R. 118, ll. 2-14.

Court's Ruling

The court ruled that Thompson's testimony regarding Appellant and Vining's alleged pseudoephedrine purchases was admissible. Its ruling was based largely on S.C. Code Ann. § 44-53-398, "which deals with the sale of products containing ephedrine or pseudoephedrine." Judge Murphy noted that the statute "delineate[s] the requirements of a retailer" before it may sell such products to a purchaser. She stated:

> [T]hey [the retailer] . . . shall require [the] purchaser to produce a government issued photo ID showing the date of birth of the person and require the purchaser to sign an electronic log showing the date and time of the transaction, the person's name and address, . . . the amount of compound, mixture,

> or preparation. The retailer shall also determine the name entered in the log corresponds to the name on the identification, that the date of birth and the address are correct and shall enter the log and the name of the product and quantity sold. The retailer shall ensure that the product is delivered directly into the custody of the purchaser and the log must include notice to purchasers that entering false statements or misrepresentations on the log may subject the purchaser to criminal penalties.
>
> That statute further delineates potential criminal penalties for retailers for not complying with the statutes requirements. An employee's duty to accurately report, basically it means that they could be held criminally responsible and criminally reliable for not accurately reporting into the database.

R. 119, l. 6 – 120, l. 8.

The court ultimately found that the requirements contained in the statute provide "indicia of trustworthiness" and, consequently, Thompson's testimony regarding evidence of Appellant and Vining's alleged pseudoephedrine purchases obtained from NPLEx was admissible provided the state laid a "proper foundation" for the transactions. R. 120, ll. 9-12.

The court also relied on S.C. Code Ann. § 23-3-1200, which requires the South Carolina Law Enforcement Division (SLED) to "maintain the information received from the data collection system in SLED's electronic monitoring system" and states that only local, state, and federal law enforcement officials may be given access to the data. Judge Murphy indicated that Thompson's testimony during the suppression hearing laid the proper foundation as to how he had access to the database. R. 120, l. 9 – 121, l. 1.

Additionally, the court stated, "In looking at your argument as to whether or not these transactions are maintained in the regular course of business, basically the logs of the transactions are properly maintained by law and they basically just create a rebuttable presumption that the person whose name appears in the logs is the person whose transactions are recorded." R. 121, ll. 2-6.

Lastly, the court found "it does not violate the confrontation clause, that the records as compiled are not testimonial in purpose." It noted that the "entries are made and recorded [regardless] of whether or not the defendant later committed a crime with the purchase of the product." R. 121, l. 11 – 122, l. 5.

When the court concluded without addressing Appellant's Rule 403, SCRE objection, defense counsel requested a specific ruling on this ground. R. 122, ll. 8-13. Judge Murphy stated, "The Court finds that the probative value outweighs the prejudicial effect to your client." R. 122, ll. 14-15.

Thompson's Testimony Before the Jury

On direct-examination, Sergeant Thompson testified as to both Appellant and Michelle Vining's alleged pseudoephedrine purchases in the months that preceded the search that he learned from accessing NPLEx.[10] He claimed Appellant purchased pseudoephedrine on September 17, 2014 and September 29, 2014 and that Vining made purchases on September 3, 2014, September 11, 2014, September 16, 2014, October 13, 2014, October 15, 2014, October 17, 2014, October 22, 2014, and October 29, 2014. R. 140, ll. 1-14. Thompson also testified in more detail about Vining's activities on October 29, 2014. He claimed that she had attempted to make two separate purchases of 2.4 grams of pseudoephedrine at Walgreens at 9:11 pm on October 29, 2014 and that both purchases were blocked, and that she eventually purchased 1.2 grams at CVS at 9:27 pm. R. 128, l. 25 – 129, l. 20.

On cross-examination, Thompson admitted that he relied solely on the NPLEx database to obtain the information about Appellant and Vining's alleged pseudoephedrine purchases. He conceded that he had no personal knowledge of their purchases. He explained, "The only

[10] Appellant made a contemporaneous objection to Thompson's testimony before the jury. The court overruled the objection stating, "The ruling is the same." R. 124, ll. 22-25.

information I have got about her [Vining's] purchases was from NPLEx. I wasn't in the store with her while she made the purchases . . . Everything I have is from the log." R. 141, l. 6 – 142, l. 5. Thompson also admitted he did not attempt to corroborate any of the information he obtained from NPLEx, for example, by going to the pharmacies where Appellant and Vining allegedly purchased pseudoephedrine and questioning the pharmacist. He stated he had no way of knowing whether "the person who owned the ID actually presented the ID" because he "was not at the store when they made the purchase or when they bought the pseudoephedrine." R. 142, ll. 6-18.

As far as NPLEx itself, Thompson testified that it is a "computer program" owned by Appriss and that Appriss is "the collection point." He said, "Legislatures decided in law that Appriss would be used to record the information on NPLEx from the pseudoephedrine logs." Thompson admitted he did not have any knowledge concerning the accuracy of the database. When asked whether he had any knowledge about the quality control measures used by Appriss, Thompson said, "No. I don't work for Appriss. I'm employed by the Sheriff's Office." R. 142, l. 19 – 143, l. 23. He was also unaware of whether Appriss has any certifications. R. 145, ll. 21-22.

Thompson further admitted he did not know whether the pharmacist manually enters the information related to the purchase, such as the specific product and "the grams associated with that product" or whether he or she scans the "UPC code." However, he claimed the pharmacist scans the individual's driver's license and the information embedded in the license is recorded. R. 144, l. 3 – 145, l. 2. He again stated, "I don't work for the pharmacist. I work for the Sheriff's Office." R. 145, ll. 1-2.

When asked again for information concerning how accurate the database is and "what possibility there is for errors of entry," Thompson admitted, "I can't testify to that. I don't know that." R. 145, ll. 3-5. Lastly, Thompson testified that his training "on the system is user level training, how to run reports, different tools that are in the database that I can use *to investigate methamphetamine crimes*." R. 145, ll. 14-20 (emphasis added).

Motion for New Trial

Appellant renewed his objection to the admissibility of the NPLEx records through Sergeant Thompson in his post-trial Motion for New Trial. In his written motion, Appellant argued, "In order for the state to offer evidence contained in an NPLEx report as a business record, it must first have provided testimony from a custodian at Appriss who could testify as to [the] manner in which Appriss obtains, compiles, and stores the NPLEx information. As Thompson had no information regarding the Appriss software and database, its accuracy, data collection technique, etc., he did not qualify under Rule 803(6), SCRE as a qualified witness to substitute in place of Appriss's records custodian." R. 300.

Appellant also argued that Thompson's testimony concerning the evidence of Appellant and Vining's alleged pseudoephedrine purchases that he obtained through his use of NPLEx violated his rights under the confrontation clause. He asserted that the NPLEx evidence was testimonial hearsay and "[s]ince Thompson's report was prepared for the purpose of his investigation and the prosecution against defendant, the PSE [pseudoephedrine] information complied in the report was testimonial. Defendant had no opportunity to cross examine or otherwise confront the source of the NPLEx data." R. 301-302.

In the order denying the post-trial motion, the trial court found the "NPLEx records were admissible pursuant to SC Code Ann. Section 44-53-398 and SC Code Ann. Section 23-3-1200." R. 309. The court provided no further analysis in support of its ruling.

Discussion

The trial court erred by admitting evidence of Appellant and Vining's alleged pseudoephedrine purchases obtained by Sergeant Thompson from NPLEx because the evidence is hearsay and the state failed to establish a sufficient foundation to satisfy the business records exception to the hearsay rule. Moreover, the testimony violated Appellant's Sixth Amendment right to confrontation since the state failed to present testimony from a records custodian at Appriss or from a representative of the pharmacy where the pseudoephedrine was allegedly purchased. Appellant had no opportunity to cross-examine or otherwise confront the source of the NPLEx data. Finally, the evidence of Appellant's alleged pseudoephedrine purchases should have been excluded because it probative value was substantially outweighed by the danger of unfair prejudice to Appellant.

Inadmissible Hearsay

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Rule 802, SCRE provides that hearsay testimony is inadmissible unless it falls under one of the exceptions to the hearsay rules or by other rules prescribed by our Supreme Court or by statute. The information Sergeant Thompson obtained from NPLEx was hearsay because, despite what the state argued at trial, it was being offered "to prove the truth of the matter asserted." More specifically, the state offered the evidence to prove Appellant and Michelle Vining had purchased pseudoephedrine, a precursor to methamphetamine, on various occasions.

The information Sergeant Thompson obtained from NPLEx was not admissible under Rule 803(6), SCRE. This rule states, "A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, **all as shown by the testimony of the custodian or other qualified witness** . . ." Rule 803(6), SCRE (emphasis added).

In order for the state to offer evidence retrieved from NPLEx as a business record, it must lay a proper foundation by providing testimony from a records custodian from Appriss, the company who manages the NPLEx database, who could authenticate the records and testify as to the manner in which Appriss obtains, compiles, and stores the information contained in the database. Because Sergeant Thompson had no information regarding the Appriss software and database, its accuracy, reliability, data collection technique, among other factors, he did not qualify under Rule 803(6), SCRE as a qualified witness to substitute in place of Appriss's records custodian.

The facts in State v. Burgdorf, 861 N.W.2d 273 (Iowa Ct. App. 2014) are similar to the facts in this case. In Burgdorf, the prosecution introduced records obtained from NPLEx through two law enforcement agents at trial. The Iowa Court of Appeals held the evidence from NPLEx was inadmissible because the prosecution offered no testimony "to authenticate or lay a foundation for the NPLEx records," and did not offer testimony certifying that the NPLEx "records were what they purported to be." Id. at 276-277. The two witnesses the state called "admitted to lacking foundational knowledge of the NPLEx records" and acknowledged they

were not custodians of the records. Id. at 277. The court held the "erroneous admission of the NPLEx records requires reversal and remand for a new trial." Id. at 279.

In Embrey v. State, 989 N.E.2d 1260, 1267 (Ind. Ct. App. 2013), the Indiana Court of Appeals held records of Embrey's pseudoephedrine purchases obtained from NPLEx were admissible under the business records exception to the hearsay rule. However, Embrey differs from this case because the records in Embrey were introduced along with a "Business Records Affidavit" from the custodian of records for Appriss. Id. at 1266-1267.

Here, the trial court relied on S.C. Code Ann. §§ 44-53-398 and 23-3-1200 in support of its ruling. The court found the requirements of § 44-53-398 created "the indicia of trustworthiness" and, consequently, Thompson's testimony concerning evidence of Appellant and Vining's alleged pseudoephedrine purchases obtained from NPLEx was admissible. This was error. Neither § 44-53-398 nor § 23-3-1200 create an exception to the hearsay rule or state that NPLEx records are admissible without the proper foundation or authentication being laid. If the legislature intended to make such an exception, it would have explicitly said so in the statute.

The trial court also maintained that § 44-53-398 "basically just create[s] a rebuttal presumption that the person whose name appears in the logs is the person whose transactions are recorded in the logs." R. 121, ll. 2-10. This was also error. The statute contains no language related to a "rebuttal presumption." The court erroneously added a provision to the statute that is simply not there.

In the State's Response to Defendant's Motion for New Trial, the state cited State v. Cady, 425 S.W.3d 234 (Mo. Ct. App. 2014) in support of its argument. In Cady, the defendant challenged the admission of NPLEx records because the state failed to establish a sufficient

foundation for their admission under the business records exception to the hearsay rule. Id. at 243. The Missouri Court of Appeals held the defendant's argument was not "on point" "because subsection 21 of section 195.017 states, 'Logs of transactions required to be kept and maintained by this section and section 195.417 *shall create a rebuttable presumption* that the person whose name appears in the logs is the person whose transactions are recorded in the logs.'" Id. at 244 (emphasis in original). The court continued:

> This evidentiary presumption is established by the "[l]ogs of transactions required to be kept and maintained by" sections 195.017 and 195.417. Therefore, under the clear and plain language of this statute, so long as a foundation is laid establishing that the records at issue are "[l]ogs of transactions required to be kept and maintained by" sections 195.017 and 195.417, those records are admissible in evidence to "create a rebuttable presumption" as to the identity of the purchaser in the transactions shown in those records.

Id. at 244-245.

Again, no similar provision creating a "rebuttable presumption" exists in S.C. Code Ann. §§ 44-53-398 and 23-3-1200. Therefore, this Court should not be persuaded by the Missouri Court of Appeal's decision in Cady. If our legislature intended to create a "rebuttable presumption" it would have explicitly said so in the statute.

Therefore, the trial court erred by admitting Thompson's testimony related to Appellant and Vining's alleged pseudoephedrine purchases obtained from NPLEx because the state failed to authenticate the records and establish a proper foundation for their admission through a records custodian from Appriss.

Confrontation Clause Violation

"The Sixth Amendment's Confrontation Clause guarantees that '[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.'" State v. Ladner, 373 S.C. 103, 111, 644 S.E.2d 684, 688 (2007) (quoting U.S. Const.

amend. VI.). In Crawford v. Washington, 541 U.S. 36 (2004), the United States Supreme Court held "testimonial, out-of-court statements" were inadmissible "unless two conditions are met: the witness is unavailable at trial and the defendant had a prior opportunity to cross-examine the witness." State v. Brockmeyer, 406 S.C. 324, 342, 751 S.E.2d 645, 654 (2013) (citing Crawford, 541 U.S. at 68).

"[T]he Confrontation Clause analysis turns on whether the challenged out-of-court statement is testimonial." Id. at 342, 751 S.E.2d at 654. "Under the primary purpose analysis required by the Confrontation Clause, where the primary purpose of an out-of-court statement is to serve as evidence or 'an out-of-court substitute for trial testimony,' the statement is considered testimonial." Id. "However, 'where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause.'" Id. at 342, 751 S.E.2d at 654-655 (quoting Michigan v. Bryant, 562 U.S. 344, 359 (2011)) (internal alternation omitted).

The evidence Thompson obtained from NPLEx regarding Appellant and Vining's alleged pseudoephedrine purchases was testimonial. The information collected by Appriss and stored in the NPLEx database is used by law enforcement to track pseudoephedrine purchases and purchases of other precursors used in the manufacture of methamphetamine to investigate and prosecute crimes. After Thompson received the anonymous tip complaining of alleged "drug activity" at 111 Marsh Pointe Road, he accessed NPLEx to compile a report of all pseudoephedrine purchases made by individuals using that address. As the investigation continued, Thompson compiled additional reports related to Vining's and Appellant's alleged pseudoephedrine purchases.

Thompson had no personal knowledge of Appellant and Vining's alleged purchases. His testimony was based solely upon the information he gathered from NPLEx. Because the evidence was collected and prepared for the purpose of Thompson's investigation and the ultimate prosecution of Vining and Appellant, the NPLEx records contained in Thompson's report were testimonial. Appellant had no opportunity to cross-examine or otherwise confront the source of the NPLEx data because the state failed to call a records custodian from Appriss who could testify about the NPLEx software and database, its accuracy, reliability, data collection technique, and other factors, or a witness from the pharmacy who allegedly sold Appellant and Vining pseudoephedrine.

Therefore, the trial court erred by admitting Thompson's testimony related to Appellant and Vining's alleged pseudoephedrine purchases obtained from NPLEx in violation of his Sixth Amendment right to confrontation. Respectfully, this Court should reverse Appellant's convictions and sentence and remand for a new trial.

Rule 403, SCRE

Under Rule 403, SCRE, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Evidence of Appellant's alleged pseudoephedrine purchases was highly prejudicial in this manufacturing methamphetamine case and should have been excluded under Rule 403. As defense counsel below emphasized, "there is nothing wrong with buying sudafed [pseudoephedrine]." R. 115, ll. 22-23. Sergeant Thompson's testimony regarding Appellant's alleged purchases was unduly prejudicial because it suggested to the jury that Appellant bought pseudoephedrine "for the wrong reason." R. 116, ll. 11-15. Individuals buy pseudoephedrine every day for various legitimate reasons and there is nothing suspicious about purchasing pseudoephedrine from a pharmacy. Admitting evidence of

Appellant's purchases invited the jury to convict him on an improper basis, namely that he had a history of buying pseudoephedrine.

Consequently, the trial court erred by admitting Thompson's testimony related to Appellant alleged pseudoephedrine purchases obtained from NPLEx because the probative value of such testimony was outweighed by its prejudicial effect. This Court should reverse Appellant's convictions and sentence and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentence, suppress the evidence illegally seized by law enforcement, or, in the alternative, remand for a new trial.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of July, 2017.

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 April 15, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

July 26, 2017

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