STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Lexington County

Honorable Clifton Newman, Circuit Court Judge

Opinion No. 5499 (S.C. Ct. App. Filed 7/19/2017)

2009-GS-32-0202, 0204, 0205

THE STATE,

RESPONDENT,

V.

JO PRADUBSRI,

PETITIONER

APPELLATE CASE NO 2015-000208

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 18, 2017.

QUESTIONS PRESENTED

I.

The Court of Appeals erred in affirming Petitioner's convictions where the trial court refused to reveal the identity of the confidential informant where the confidential informant acted beyond the scope of a mere tipster and, as the sole source of law enforcement information regarding Petitioner, her identity was relevant and helpful to Petitioner and essential to a fair determination of Petitioner's case.

II.

The Court of Appeals erred in affirming Petitioner's convictions where the trial court erroneously ruled that reasonable suspicion existed to justify stopping Petitioner's vehicle when Petitioner had not violated any traffic laws and the stop was based only on information provided by the confidential informant, whose information on Petitioner was uncorroborated.

III.

The Court of Appeals erred in affirming Petitioner's convictions where, in violation of *State v. Daniels*[1] and in contravention of its own ruling, the trial judge improperly defined reasonable doubt as, "doubt which makes an honest, sincere, conscientious juror in search of the truth to hesitate to act."

IV.

The Court of Appeals erred in affirming Petitioner's convictions where the trial court erroneously ruled that former co-defendant Melissa Martin's testimony regarding a prior drug sale occurring before the traffic stop and alleging that Petitioner manufactured crack cocaine in his residence, constituted direct evidence of an element of trafficking and were not prior bad acts subject to Rule 404(b), SCRE.

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[1] 401 S.C. 251, 258, 737 S.E.2d 473, 477 (2012).

STATEMENT OF THE CASE

On February 9, 2009, the Lexington County Grand Jury indicted Petitioner Jo Pradubsri for: trafficking in crack cocaine (28-100 grams); possession with intent to distribute crack cocaine within the proximity of a school; and unlawful carrying of a pistol. R. 387.

On January 13, 2015, Petitioner proceeded to trial[2] before the Honorable Clifton B. Newman and a jury. R. 1 Dayne C. Phillips and David M. Mauldin again represented Petitioner and Assistant Solicitors Lester M. Bell, Jr. and Casey N. Rankin represented the State. The jury found Petitioner guilty as charged. R. 347, ll. 17 - 348, ll. 5. The trial court sentenced Petitioner to twenty-five years imprisonment. R. 356, ll. 1-6.

Petitioner filed a timely notice of appeal. Appellate Defender John H. Strom represented Petitioner on appeal. Assistant Attorney General William Blitch, Jr. represented the State. The Court of Appeals affirmed Petitioner's convictions in a published opinion issued on July 19, 2017. *State v. Pradubsri*, ___ S.C. ___, 803 S.E.2d 724 (Ct. App. 2017).

Petitioner filed a timely petition for rehearing on July 28, 2017 The Court of Appeals denied the petition for rehearing on Augsut 18, 2017. This petition follows.

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2 Petitioner previously stood trial on the same charges in February 11, 2010. His convictions were reversed by the South Carolina Court of Appeals in an opinion filed on May 1, 2013. *State v. Pradubsri*, 403 S.C. 270, 743 S.E.2d 98 (Ct. App. 2013).

On November 4-5, 2014, Petitioner stood trial again with the Honorable Donald B. Hocker presiding. David M. Mauldin represented Petitioner. The second trial ended in a mistrial.

ARGUMENTS

I.

The Court of Appeals erred in affirming Petitioner's convictions where the trial court refused to reveal the identity of the confidential informant when the confidential informant acted beyond the scope of a mere tipster and when, as the sole source of law enforcement information regarding Petitioner, her identity was relevant and helpful to Petitioner and essential to a fair determination of Petitioner's case.

Relevant Facts

On November 9, 2008, Petitioner and his girlfriend, Melissa Martin, were stopped while pulling out of the Kroger parking lot in Irmo, South Carolina, by Sgt. John Finch of the Lexington County Sheriff's Department. R. 136, ll. 18 - 137, ll. 24. The stop was the culmination of months of fruitless searching by Finch and other law enforcement officers.

For three months prior to the stop, Finch had been in regular communication with an informant, who identified Petitioner and Martin as drug dealers. R. 47, ll. 5 - 50, ll. 9. The informant was a prostitute with past drug convictions. R. 46, ll. 4-25; R. 55, ll. 4-23. ***Based solely on the informant's information***, Finch had issued multiple "be on the lookout" orders to his deputies and other county law enforcement agencies. R. 47, ll. 5 - 50, ll. 9 (*emphasis added*).

Despite being provided detailed information on the location, times of day, and method of sale; law enforcement was unable to locate Petitioner in the three months leading up the stop. *Id.* Law enforcement never witnessed any drug sales and police surveillance of Petitioner's residence did not yield any evidence of drug manufacturing. R. 62, ll. 22 - 64, ll. 24. At trial, Finch candidly admitted, Petitioner committed no traffic violations and his stop was based only on the information supplied by the prostitute informant. R. 66, ll. 2-18.

Finch averred that Petitioner and Martin made "furtive" movements as he and a back-up officer, Deputy Kevin Blake, approached the vehicle. R. 69, ll. 7 - 74, ll. 24. Finch also claimed that

as he approached the vehicle he saw the handle of a pistol protruding from the gap between the driver's side seat and center console. *Id.* He ordered Petitioner and Martin out of the vehicle. *Id.* Martin became confrontational with Deputy Blake. R. 188, ll. 3-21. Blake claimed that as he was taking Martin out of the vehicle he noticed a small bag in her hand and a second bag in the waist line of her pants. R. 179, ll. 16 - 181, ll. 11. Blake then observed an unusual bulge in the crotch of Martin's pants and requested that a female deputy search Martin. *Id.*

Martin, who has an extensive criminal record with convictions for prostitution, drug, and property crimes, had a total of sixty-seven and eighty-eight hundredths grams of crack cocaine in her possession. R. 193, ll. 16 - 198, ll. 23. Law enforcement also discovered a pistol in Martin's purse. R. 182, ll. 1-6. Martin confessed that the crack cocaine belonged to her. R. 238, ll. 10-20.

Once incarcerated, Martin wrote a letter to the solicitor's office offering to testify against Petitioner, "I'm willing to do anything that needs to be done" in order receive a lighter sentence and to secure bond. R. 239, ll. 22 - 240, ll. 24; R. 263, ll. 6-10. On reaching an agreement with the State, Martin repudiated ownership of the drugs found on her person and testified that the drugs belonged to Petitioner. R. 261, ll. 4 - 264, ll. 23. In return, the State consented to a reduced bond and arranged for her to be represented by a former solicitor at no expense to her. R.265, ll. 2-23.

Once released, Martin failed to attend her next appearance and Martin was eventually arrested in Richland County. R. 266, l. 11 – 267, l. 7. She again secured bond, this time by offering to have sex with the bail bondsman. *Id.* at ll. 8-22. Subsequently, Martin was arrested for a third time during which she was also caught smuggling crack cocaine into prison. R. 258, ll. 12 - 259, ll. 19. Martin faced the same charges as Petitioner with a mandatory minimum sentence of seven years imprisonment. R.268, ll. 6 - 269, ll. 19. Martin plead guilty to simple possession of crack

cocaine and unlawful possession of a gun. *Id.* She was sentenced to eighteen months imprisonment with no subsequent probation. *Id.*

Pre-Trial Motion: Reveal Informant's Identity

Defense counsel moved pre-trial to compel the State to reveal the identity of the informant arguing that the informant was more than a mere tipster and that her identity was highly relevant and helpful to the defense. R. 4, ll. 2 - 6, ll. 7. The defense posited the solicitor's office acknowledged that there was no formal agreement with the informant rendered the informant's privilege inapplicable in a letter to defense counsel. *Id.* In addition, ***Finch was completely reliant on her information when he initiated the investigatory traffic stop,*** as such the informant was more than a tipster. R. 6, ll. 25 - 12, ll. 3 (*emphasis added*). At trial, Finch conceded that law enforcement had ***conducted no independent investigation into the informant's allegations***, made no attempted controlled buys, and only conducted cursory surveillance of Petitioner's residence. R. 63, ll. 18 - 65, ll. 24.

The State maintained that the informant simply provided law enforcement with information and that she was not an active participant in any crimes. R. 30, ll. 22 - 33, ll. 23. Curiously, given that the informant's significant involvement in Petitioner's case, the State noted that they "couldn't run programs like Crime Stoppers" if the informant's identity was disclosed. *Id.* The State then proffered testimony from Sgt. Finch in an effort to establish the informant's reliability.

Proffered Testimony of Sgt. John Finch

Finch averred that the informant had worked with police since 2006 and never provided false or inaccurate information. R. 43, ll. 2 - 46, ll. 25. The informant had helped police locate a series of persons from "Midland's Most Wanted" lists. *Id.* However, Finch was unable to identify these "most wanted" by name or recall the details of their cases, "[t]here's been a lot of cases of

wanted individuals, especially more special like Midlands Most Wanted-type individuals." R. 44, ll. 16-25.

According to Finch, the informant regularly provided police with the same kind of information on many different individuals. For example, he recollected that the informant had provided information on persons residing at an Executive Inn:

> "I've gotten several different people. In that case, let's see, those two different Midland's Most Wanted subjects based on intelligence received from the informant, very specific about the room, the dates and times they would be there, all of the identifiers, you know, everything just matched up perfectly in that case, and that was two at just the Executive Inn alone."

Id. The informant also apparently provided identical information on two different "wanted subjects" residing at a Red Roof Inn and a Motel Six respectively. R. 45, ll. 1-8.

In another case, the informant told police about "an individual that was wanted for trafficking heroin." R. 43, ll. 2-17. On this occasion, she allegedly identified a co-defendant, the car being used, and the area and time that the targets sold drugs. *Id.* Oddly given that the informant provided police with the time and area of drug sales, Finch recalled that "I started working on that case. ***Subsequently*** we did locate the individuals." *Id.* (*emphasis added*).

The information the informant provided in Petitioner's case followed this same basic pattern. Finch testified that for three months prior to Petitioner's traffic stop he was in regular communication with the informant about Petitioner's supposed whereabouts. R. 47, ll. 5 - 50, ll. 21. Finch alleged that the informant, had personally observed Petitioner and Martin making crack cocaine at their residence. *Id.*

Finch claimed that he received between ten to twenty telephone calls from the informant. R. 42, ll. 17-22. She described Petitioner's car, claimed that Petitioner allegedly sold drugs in the Irmo-St. Andrews area of Columbia during nights and evenings, and – incredibly – knew the make,

model, and caliber of guns that Petitioner and Martin carried. R. 55, ll. 2 - 90, ll. 23. He claimed that he recognized Martin as someone he believed was involved in prostitution and that he accessed Petitioner's criminal record. R. 64, ll. 13-24.

On cross-examination, Finch admitted that despite having supposedly accurate and detailed information from the informant; the police never observed Petitioner make a single drug sale, made no effort to conduct a controlled buy, and surveilled Petitioner's house without observing anything that corroborated the informant's claims. R. 63, ll. 18 - 65, ll. 24. The lack of corroboration was disconcerting given that many of the informant's telephone calls over the three month period purportedly provided Petitioner's current location and his direction of travel. R. 88, ll. 2 – 90, ll. 10. Finch blamed his inability to corroborate the information, not on the informant being unreliable, but on law enforcement having other commitments which made any independent investigation too onerous. *Id.*

After stressing the informant's detailed personal knowledge of Petitioner's alleged drug dealing, Finch became suddenly more reticent and skeptical of whether Petitioner and the informant had a personal connection under cross-examination, "I don't know about how close of a personal relationship it was, but I'm saying that they knew each other on the street." R. 85, ll. 25 - 87, ll. 18. When asked what benefits the informant received from her service with law enforcement, Finch adamantly denied that she received any benefits, conjecturing that the informant:

> "[K]new that if she committed a crime that I would lock her up and then that's -- you know, she -- she gave me this information voluntarily and willfully. On the street she developed a level of trust with the folks out there and, you know, after a long period of time it was developed with this individual, you know, so she forwards the information to me and I look into it, and everything she's ever given me has been reliable.

Id. at ll. 5-12.

When asked, he again conceded that never corroborated the informant's information, never attempted to set-up a controlled buy, never sought a search warrant for Petitioner's residence, and the surveillance police conducted did not yield any corroborating evidence of trafficking. R. 63, ll. 22 - 64, ll. 24. On redirect, Finch readily agreed to the State's suggestion that simply because the informant supplied inaccurate or uncorroborated information regarding Petitioner's location on ten to twenty separate occasions over a three month period, it did not mean that the informant was unreliable. *Id.*

Trial Court's Ruling and Court of Appeal's Affirmance

The trial court ruled that the State was not required to reveal the identity of the informant. R.78, ll. 2 - 79, ll. 10. The court found that the informant was not an active participant in the crime and was not a material witness. *Id.* The court noted that "it's hard to put a label on who she was, but if I were to put a label on her[,] she would be a tipster as argued by the State." *Id.*

The court further stated that the interests of law enforcement in receiving information outweighed the prejudice to Petitioner's right to a fair trial. *Id.* The Court of Appeals summarily affirmed the trial court's refusal to require the State to reveal the identity of their informant. *Pradubsri*, 803 S.E.2d at 730.

Discussion

Generally, the State may not be compelled to disclose the names of its confidential informants. *State v. Burney*, 294 S.C. 61, 362 S.E.2d 635 (1987). However, the United States Supreme Court has held, "Where the disclosure of an informant's identity . . . is *relevant and helpful* to the defense of an accused, or is *essential to a fair determination of a case*, the privilege must give way." *Roviaro v. United States,* 353 U.S. 53 (1957) (*emphasis added*); *see State v. Hayward*, 302 S.C. 75, 393 S.E.2d 635 (1990).

This Court has held, "[p]ublic policy considerations for nondisclosure of an informant's identity are absent where the informant openly participates in the criminal transaction." *State v. Diamond*, 280 S.C. 296, 299, 312 S.E.2d 550, 551 (1984)(whether to call an informant as a witness is a matter for the accused rather than the State); *see McLawhorn v. North Carolina,* 484 F.2d 1 (4th Cir. 1973) (disclosure is required where an informant is an actual participant, particularly where he sets up the criminal transaction); *see also State v. Blyther*, 287 S.C. 31, 33, 336 S.E.2d 151, 152-53 (Ct. App. 1985) (finding "where . . . the informant is either *a material witness to the crime* or directly participates in it, disclosure may be required, particularly where, in a drug related crime, he is the *only witness to the transaction other than the buyer and the defendant*") (internal citation omitted) (*emphasis added*).

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

Since the State was not required to identify the informant, Petitioner was unable to effectively challenge whether reasonable suspicion existed to justify the investigatory stop. R. 81 - 82. Police conducted virtually no independent investigation to confirm the validity of the informant's information. *State v. Burns*, 294 S.C. 338, 340, 364 S.E.2d 465, 466 (1988) (***informant relied upon by law enforcement when seeking warrant was a material witness***).[3]

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[3] *See also*: *Burns,* 294 S.C. at 340-341, 364 S.E.2d at 467 ("The right of an accused to learn the identity of an informant includes more than the state's revelation of the informant's name. In cases where the informant's testimony relates to the offense, preliminary matters such as search

What investigation police did do, should have lead them to question their informant's reliability. Finch testified that he received between ten and twenty calls about Petitioner from the informant over a three month period. R. 47, ll. 5 - 50, ll. 4. Despite the timeliness of the informant's information and her supposed unassailable reliability, police repeatedly failed to locate Petitioner. R. 55, ll. 9 - 59, ll. 16. Thanks to the informant, law enforcement supposedly knew when, where, and how Petitioner allegedly sold drugs. *Id.* She also claimed to know where Petitioner manufactured drugs, but police surveillance failed to corroborate the information. R. 63, ll. 22 - 65, ll. 24.

The identity of the informant was not only helpful and relevant to Petitioner's case, but essential to a fair determination of reasonable suspicion, especially in light of law enforcement's inability to independently corroborate the informant's information. As a mere tipster, the State maintained that the informant did not participate in any drug transactions; the defense could not investigate whether this was the case. However, the quantity and the specificity of the information provided by the informant strongly suggests more than "peripheral knowledge" of the alleged crimes.

Finch stressed the informant's personal connection to Petitioner, before later waffling on her degree of involvement during cross-examination R. 55, ll. 9 - 59, ll. 16. In addition to the information above, the informant knew Petitioner's supposed method for manufacturing drugs and, most incredibly, the make, model, caliber of guns usually carried by Petitioner and Martin. Defense counsel was also precluded from investigating the informant's background, which the State conceded included multiple drug and prostitution arrests. R. 193, ll. 16 - 198, ll. 23.

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and seizure, or other constitutional matters, the defense is entitled to a reasonable opportunity to search for the informant") (internal citations omitted).

Whether the informant had ulterior motives was likewise impossible to discover. The defense was also unable to challenge Finch's odd contention that the informant received "no benefits" as a result of her nearly eight years of cooperation with law enforcement. *Diggers*, 322 S.C. at 514, 473 S.E.2d at 61 (ulterior motives of informant relevant to reliability). His claim is especially curious given that tips leading to the arrest of individuals on the "Midland's Most Wanted" list includes a cash reward.[4]

Finally, Petitioner was arrested over six years before trial, thus there was minimal risk that revealing the informant's identity would compromise the flow of information to law enforcement or harm the informant. R. 387. Moreover, law enforcement's investigative decisions made the informant a material witness; notably police choose to forgo other investigative techniques such as controlled buys or surveillance, and did not even wait for a pretextual traffic violation.

Without the identity of the informant, Petitioner was unable to effectively attack the existence of reasonable suspicion. Therefore, the trial court erred in refusing to reveal the identity of the informant where the informant acted beyond the scope of a mere tipster and her identity was essential for a fair determination of Petitioner's case.

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[4] *See*: http://www.midlandcrimestoppers.com/wanteds.aspx.

II.

The Court of Appeals erred in affirming Petitioner's convictions where the trial court erroneously ruled that reasonable suspicion existed to justify a traffic stop of Petitioner's vehicle based only on uncorroborated information provided by the informant.

Relevant Facts

Petitioner moved to suppress the crack cocaine and guns seized during the traffic stop on the grounds that law enforcement did not have reasonable suspicion to justify the stop. R. 79, ll. 20 - 80, ll. 23; R. 369. Defense counsel stressed that because the police were completely reliant on the uncorroborated information provided by the informant, they lacked reasonable suspicion that Petitioner was engaged in criminal activity. R. 84, ll. 5-15. Citing to Sgt. Finch's testimony, counsel argued that the informant's reliability had not been established. R. 85, ll. 3-24. The trial court denied Petitioner's motion to suppress the evidence, ruling that law enforcement had reasonable suspicion based on the past reliability of the informant. R. 87, ll. 16-18.

In affirming Petitioner's convictions, the Court of Appeals conceded that "the informant did not provide as much predictive information as the tipster in *White*"[5] and that the informant fist gave information on Petitioner three months prior to his arrest. *Pradubsri*, 803 S.E.2d at 728. The Court of Appeals concluded that Finch's characterization of the informant as reliable in prior cases outweighed the three months of uncorroborated tips in Petitioner's case. *Id.*

The Court of Appeals also discounted law enforcement's failure to witness a single drug sale and failure to find evidence of crack cocaine manufacturing at Petitioner's residence during their surveillance. *Id.* In concluding reasonable suspicion existed, the Court of Appeals found that the informant's correct description of Petitioner's car in the "small identified area at a time when the

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5 *Alabama v. White*, 496 U.S. 325 (1990).

informant reported drugs and two specified weapons would very likely be in the vehicle" was sufficient for reasonable suspicion. *Id.*

Discussion

The Court of Appeals erred in upholding the trial court's determination that reasonable suspicion existed to justify the traffic stop. *Pradubsri*, 803 S.E.2d at 728. The information furnished by the informant was not sufficiently particularized to provide law enforcement with reasonable suspicion to initiate the traffic stop.

The Fourth Amendment to the United States Constitution ensures "the right of the people to be secure. . . [from] unreasonable searches and seizures." U.S. Const. amend. IV. The "temporary detention" of individuals during an automobile stop by police constitutes a "seizure" within the meaning of the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 809 (1996). Generally, "the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *State v. Butler*, 343 S.C. 198, 201, 539 S.E.2d 414, 416 (Ct. App. 2000).

However, if an officer has reasonable suspicion that the occupants of an automobile are involved in criminal activity, the officer may stop and briefly detain them. *Id.; Knight v. State*, 284 S.C. 138, 325 S.E.2d 535 (1985*); see also State v. Nelson*, 336 S.C. 186, 192, 519 S.E.2d 786, 789 (1999) (*quoting Berkemer v. McCarty*, 468 U.S. 420, 439 (1984)) ("'[A] policeman who lacks probable cause but ***whose observations lead him*** reasonably to suspect that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to investigate the circumstances that provoke that suspicion.'")(*emphasis added*).

Reasonable suspicion requires "a particularized and objective basis that would lead one to suspect another of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417 (1981); *State v.*

Lesley, 486 S.E.2d 276 (Ct. App. 1997). A court must consider "the totality of the circumstances – the whole picture" when determining whether reasonable suspicion exists. *Cortez*, 449 U.S. at 417; *see also State v. Woodruff*, 344 S.C. 537, 546, 544 S.E.2d 290, 295 (Ct. App. 2001) ("reasonable suspicion requires a particularized and objective basis that would lead one to suspect another of criminal activity. . . the whole picture must be considered."). Reasonable suspicion "entails. . . something more than an inchoate and unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause" *Butler*, 343 S.C. at 202, 539 S.E.2d at 416.

The United States Supreme Court created the exclusionary rule[6] to safeguard Fourth Amendment rights. *United States v. Calandra*, 414 U.S. 338 (1974). The exclusionary rule prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure under the fruits of the poisonous tree doctrine. *See Wong Sun v. United States*, 371 U.S. 471, 484 (1963); *see also State v. Nelson*, 336 S.C. 186, 519 S.E.2d 786 (1999) (evidence not admissible under the "fruit of the poisonous tree" doctrine when police exploit unlawful search to seize evidence that would not have otherwise come to light).

In many respects the informant in the present case is a less precise, less reliable version of the informant in *State v. Pope*, 410 S.C. 214, 763 S.E.2d 214 (Ct. App. 2014). In *Pope,* police received a tip from a non-confidential informant that a black Ford Exhibition would be leaving Spartanburg on Highway 176. *Id.* at 224, 763 S.E.2d at 820. In the presence of police officers, the informant called Pope, who was driving the Exhibition. *Id.* at 225, 763 S.E.2d at 820. Pope told the informant that he was passing the "Lighthouse Fish Camp," this was confirmed by a trailing police car. After the phone call, law enforcement initiated the traffic stop. *Id.*

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6 The Fourteenth Amendment makes the exclusionary rule applicable to the states. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

On appeal, the Court of Appeals found that reasonable suspicion justified the traffic stop, based solely on the information provided by the informant. The non-confidential informant accurately described the Pope's vehicle. He also accurately predicted the highway, Pope's direction of travel at a specific time; and that more than one person was in the vehicle. *Id.* at 225, 763 S.E.2d at 814 (*emphasis added*); *see also Illinois v. Gates*, 462 U.S. 213 (1983) ("Our decisions applying the totality of circumstances analysis . . . have consistently recognized the value of corroboration of details of an informant's tip by independent police work").

Petitioner's case is also distinguishable from *State v. Willard*, 374 S.C. 129, 64 S.E.2d 252 (Ct. App. 2007), and *State v. Roberts*, 368 S.C. 529, 629 S.E.2d 679 (Ct. App. 2006) which were both argued extensively at trial and relied upon by the Court of Appeals. R. 357. In *Rogers*, law enforcement knew that a crime had been committed - based on a police report of a bank robbery - when they initiated the investigatory stop. *Id.* In *Willard*, law enforcement utilized a non-confidential informant to arrange a drug buy via telephone with officers present. 374 S.C. 129, 64 S.E.2d 252. Crucially, Willard also confessed to law enforcement following the traffic stop. *Id.*

The Court of Appeals' reliance on *Alabama v. White*, is misplaced. 496 U.S. 325 (1990). The informant in *White* provided police with **detailed, current information** regarding White's current location and car and alleged that White was preparing to deliver marijuana to a specific motel. *Id.* at 327-328. Police then **immediately** went to the apartment and observed White leaving from the predicted building, getting into a car matching the description provided by the informant, and driving for four miles on the most direct route to the motel. *Id.* at 331.

By contrast, the informant in Petitioner's case provided significantly less specific information. In ten to twenty phone calls during a three month period, the informant told police about Petitioner's working patterns: that he manufactured crack cocaine at residence and then sold

drugs at night in an approximately twelve square mile area between Irmo and the St. Andrews neighborhood of Columbia. R. 47, ll. 8 - 50, ll. 4. Despite this information and receiving regular updates from the informant, the police were unable to locate Petitioner for three months.

Police efforts to corroborate the incriminating details of the informant's information were a complete failure. Despite surveillance and multiple BOLOs, police never found any evidence that Petitioner manufactured crack cocaine at his residence and never saw him make a single drug sale. R. 63, ll. 22 - 65, ll. 24. The only details police corroborated prior to initiating the traffic stop were not overtly incriminating. *Butler*, 343 S.C. 198, 539 S.E.2d 414 (presence of temporary tag on back of car, without more, was insufficient to provide reasonable suspicion that driver was involved in criminal activity).

As to reliability, Finch claimed that the informant had always been accurate and reliable in past investigations. R. 44, ll. 14 - 47, ll. 4. However, his testimony on these past instances was conclusory and circular. *Id.* He could not recall the names of those arrested, the dates, or the final disposition of these cases. *Id.*; *see also* R. 30, ll. 5 - 34, ll. 24. All Finch remembered was that on every occasion the informant supplied police with exactly the same quantity of information all of which was "very reliable, very accurate" and the informant never received any benefit for her nearly decade of service to law enforcement. R. 44, ll. 14.

In sum, the information furnished by the informant was not sufficiently particularized or timely so as to provide law enforcement with reasonable suspicion to initiate the traffic stop. Therefore, the Court of Appeals erred in affirming the trial court's refusal to suppress the evidence seized by law enforcement. *See Wong Sun*, 371 U.S. at 484; *see also Nelson*, 336 S.C. 186, 519 S.E.2d 786.

III.

The Court of Appeals erred in affirming Petitioner's convictions where, in violation of *State v. Daniels*[7] and in contravention of its own ruling, the trial judge improperly defined reasonable doubt as, "doubt which makes an honest, sincere, conscientious juror in search of the truth to hesitate to act."

Relevant Facts

Before closing arguments, the trial court held a charge conference. R. 285, ll. 1 - 299, ll. 10. Defense counsel objected to language in the court's proposed charge instructing jurors to "search for the truth." R. 291, ll. 9 -292, ll. 25. Citing to *State v. Daniels*, defense counsel argued that such language was improper. *Id.* The trial court agreed to remove the improper language. R. 295, ll. 9-10.

Nevertheless, in its charge, the trial court defined reasonable doubt as "doubt which makes an honest, sincere, conscientious juror in search of the truth to hesitate to act." R. 330, ll. 13-15. The trial court also charged that, "it is your duty to determine the effect, the value, weight, and the truth of the evidence presented during trial." R. 325, ll. 13-15.

The court further instructed the jury that, "[i]t becomes your duty as jurors to evaluate the evidence and determine that evidence which convinces you of its truth." R. 326, ll. 13-18. At the end of the charge, defense counsel renewed its objection and moved for a mistrial, noting that the court had agreed to remove such language. R. 339, ll. 5-20. The trial court overruled the objection, stating "I think that's nitpicking to the 'nth' degree." *Id.*

In affirming Petitioner's conviction, the Court of Appeals concluded that the trial court did not commit reversible error by defining reasonable doubt in terms of the search for the truth. *Pradubsri*, 803 S.E.2d at 730. Specifically, the Court of Appeals concluded that Petitioner was not prejudiced because the trial court "referenced the 'beyond a reasonable doubt" standard at least twenty times during its instruction." *Id.*

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[7] 401 S.C. 251, 737 S.E.2d 473 (2012).

Discussion

The purpose of jury instructions is to enlighten the jury as to applicable law so that a just, fair, and proper verdict can be reached. *See State v. Leonard*, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987); *see also State v. Blurton*, 352 S.C. 203, 207, 573 S.E.2d 802, 804 (2002). The South Carolina Supreme Court has held that it is error to give instructions which are calculated to confuse or mislead a jury. *Blurton*, 352 S.C. at 208, 573 S.E.2d at 804 (quoting *Leonard*, 292 S.C. at 137, 355 S.E.2d at 273).

On review an appellate court considers the instructions as a whole, and "if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error." *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000). The standard of review when considering an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the constitution. *Id.* at 27, 538 S.E.2d at 251 (*citing Estelle v. McGuire*, 502 U.S. 62, 72 (1991)).

This Court has specifically held jurors should not be instructed that, "their verdict would represent truth and justice for the parties." *State v. Daniels*, 401 S.C. 251, 258, 737 S.E.2d 473, 477 (2012); *see also State v. Needs*, 333 S.C. 20, 538 S.E.2d 248 (2000) (instructions on reasonable doubt which charge the jury to "seek the truth" are disfavored because they risk unconstitutionally shifting the burden of proof to defendant).

In Petitioner's case, the trial court instructed jurors three times that they should base their verdict on what they believed to be the truth. Critically, reasonable doubt was defined as, "***doubt which makes an honest, sincere, conscientious juror in search of the truth to hesitate to act.***" R. 330, ll. 11-18 (*emphasis added*). The trial court also twice instructed jurors to determine the "truth

of the evidence presented" and to "determine that evidence which convinces you of its truth." R. 325, ll.13-15; R. 326 13-18.

The improper instruction in Petitioner's case raises serious concerns that the jury based its verdict by trying to determine which version of events is more likely true, the government's or Petitioner's. This is a preponderance of evidence standard, "***such an instruction would be error if used in the explanation of the concept of proof beyond a reasonable doubt.***" *Daniels*, 401 S.C. at 259, 737 S.E.2d at 477 (*citing United States v. Gonzales-Balderas*, 11 F.3d 1218 (5th Cir. 1994)) (internal citations omitted) (*emphasis added*).

In contrast, the trial courts in *Daniels* and *Aleksey* gave correct reasonable doubt charges, thus their charges, as a whole, properly conveyed the law to the jury. *Id.*; *Aleksey*, 343 S.C. at 29, 538 S.E.2d at 252–53 (reversal not required when improper instructions were given in the context of witness credibility and not reasonable doubt). In Petitioner's case, the trial court's reasonable doubt charge was improper and resulted in unconstitutional burden shifting.

Petitioner was prejudiced because the court's reasonable doubt charge instructed the jurors' to determine whether it was more likely than not that Petitioner was guilty, instead of requiring jurors to weigh whether the State had proven Petitioner's guilt beyond a reasonable doubt. Jurors are presumed to follow the law as instructed to them. *State v. Ard*, 332 S.C. 370, 505 S.E.2d 328 (1998). It is very likely that the jurors substituted the trial court's repeated admonition to determine the truth in this case for the State's constitutional duty to prove Petitioner's guilt beyond a reasonable doubt. *Accord Daniels*, 401 S.C. 251, 737 S.E.2d 737; *Needs*, 333 S.C. 134, 508 S.E.2d 857; *Aleksey*, 343 S.C. 20, 538 S.E.2d 248; *Cf: Todd v. State*, 355 S.C. 396, 585 S.E.2d 305 (2003) (no reasonable likelihood that the jurors applied the judge's instruction in a way that violated Due Process Clause).

Contrary to the Court of Appeals' contention, the State's reasonable doubt instruction could not have been harmless. *Pradubsri*, 803 S.E.2d at 730. Repeating the words "beyond a reasonable doubt" some twenty times does not cure the underlying problem, which is that the trial court provided the wrong definition of what "beyond a reasonable doubt" actually meant. Simply reiterating that jurors must find Petitioner guilty "beyond a reasonable doubt" could not correct the erroneous definition of what constituted "beyond a reasonable doubt." If anything, repeating the burden of proof reinforced the erroneous burden-reducing definition to jurors. Michael D. Cicchini & Lawrence T. White, *Truth or Doubt? An Empirical Test of Criminal Jury Instructions*, 50 U. Rich. L. Rev. 1139 (2016).

The State did not present overwhelming evidence of Petitioner's guilt to the jury, and the trial court's erroneous instructions clearly contributed to the guilty verdict. *See Lowry v. State*, 376 S.C. 499, 509, 657 S.E.2d 760, 765 (2008) (for harmless error to apply, any errors must be "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record."). Petitioner had previously received a mistrial and had an earlier conviction reversed. The jurors deliberated at length over the verdict and asked several questions regarding constructive possession and Petitioner's initial charges. R. 340, ll. 24 - 347, ll. 16. Petitioner's case was a battle of two narratives with the State having the burden of proving their version of events by beyond a reasonable doubt, not a preponderance of the evidence.

Thus, the Court of Appeals erred when concluding that the trial court's erroneous definition of proof beyond a reasonable doubt as "doubt which makes an honest, sincere, conscientious juror in search of the truth to hesitate to act" did not prejudice Petitioner. *See Needs*, 333 S.C. 20, 538 S.E.2d 248; *see also Aleksey*, 343 S.C. 20, 538 S.E.2d 248.

IV.

The Court of Appeals erred in affirming Petitioner's convictions where the trial court erroneously ruled that former co-defendant Melissa Martin's testimony regarding Petitioner's alleged manufacture of crack cocaine at his residence and her testimony regarding a drug sale she purportedly undertook at Petitioner's instruction that occurred prior to the traffic stop, constituted evidence of an element of trafficking and were not prior bad acts subject to scrutiny under Rule 404, SCRE.

Introduction

Over Petitioner's objection, Martin testified that immediately before police initiated the traffic stop, she had sold crack cocaine to two women in the Irmo Kroger's bathroom. R. 232, ll. 1 - 234, ll. 22. Martin claimed that Petitioner waited outside during the sale and that she conducted the sale at Petitioner's instigation. *Id.* Martin alleged that one woman paid with a gift card, the other with cash. R. 248, ll. 8 - 249, ll. 24. No gift card was reported by police, the two women were never located, and no video footage was ever retrieved from the Kroger.

In addition to testifying about the alleged sale, Martin also claimed that Petitioner manufactured crack cocaine in their shared residence. R. 227, ll. 9 - 231, ll. 22. The trial court ruled that her testimony on both the sale and the method of manufacturing did not constitute prior bad act evidence, but that her testimony was evidence tending to prove the "all encompassing" nature of trafficking.

Accordingly, the trial court declined to conduct a Rule 404(b) analysis. R. 222, ll. 4 - 223, ll. 1. The Court of Appeals summarily affirmed the trial court's determination that Martin's prior drug constituted proof of an element of Petitioner's trafficking charge. *Pradubsri*, 803 S.E.2d at 730.

Discussion

Under Rule 404(b), SCRE, evidence of other crimes, wrongs, or acts are generally not admissible to prove the defendant's guilt for the crime charged. *State v. Fletcher*, 379 S.C. 17, 23,

664 S.E.2d 480, 483 (2008). However, such evidence is admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. *State v. Pagan,* 369 S.C. 201, 631 S.E.2d 262 (2006); *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).

To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing. *Id.*; *State v. Beck*, 342 S.C. 129, 135–36, 536 S.E.2d 679, 682–83 (2000).

Even if otherwise admissible, prior bad act evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Rule 404(b), SCRE; *State v. Gillian*, 373 S.C. 601, 646 S.E.2d 872 (2007) (trial court must gauge logical relevancy of the prior bad act, whether it reasonably tends to prove a material fact in issue, to the particular purpose for which it is sought to be introduced).

Here, the trial court erred in ruling that Martin's testimony was being offered to prove that Petitioner was guilty of trafficking. R. 222, ll. 4 - 223, ll. 1. Trafficking is defined as:

> Any person who knowingly sells, manufactures, cultivates, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, cultivate, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession . . . . is guilty of a felony which is known as "trafficking in cocaine"

S.C. Code Ann. § 44-53-370(e) & (e)(2). In short, trafficking "includes practically any activity related to being involved with drugs above ***a certain weight***." Willaim S. McAninch, W. Gaston Fairey & Lesley M. Coggiola, *The Criminal Law of South Carolina* 448 - 449 (5th ed. 2007) (*emphasis added*).

Petitioner's indictment accused him of trafficking by "actual of constructive possession" or attempted actual or constructive possession of 68.88 grams of crack cocaine. Petitioner was not charged with conspiracy to traffic in some larger, undetermined amount of crack cocaine. R. 387. Therefore, the prior manufacture and sales of crack cocaine could not have constituted proof of an element of Petitioner's trafficking charge. *State v. Amerson*, 311 S.C. 316, 428 S.E.2d 871 (1993).

Had the trial court properly assessed the evidence of prior drug sales and manufacture under Rule 404(b), SCRE, it would have been clear that the State could not prove these prior bad acts by a preponderance of the evidence and that the danger of unfair prejudice substantially outweighed any marginal relevance.

For both purported bad acts, the State was totally reliant on Martin's unreliable, biased testimony. *Cf: State v. Cheeseboro*, 346 S.C. 526, 552 S.E.2d 300 (2001) (testimony defendant previously murdered cab driver was admissible, there was evidence appellant owned murder weapon at time of cab driver's death and cab driver gave description generally matching appellant).

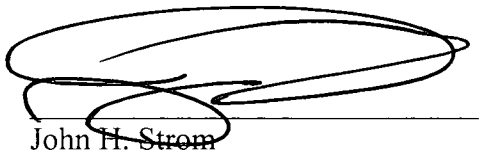
The State could not produce any surveillance footage from the Kroger, nor the gift card that Martin claimed she accepted as a payment for the crack cocaine. With respect to her claims that Petitioner manufactured crack cocaine in their residence, Sgt. Birch testified that his observation of the house did not reveal any suspicious activity. R. 62, ll. 22 - 64, ll. 24; *State v. Humphries*, 345 S.C. 87, 579 S.E.2d 613 (2003)(testimony by former employee that defendant had marijuana delivered to employee's residence two days following defendant's arrest was improper).

Accordingly, the Court of Appeals erred in affirming the trial court's determination that Martin's testimony regarding Petitioner's alleged manufacture of crack cocaine at his residence and an alleged prior drug sale constituted evidence of an element of trafficking and were not prior bad acts subject to Rule 404(b), SCRE.

CONCLUSION

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

Respectfully Submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of October, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County
Honorable Clifton Newman, Circuit Court Judge

Opinion No. 5499 (S.C. Ct. App. filed 7/19/2017)
2009-GS-32-0202, 0204, 0205

THE STATE,

RESPONDENT,

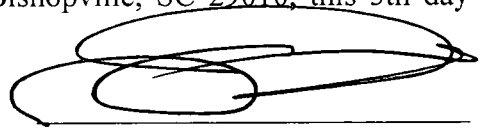
V.

JO PRADUBSRI,

PETITIONER

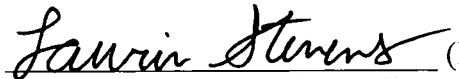
CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on William M. Blitch, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Jo Pradubsri, #181097, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 5th day of October, 2017.



John H. Strom
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 5th day of October, 2017.


(L.S)
Notary Public for South Carolina
My Commission Expires: