THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Cynthia Graham Howe, Master in Equity

Case No. 2017-002365

Jimmy A. Richardson, II, Solicitor for the Fifteenth Judicial Circuit, on behalf of the 15th Circuit Drug Enforcement Unit,

Respondent,

v.

Twenty-One Thousand and no/100 Dollars ($21,000) U.S. Currency and Various Jewelry, Defendant Property, and Marvin White,

Appellant.

INITIAL BRIEF OF APPELLANT

Ralph J. Wilson, Jr.
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Attorney for Appellant

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STATEMENT OF THE CASE

On May 19, 2015 Respondent filed an action in State court for seizure of Appellant's property pursuant to S.C. Code Section 44-53-520. Appellant was served at the Horry County Detention Center on or about May 21, 2015 and an Affidavit of Service was filed June 3, 2015. Appellant filed an Answer on June 18, 2015 demanding a jury trial. On June 23, 2015 Respondent served discovery requests upon the Appellant which were answered July 29, 2015. Appellant served discovery requests upon Respondent via U.S. mail on August 3, 2015. Respondent failed to answer the requests stating they never received the request.

This matter appeared on the Common Pleas trial roster for the term of court beginning June 20, 2016 but was continued upon Respondent's request filed June 3, 2016. On September 19, 2016, the Honorable Benjamin H. Culbertson filed a consent order referring this matter to this Court pursuant to Rules 53 and 71, SCRCP. A hearing on the merits of this case was scheduled for date-certain on October 12, 2016. A continuance was requested and granted and the hearing was rescheduled for December 6, 2016 at 1:00 pm

before the Honorable Master in Equity Cynthia Graham Howe. Appellant contacted counsel and informed he desired Attorney Thurmond Booker be substituted for as counsel for Appellant in this matter. A motion to continue was filed December 5, 2016 pursuant to Appellant and Attorney Booker's request. A proposed consent order was signed by Attorney Wilson and Attorney Booker then submitted to the Court, however upon the Court's receipt Attorney Booker was contacted by the Court and informed a continuance would not be granted. Attorney Booker then withdrew his consent for substitution of counsel. A hearing on the merits of this case was held on December 6, 2016 before The Honorable Master in Equity, Cynthia Graham Howe. Prior to the factual presentation, Appellant's counsel made a motion for Judge Howe to recuse herself, a motion for a continuance based on Appellant's request for new counsel, and a motion to exclude Respondent's evidence based on a discovery dispute. After considering their merits, the Court denied Appellant's motions. After hearing from the parties the Court took the matter under consideration. On September 14, 2017, the Court contacted counsel of record with the Court's ruling via email. The Order of Forfeiture was filed October 10, 2017. The Notice of Appeal was postmarked November 9, 2017.

FACTS OF THE CASE

On or about July 13, 2013 Appellant was arrested following a traffic stop regarding Warrant 2013A2620400451 and Warrant 2013A2620400452. On September 3, 2013 three search warrants were executed on three electronic devices in the possession of Shelton Brantley. Pictures and/or video was extracted from these devices. These arrest warrants were both *nolle prossed* not indicted in the Horry County General Sessions Court on and

about April 24, 2015. On or about February 18, 2015 Appellant was arrested and charged with several drug charges in the Horry County General Sessions Court, specifically Warrant 2015A2610700172, Warrant 2015A2610700173, Warrant 2015A2610700175, Warrant 2015A2610700176, Warrant 2015A2610700177, Warrant 2015A2610700178, Warrant 2015A2610700179, Warrant 2015A2610700180, Warrant 015A2610700181, Warrant 2015A2610700182, Warrant 2015A2610700183, Warrant 2015A2610700184, Warrant 2015A2610700185, Warrant 2015A2610900051, Warrant 2015A2610900052, and Warrant 2015A2610900061. On February 18, 2015, a search warrant was executed on a residence alleged to be the Appellant's. A search warrant was executed on April 28, 2015 on safe deposit box number 317 at Wells Fargo and the items contained were seized. The items seized, $21,000 U.S. cash; three gold color rings; one silver color ring; one gold colored necklace; one gold colored bracelet; one gold colored cross; one silver pair of earrings; and one gold colored heart shape necklace charm. Appellant's warrants were all dismissed and not indicted in state court on or about November 18, 2015.

ARGUMENTS

I. THE COURT ERRED IN ALLOWING EVIDENCE NOT DISCLOSED IN DISCOVERY

The Court found in Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213 (S.C. App., 1997) that when deciding the severity of sanctions "for failure to disclose evidence during the discovery process, the trial court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice."

"Although the trial judge in this case correctly framed the issue as discovery abuse, he did not weigh the required factors. A failure to exercise discretion amounts to an abuse

of that discretion." Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) "When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred."; Balloon Plantation v. Head Balloons, 303 S.C. 152, 155, 399 S.E.2d 439, 441 (Ct.App.1990) (quoting State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) "It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly.". See also Lollis v. Dutton (S.C. App., 2017), Patton v. Miller (S.C., 2017), Arrow Bonding Co. v. Warren, 399 S.C. 603, 732 S.E.2d 622 (S.C., 2012), Davis v. Parkview Apartments, 409 S.C. 266, 762 S.E.2d 535 (S.C., 2014) (stating when deciding the severity of sanctions "for failure to disclose evidence during the discovery process, the trial court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice"), Teseniar v. Prof'l Plastering & Stucco, Inc., 407 S.C. 83, 754 S.E.2d 267 (S.C. App., 2014), Cfre Llc v. Greenville County Assessor, 395 S.C. 67, 716 S.E.2d 877 (S.C., 2011), McNair v. Fairfield County, 379 S.C. 462, 467, 665 S.E.2d 830, 832 (Ct.App.2008), Historic Charleston Holdings v. Mallon, 673 S.E.2d 448, 381 S.C. 417 (S.C., 2009), and Jamison v. Ford Motor Co., 644 S.E.2d 755, 373 S.C. 248 (S.C. App., 2007).

The entire thrust of the discovery rules involves full and fair disclosure, "to prevent a trial from becoming a guessing game or one of surprise for either party." State Highway Dep't v. Booker, 260 S.C. 245, 252, 195 S.E.2d 615, 619 (1973) (quoting Hodge v. Myers, 255 S.C. 542, 545, 180 S.E.2d 203, 205 (1971)). Essentially, the rights of discovery provided by the rules give the trial lawyer the means to prepare for trial, and when these rights are not accorded, prejudice must be presumed. Downey v. Dixon, 294 S.C. 42, 46,

362 S.E.2d 317, 319 (Ct.App.1987). Unless the party who has failed to submit to discovery can show lack of prejudice, reversal is required. Id. at 46, 362 S.E.2d at 319.

Even though the imposition of sanctions is usually left to the sound discretion of the trial judge, whatever sanction the judge imposes "should serve to protect the rights of discovery provided by the Rules." Downey v. Dixon, 294 S.C. 42, 362 S.E.2d 317 (Ct.App.1987). Overly lenient sanctions are to be avoided where they result in inadequate protection of discovery. Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1126 (5th Cir.1970), cert. denied sub nom., Trefina v. U.S., 400 U.S. 878, 91 S.Ct. 118, 27 L.Ed.2d 115 (1970). See also Holly Woods Ass'n of Residence Owners v. Hiller, 392 S.C. 172, 708 S.E.2d 787 (S.C. App., 2011) ("Essentially, the rights of discovery provided by the rules give the trial lawyer the means to prepare for trial, and when these rights are not accorded, prejudice must be presumed."), Conway v. Charleston Lincoln Mercury Inc., 363 S.C. 301, 609 S.E.2d 838 (S.C. App., 2005) Where these rights are not accorded, prejudice is presumed and unless the party that failed to comply establishes a lack of prejudice, reversal is required), CEL PRODUCTS, LLC v. Rozelle, 357 S.C. 125, 591 S.E.2d 643 (S.C. App., 2004), Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (S.C. App., 2003), Fields v. Regional Med. Center Orangeburg, 354 S.C. 445, 581 S.E.2d 489 (S.C. App., 2003), Scott v. Greenville Housing Authority, 353 S.C. 639, 579 S.E.2d 151 (S.C. App., 2003)

Precedent reveals a more meaningful sanction was required in this case. In Bramlette v. Charter Medical-Columbia, 302 S.C. 68, 393 S.E.2d 914 (1990) the court stated that it is error to exclude witness's testimony where witness called to rebut ***unanticipated*** trial testimony, which was not revealed to other side despite specific

inquiries during discovery. The Court found in Brandi v. Brandi, 302 S.C. 353, 396 S.E.2d 124 (Ct.App.1990) that it does not appear counsel willfully violated the rule by failing to supplement interrogatories when record supports witness was discovered the night before trial but in this instant case, the discovery materials were known to the Respondent's counsel all along and not disclosed. The court stated in Reed v. Clark, 277 S.C. 310, [329 S.C. 113] 286 S.E.2d 384 (1982) that there was no abuse of discretion by trial judge disallowing unexpected expert witness where no reason given why witness was not obtained until after trial had begun.

A continuance was requested, although on separate grounds, and it was denied. Also there is not authority mandating Appellant request a continuance only authority stating that in the context of a motion to compel where the Court granted summary judgment before discovery was completed, authority states *in that situation*, you must move for a continuance.

The Appellant answered discovery responses for the Respondent timely. The Appellant timely requested discovery responses from the Respondent by and through serving interrogatories and requests for production and received no response. On or about December 1, 2016, counsel for the Respondent sent an email enclosing three documents – a guilty plea, an indictment and a plea agreement – stating counsel may use this material at trial. The Appellant requested the Respondent not be able to admit to evidence any documents, testimony, or other materials during the hearing as nothing was disclosed, the Court denied the Appellant's motion and allowed the Respondent to proceed and enter testimony and evidence not previously disclosed. Counsel for the respondent did state during the hearing that they had not responded to discovery requests because they had not

received the requests. Appellant was unable to depose witnesses, unable to review evidence and retain experts to refute any evidence.

II. THE COURT ERRED IN RELYING UPON EVIDENCE OBTAINED THROUGH AN IMPROPER SEARCH WARRANT

The search warrant affidavit used as the basis for the later search warrants was insufficient and therefore all evidence obtained should be excluded. A magistrate may issue a search warrant only upon a finding of probable cause. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). "This determination requires the magistrate to make a practical, common-sense decision of whether, given the totality of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying the information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." State v. King, 349 S.C. 142, 150, 561 S.E.2d 640, 644 (Ct. App. 2002). "The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause. The magistrate should determine probable cause based on all of the information available to the magistrate at the time the warrant was issued." State v. Dupree, 354 S.C. 676, 684, 583 S.E.2d 437, 441 (Ct. App. 2003) (citations omitted).

In South Carolina, the General Assembly has imposed stricter requirements than federal law for issuing a search warrant. Both the Fourth Amendment of the United States Constitution and Article I, § 10 of the South Carolina Constitution require an oath or affirmation before an officer of the court can find probable cause and issue a search warrant. U.S. Const. amend. IV; S.C. Const. art. I, § 10. Additionally, the South Carolina Code mandates that a search warrant "shall be issued only upon affidavit sworn to before

the magistrate, municipal judicial officer, or judge of a court of record..." S.C. Code Ann. § 17-13-140 (1985).

The search warrant in this case was not valid and should be suppressed because it does not set forth sufficient information upon which a magistrate could make a probable cause determination and in one instance was not signed by the affiant and the issuing magistrate and/or the affiant were not present to offer testimony as to the information contained in the search warrant request. Further, the affidavit presented to the court was not signed and the affiant not called to testify to the Court.

The evidence obtained pursuant to the search warrant should be suppressed because it does not set forth information as to the reliability of the informant, the source of the facts that are alleged, or why the police believe the suspect is the person who committed the crime.

In State v. Johnson, 302 S.C. at 247, 395 S.E.2d at 169 (1990), our supreme court found an affidavit defective because "it [did] not set forth any information as to the reliability of the informant nor was the information corroborated."

> Although the affidavit states that the informant saw the evidence in Johnson's home within 72 hours of the issuance of the warrant, it does not set forth any information as to the reliability of the informant nor was the information corroborated. The officer who had obtained the warrant testified during *248 the suppression hearing that he had worked with the informant on several other cases. It is not clear from the record, however, whether this information was given to the magistrate.
>
> Without any information concerning the reliability of the informant, "`the inferences from the facts which lead to the complaint' will be drawn not `by a neutral and detached magistrate,' as the Constitution requires, but instead, by a police officer `engaged in the often competitive enterprise of ferreting out crime,' or, as in this case, by an unidentified information." (Citations omitted.) *Aguilar v. Texas*, 378 U.S. 108, 115, 84 S. Ct. 1509, 1514, 12 L.Ed. (2d) 723 (1964). Applying the totality of the circumstances test, it is the opinion of this Court that the affidavit

by itself did not provide the magistrate with sufficient information concerning the informant's reliability upon which he could base a probable cause determination.

In State v. Jenkins, 398 S.C. 215, 727 S.E.2d 761 (S.C. App., 2012), our supreme court found an affidavit defective because:

> 1) The affidavit did not set forth facts as to why the police believed the suspect was the person who committed the crime;
>
> 2) The affidavit did not set forth the source of the facts alleged in it. "Mere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient." Smith, 301 S.C. at 373, 392 S.E.2d at 183; and
>
> 3) The affidavit did not contain even a conclusory assertion that the information or its source is reliable. See Gates, 462 U.S. at 238 (stating the circumstances a magistrate must consider include the "veracity" of the persons supplying the information on which the warrant is based).

In State v. Smith, 301 S.C. 371, 392 S.E.2d 182 (1990), our supreme court found an affidavit defective because it did not state why police believed the defendant committed the crime.

> An affidavit must contain sufficient underlying facts and information upon which a magistrate may make a determination of probable cause. *State v. Viard*, 276 S.C. 147, 276 S.E. (2d) 531 (1981). Mere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient. "[H]is action cannot be a mere ratification of the bare conclusions of others."

Illinois v. Gates, 462 U.S. 213, 239, 103 S. Ct. 2317, 2333, 76 L.Ed. (2d) 527, 549 (1983).

> Here, the affidavit sets forth no facts as to *why* police believed Smith robbed the Master Host Inn. Although the record reveals that police relied upon information from an informant, there is no indication that this fact was made known to the magistrate, or that the magistrate made any determination of the informant's reliability.

In State v. Weston, 329 S.C. 287, 494 S.E. 2d 801 (1997), our supreme court found an affidavit defective because it did not state why police believed defendant committed the crime and because there was no finding as to the credibility of the informant.

> In this case, the affidavit failed to set forth any facts as to why police believed Weston committed the Crumlin crime. The first three sentences of the affidavit were mere conclusory statements. While the fourth sentence provided information *292 linking Weston to his car at the time of the incident, it offered nothing to link Weston or the Datsun to the Crumlin crime itself. Additionally, there was absolutely nothing on the face of the affidavit from which the ministerial recorder could have assessed the veracity and basis of knowledge of the informant. Therefore, based on the totality of the circumstances, we find the affidavit could not have provided the ministerial recorder with a substantial basis for finding probable cause to search Weston's car.

III. THE COURT ERRED IN FINDING PROBABLE CAUSE FOR THE SEIZURE BY RELYING UPON UNCORROBORATED TESTIMONY TO ESTABLISH A NEXUS BETWEEN ALLEGED DRUG ACTIVITY AND THE APPELLANT

Pursuant to S.C. Code Section 44-53-520(a), the following may be seized and forfeited to the State:

> (4) All property, both real and personal, which in any manner is knowingly used to facilitate production, manufacturing, distribution, sale, importation, exportation, or trafficking in various controlled substances as defined in this article;...
>
> (7) all property including, but not limited to, monies, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance, and all proceeds including, but not limited to, monies, and real and personal property traceable to any exchange.

A forfeiture hearing is to confirm the state had probable cause to seize the property forfeited. Medlock v. One 1995 Jeep Cherokee VIN 1JCWB7828FT129001, 322 S.C. 127, 131, 470 S.E.2d 373, 376 (1996). Section 44-53-520(a) enumerates eight instances when property is subject to forfeiture. S.C.Code Ann. § 44-53-520(a)(1)-(8) (2002 & Supp.2007).

The State has the initial burden of demonstrating probable cause for the belief that a substantial connection exists between the property to be forfeited and the criminal activity defined by statute. United States v. Thomas, 913 F.2d 1111, 1114 (4th Cir.1990) In Pope v. Gordon the Court rejected the "totality of the circumstances" approach to finding probable cause in seizure actions stating that approach would lessen the burden on the State and is in direct contravention to the word traceable in the language of the statute. Pope v. Gordon, 369 S.C. 469, at 474 (2006).

In *Gowdy* the Court stated "[it is] not prepared to say that, as a matter of law, money is forfeitable simply because it is found on the same property as contraband, or because it

is found on property that is controlled by the criminal defendant." Gowdy v. Gibson, 391 S.C. 374 (2011) at 381. Further the Court stated "the Court ... may not do, and what the State urged this Court to do in Gordon, is draw inferences based on evidence that is unrelated to the property being seized. Gowdy at 383.

If probable cause is shown, the burden then shifts to the owner to prove that he or she was not a consenting party to, or privy to, or did not have knowledge of, the use of the property which made it subject to seizure and forfeiture. Medlock, 322 S.C. at 131.

The Court relied solely upon testimony from Agent Suggs and his past dealings with the Appellant to find that White engaged in the sale of illegal narcotics including a previous arrest where the charge was later dismissed; an unsubstantiated theory that guns found in a storage unit were traded for illegal narcotics; a confidential informant sale from which the informant was not named, not brought to court to testify, and not shown audio or video footage of the sale); and items found from a search warrant for which the affidavit was not signed and the affiant failed to testify that was executed at a residence not owned by Appellant and which no evidence was provided was in the custody or control of Appellant. There was no evidence presented that the property was linked to the Appellant's 2013 arrest for possession with intent to distribute crack cocaine. There was no evidence presented that the property was somehow linked to the 22 firearms recovered from Appellant's storage unit. There was no evidence that the funds were marked funds used in a confidential informant purchase. There was no evidence that the items found at the residence were in Appellant's possession or control only that 209 grams of cocaine and 39 grams of crack cocaine were found (with an improper search warrant) at a residence Police believed to be tied to Appellant. While in *Gordon*, the Court did not construe traceability

so narrow as to require bills be marked or serial numbers be recorded. Neither did this Court require the State prove to an absolute certainty that the money in the bank account was a product of illegal drug transactions.". an instead, in *Gowdy* allowed the court to "make a practical, common-sense decision whether, given all the circumstances set forth...there is a fair probability that the properties to be forfeited are proceeds of illegal drug transactions." *Id.* There was essentially no evidence provided that the items found inside the safety deposit box were linked to illegal activity and therefore probable cause could not have been found. If probable cause is not found, the burden does not shift to the Appellant and therefore no evidence is needed to substantiate that the funds were obtained legally.

CONCLUSION

For the reasons stated herein, this Court should reverse the judgment of the circuit court and dismiss the forfeiture action or in the alternative remand for a new trial on the merits of this matter.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Cynthia Graham Howe, Master in Equity

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v.

Twenty-One Thousand and no/100 Dollars ($21,000) U.S. Currency and Various Jewelry, Defendant Property, and Marvin White,

Appellant.

PROOF OF SERVICE

I certify that I have served the Appellant's Initial Brief and Designation of Matters to be Included in the Record on Appeal on the Respondent by depositing a copy of it in the United States Mail, postage prepaid, on February 8, 2017, addressed to his attorney of record, James Richard Battle, II, Esquire of Battle Law Firm, LLC, at PO Box 530, in Conway, SC 29528-0530.

February 8, 2017

Ralph J. Wilson, Jr.
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THE LAW OFFICE OF
RALPH WILSON, JR.

Ralph Wilson Jr., Esq.
Managing Attorney/CEO

February 8, 2018

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Jimmy A. Richardson, II, v. Twenty-One Thousand (Marvin White)
Appellate Case No. 2017-002365

Dear Honorable Clerk:

Enclosed please find Appellant's Initial Brief and Designation of Matters for Record of Appeal in the above-referenced matter.

With kind regards, I remain

Sincerely, yours,

Ralph Wilson Jr.
Law Office of Ralph Wilson Jr.
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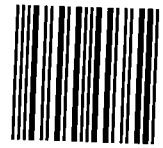

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THE LAW OFFICE OF
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SC Court of Appeals

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