ORIGINAL

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY

Court of General Sessions

The Honorable John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2016-002538

THE STATE,

Respondent,

v.

DENNIS DEMARIO OBRIAN KENNEDY,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Appellant was indicted during the May 2016 term of the Grand Jury for York County for trafficking in cocaine (2016-GS-46-01367), possession with intent to distribute crack cocaine (2016-GS-46-01369), and possession of a weapon during the commission of a violent crime (2016-GS-46-01370). Appellant proceeded to a jury trial from December 13-14, 2016, in York, South Carolina. At the conclusion of trial, Appellant was found guilty as indicted. He was sentenced by the Honorable John C. Hayes, III, to imprisonment for a term of ten years for trafficking in cocaine, fifteen years for possession with intent to distribute crack cocaine, and five years for possession of a weapon during the commission of a crime, with all sentences to be served concurrently. Appellant timely filed a notice of appeal and subsequently submitted a brief. This Brief of Respondent follows.

STATEMENT OF FACTS

Background Facts

On the afternoon of January 7, 2016, Investigator Heath Clevenger of the York County Drug Enforcement Unit executed a search warrant at a residence in Rock Hill. R. p. 108. After the SWAT team secured the residence, Investigator Clevenger encountered Appellant in the living room area standing in front of a love seat. R. p. 109. Appellant was the only individual inside the home. R. p. 110. Investigator Clevenger conducted a protective sweep of the sofa to ensure there were not any weapons within reach. R. p. 109. When he picked up one of the cushions, Investigator Clevenger located a loaded Smith and Wesson handgun. R. pp. 109-10. Investigator Clevenger also located a holster and magazine inside a tote bag at the end of the love seat. R. p. 111. After the pistol was found, Appellant was placed under arrest. R. p. 116. Appellant was subsequently searched incident to arrest and investigators found sixteen grams of powder cocaine and ten grams of crack cocaine on his person. R. p. 116. Investigator Clevenger testified the drugs were found in several bags inside Appellant's jacket pocket. R. p. 117. Appellant also had scales that were caked in a powder residue and three hundred and nighty-four dollars in cash. R. p. 118. Appellant acknowledged that a set of keys found in the home's door were his. R. p. 124.

Detective David Vaughn of the York County Sheriff's Department was previously employed as an investigator in the York County Drug Enforcement Unit. R. p. 154. Detective Vaughn was present when the search warrant was executed at Appellant's residence. R. p. 158. Detective Vaughn described the amount of drugs found on Appellant's person as a "dealer level" amount. R. pp. 157-58. When Appellant was brought to the Rock Hill Police Department, Detective Vaughn sat with him while the other officers completed administrative paperwork. R.

p. 159. Appellant ultimately gave Detective Vaughn a statement. R. pp. 160-62. Appellant told Detective Vaughn he had, "between ten to twelve grams of soft and ten to twelve grams of hard" on his person at the time of his arrest.[1] R. p. 162. Appellant stated the gun was given to him by a friend. R. p. 162. When pressed by Detective Vaughn, Appellant refused to divulge the identity of the friend who provided him with the pistol. R. p. 162. Appellant claimed he was not a drug user himself and that he only sold drugs to support his family because he could not get a job. R. p. 162.

Underlying Search Warrant and Affidavit

The search warrant in Appellant's case was signed by York County Magistrate Judge Mandrile Young on January 1, 2016. The warrant described the property sought as, "cocaine, cocaine paraphernalia, currency, records, receipts, and any other items relating to the storing, packaging, shipping, receiving, distribution, manufacturing cocaine and possession of cocaine, firearms, including computer drives, disk, cell phones, cell phone data to include, text messages, e-mails, and any other information contained within the cellular phone." R. p. 289. The accompanying affidavit included an identical description of the property sought. Under the section entitled, "Reason for Affiant's belief that the property sought is on the subject premises, the affidavit states:

> The affiant, D.H. Clevenger, who is a certified law enforcement officer assigned to the York County Multijurisdictional Drug Unit (YCMDEU) and has several years experience to include narcotics investigations, states the following facts to support probable cause to search [Appellant's address]. The affiant received information from a confidential informant (CI) that [Appellant] is selling cocaine at the residence. Within the past 72 hours, the affiant utilizing the same CI was able to make a controlled cocaine purchase from [Appellant] while at the residence of [Appellant's residence]. The CI was given government currency and fitted with a body wire. The CI and the CI's vehicle were searched with no contraband being found. Surveillance officers followed the CI to and from the residence and did recover the cocaine after the purchase. The officer did monitor

[1] "Soft" is a slang term for cocaine, while "hard" is slang for crack. R. p. 162.

> the transaction via the body wires. The CI identified [Appellant] by name and a SCDMV photo. The CI communicated with [Appellant] via cell phones. Based on the affiant's training and experience in narcotics investigations, it is common practice for drug dealers to use and store information on cell phones such as text messages (sent and received), e-mails (sent and received) and all incoming and outgoing calls. The CI provided information that [Appellant] regularly carries a firearm. A firearm is visible in a video of the purchase. [Appellant's] criminal history has convictions for violence against police. For these reason, the affiant is requesting a no knock warrant.

R. p. 289.

Appellant's Motion to Compel and Motion to Reconsider

During a pretrial hearing on November 3, 2016, Appellant made a motion to compel discovery. Pretrial Hearing R. p. 4. Specifically, Defense Counsel requested access to the video of the controlled buy in order to evaluate the search warrant that led to the search of Appellant's residence. Pretrial Hearing R. p. 5. The trial judge subsequently denied Appellant's motion in an Order dated November 8, 2018. R. p. 303-04. Specifically, in his Order, the trial judge found:

> There is no evidence of any irregularities in the procuring of the search warrant. The search warrant was issued by a detached, neutral judicial officer based on that judicial officer's assessment that probable cause existed for the issuance of same. There has been no showing of any inaccuracies in the Affidavit upon which the judicial officer relied in determining that probable cause for the issuance of the Warrant existed. There has been no showing that the Affidavit is "false" in any regard.

R. p.303-04. The trial judge went on to note, "If the Court were to accept [Appellant's] position, the Court would be allowing [Appellant] what is often termed a "fishing expedition." This, the Court cannot and will not allow." R. p. 303-04.

Appellant subsequently made a Motion to Reconsider and the trial judge conducted a hearing on the matter. R. pp. 27-67. During the hearing, York County Magistrate Judge Mandrile Young testified he did not have a personal recollection of the search warrant in Appellant's case but could attest to his usual procedure. R. p. 38. Judge Young testified he has never viewed a

video tape of an undercover buy when a search warrant was signed. R. p. 39. Judge Young testified the sworn testimony by the law enforcement officer in the affidavit would have provided a sufficient basis to move forward with a no-knock warrant. R. pp. 43-44.

Following argument by Counsel, the trial judge reviewed the video of the controlled buy *in camera*. R. p. 61. After viewing the video, the trial judge found:

> The motion is to reconsider my order and I'm not gonna reconsider it. I find that the order as earlier issued sums up and correctly disposes of the issue as to going behind the search warrant. As to the search warrant itself I find that it does contain sufficient indicia of reliability of the CI sufficient to support probable cause and the reliability of the informant based on the information about there being a controlled buy at the residence. That the CI vehicle was searched, no contraband found; surveillance officers followed the CI and recovered the cocaine, and that the officers followed the CI and recovered the cocaine, and that the officers monitored the transaction. Also - - Let me put on my glasses - - there also corroborating is the information that the defendant regularly carries a firearm. I'm not gonna put the - - I'm gonna put the video under seal but I have reviewed it and there is a firearm in the video and it's actually handled by someone. I can't tell who is actually handling it but it's present in this room in the home in which this transaction took place.
>
> I'm gonna set aside the no-knock – I take that back. I'm not gonna set aside the no-knock because there is correct information about [Appellant] regularly carries a firearm and there being in the video as indictaed by the affiant that a firearm was visible in the video of the purchase that is a correct statement of law so I'm not gonna suppress the search.
>
> And I'm not going to change my earlier order about requiring the State to divulge any other information about the search warrant. And I am going to keep the video and put it under seal for purposes of an appeal and make it Court's Exhibit Number Two.

R. pp. 61-63.

Defense Counsel then made a motion to suppress the evidence seized in the search of the home. R. p. 67. Specifically, Defense Counsel argued:

> From the defendant's personal search warrant only list their ability to search the house and not the defendant. My reading of the report is that they searched the defendant because he was found in proximity to a weapon. But the report indicates that they uncovered the weapon on a couch not in proximity to the defendant; that they were gonna place the defendant there, and therefore the

> search of the defendant exceeded the scope of the search warrant and was also backed based on a lack of probable cause.

R. pp. 67-68. After hearing testimony from Investigator Clevenger and argument by the solicitor and Defense Counsel, the trial judge denied the motion, holding:

> I find that he was in custody for safety reasons and that the protective - - that's not the - - maybe not the right word to use but that they had the - - the law enforcement had – it was within their providence to search the area within his immediate control for weapons and other possible evidence and that's sufficient to support the seizure of the pistol and the arrest.

R. p. 90.

ARGUMENT

The trial judge properly denied Appellant's motion to suppress where Investigator Clevenger's affidavit provided probable cause for issuance of the search warrant and where the search warrant affidavit was not submitted with intent to deceive or with reckless disregard for the truth. Further, the State was not required to provide the video of the controlled buy to Defense Counsel where Appellant did not face any charges stemming from the transaction with the confidential informant. Finally, even if the search warrant had been defective, the good-faith exception applied to preclude suppression of the fruits of the search.

Appellant contends the trial judge erred in denying his motion to suppress because of various perceived defects in the underlying affidavit. Specifically, Appellant avers the affidavit lacked probable cause, contained insufficient corroboration, and included false statements. Appellant also alleges the State's decision not to turn over the videotape of the controlled drug buy resulted in Rule 5 and Franks[2] violations. To the contrary, the affidavit in Appellant's case provided ample probable cause for the search warrant. Further, while no specific Franks argument was raised below, the affidavit was not submitted with intent to deceive or with reckless disregard for the truth. Also, the State was not obligated to put a confidential informant's identity in jeopardy by turning over the video of the transaction to Defense Counsel where Appellant didn't face any charges from his transaction with the confidential informant. Finally, even if the search warrant had been defective, the good-faith exception applied to preclude suppression of the fruits of the search.

Probable Cause

When reviewing a decision to issue a search warrant, the reviewing court should decide whether the magistrate had a substantial basis for concluding probable cause existed. State v. Dupree, 354 S.C. 676, 683, 583 S.E.2d 437, 441 (Ct. App. 2003). Applying the same standard as the magistrate, the court should base its determination on the totality of circumstances. State v.

[2] 438 U.S. 154 (1978).

Keith, 356 S.C. 219, 223, 588 S.E.2d 145, 147 (Ct. App. 2003). The magistrate's probable cause determination should be afforded great deference. State v. Rutledge, 373 S.C. 312, 316, 644 S.E.2d 789, 791 (Ct. App. 2007).

In order for a magistrate to issue a search warrant, an officer must present a sworn affidavit establishing the grounds for the warrant. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). A search warrant affidavit must contain sufficient underlying facts upon which a magistrate can base a probable cause determination. State v. Smith, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990). The facts contained in the affidavit must be so closely related to the time of the issuance of the warrant to justify a finding of probable cause at that time. State v. Winborne, 273 S.C. 62, 64, 254 S.E.2d 297, 298 (1979).

A search warrant may only be issued upon a finding of probable cause. Bellamy, 336 S.C. at 143, 519 S.E.2d at 348. In State v. Williams, 262 S.C. 186, 189, 203 S.E.2d 436, 437-438 (1974), the South Carolina Supreme Court explained probable cause as it relates to the issuance of a search warrant:

> In order to justify the issuance of a search warrant, probable cause must be shown, but the term 'probable cause' does not import absolute certainty. In determining whether there is sufficient evidence to sustain a finding of probable cause, each case stands on its own facts. The evidence need not be sufficient to support a conviction, or a verdict of guilty, or to establish guilt beyond a reasonable doubt; nor need the proof be positive, it being enough if it is such as to induce in the mind of the issuing officer an honest belief that the facts set forth exist, or as would lead a man of prudence to believe that the offense has been committed.

(citing State v. Bennett, 256 S.C. 234, 182 S.E.2d 291 (1971)).

In deciding whether to issue a search warrant, the magistrate must "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular

place." Illinois v. Gates, 462 U.S. 213, 238 (1983). In making a probable cause determination, "magistrates are concerned with probabilities and not certainties." State v. Sullivan, 267 S.C. 610, 617, 230 S.E.2d 621, 624 (1976); see Bennett, 256 S.C. at 240-241, 182 S.E.2d at 294. Consideration should be given to the fact search warrant affidavits are typically prepared by non-lawyers in the haste of criminal investigations, and they must be viewed in a common sense and realistic fashion. State v. Arnold, 319 S.C. 256, 260, 460 S.E.2d 403, 405 (Ct. App. 1995). Searches based on warrants will be given judicial deference such that an otherwise marginal search may be justified as long as it meets a realistic standard of probable cause. Bennett, 256 S.C. at 241, 182 S.E.2d at 294; U.S. v. Ventresca, 380 U.S. 102, 109 (1965).

In Appellant's case, the search warrant affidavit clearly provided probable cause for a search of the residence in question. Standing alone, the controlled buy that occurred within seventy-two hours of the swearing of the affidavit provided probable cause because it established the confidential informant conducted a drug transaction with Appellant at the address to be searched. Investigator Clevenger viewed the entire transaction via body wires and, as well as confirming the details of the drug transaction, observed a firearm in the video of the purchase. See State v. Dupree, 354 S.C. 676, 687, 583 S.E.2d 437, 443 (Ct. App. 2003) ("An informant's controlled buy of drugs can constitute probable cause sufficient for a magistrate to issue a warrant."); U.S. v. Anderson, 851 F.2d 727, 729 (4th Cir. 1988) ("[T]he nexus between the place to be searched and the items to be seized may be established by the nature of the item and the normal inferences of where one would likely keep such evidence."); State v. Scott, 303 S.C. 360, 363, 400 S.E.2d 784, 786 (Ct. App. 1991) (citation omitted) ("In the case of drug dealers, evidence is likely to be found where the dealers live."); U.S. v. Grossman, 400 F.3d 212, 218 (4th Cir. 2005) (it is reasonable to suspect that a drug dealer stores drugs in a home to which he has a

key). The affidavit stating officers observed a confidential informant conduct a drug transaction with Appellant at the place to be searched thus provided sufficient probable cause for the search.

Appellant's principal criticisms of the search are that the affidavit did not include information regarding the reliability of the confidential informant and that, without production of the videotape of the controlled buy, the veracity of the informant could not be corroborated. These arguments lack merit and overlook the content of the affidavit in Appellant's case. Information about the reliability of the confidential informant was wholly unnecessary where Investigator Clevenger, the affiant in this case, viewed the entire transaction himself via body wires. The instant case is thus distinguishable from State v. Martin, 347 S.C. 522, 556 S.E.2d 706 (Ct. App. 2001), State v. Adolphe, 314 S.C. 89, 441 S.E.2d 832 (Ct. App. 1994), and the other cases relied upon by Appellant. The cases cited by Appellant all deal with affidavits where the word of the confidential informant was the only thing relied upon when acquiring the search warrant, thus rendering a showing of reliability or some sort of corroboration necessary. However, in the instant case, the affidavit was not based on the mere assertion of a confidential informant, but by first-hand observation by a law enforcement officer. The confidential informant's reliability, therefore, was rendered wholly irrelevant.

While Appellant avers the videotape was necessary to corroborate the informant, this is simply not correct. No corroboration is necessary where law enforcement viewed the entire transaction via body wires. Nevertheless, there was corroboration in the current case. Investigator Clevenger corroborated the veracity of the confidential informant's claim he could buy drugs from Appellant by conducting a controlled buy using the same confidential informant, and monitoring the entirety of the buy via body wires. While Appellant urges this Court to find the affidavit uncorroborated because the magistrate and Defense Counsel did not view the

videotape, this overlooks the fact that a magistrate is not required to view a controlled buy in order to find a probable cause determination. Similarly, as will be discussed *infra*, the State was under no obligation to disclose the video of the controlled buy to Defense Counsel because Appellant did not face any charges stemming from his transaction with the confidential informant. During the hearing on Appellant's Motion to Reconsider, Judge Young testified he has **never** viewed a videotape of an undercover buy when a search warrant was signed. R. p. 39. Judge Young also noted the sworn testimony of the officer was sufficient to proceed with a no-knock warrant in this case. R. pp. 43-44. Finally, Judge Young correctly stated that, in his view, the informant was sufficiently corroborated because the confidential informant indicated he could buy drugs from Appellant, and within seventy-two hours, Investigator Clevenger watched on video as the confidential informant was able to do just that. R. p. 44. See Dupree, 354 S.C. at 691, 593 S.E.2d at 445 ("The controlled buy was evidence of the credibility and trustworthiness of the informant."). The affidavit therefore, was sufficient to provide probable cause for issuance of the search warrant.

Alleged Franks Violation

As a threshold matter, Appellant's conclusory Franks argument is not preserved for appellate review. The issue of whether a Franks violation occurred was never raised to nor ruled upon by the trial judge. Appellant's brief repeatedly refers to a "Franks hearing," however a Franks hearing was never conducted. Instead, Appellant only mentioned Franks in the context of wanting to review the videotape.[3] Appellant's failure to properly raise the issue of a Franks violation and discuss any alleged deliberate falsehoods or statements made with reckless

[3] Interestingly, the falsity Defense Counsel identified in the affidavit, that the affidavit claimed Appellant had a conviction for violence against law enforcement while his conviction was a non-violent resisting arrest conviction, had nothing to do with the videotape. Instead, it appears Appellant was simply raising the specter of a Franks violation in order to bolster his argument that he was entitled to review the videotape of the controlled buy. See R. pp. 46-47.

disregard for the truth in the affidavit. The issue of a Franks violation is thus not preserved for review by this Court. The appellate court will not consider any issues or arguments that were not presented to or passed upon by the trial court, and an appellant is limited on appeal solely to the grounds raised during trial. State v. Fleming, 254 S.C. 415, 421, 175 S.E.2d 624, 627 (1970); see State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."). See also State v. Garner, 389 S.C. 61, 67, 697 S.E.2d 615, 618 (Ct. App. 2010) (holding a conclusory, unsupported argument was abandoned on appeal).

Preservation concerns aside, there is no evidence the search warrant affidavit was submitted with an intent to deceive or a reckless disregard for the truth. In Franks v. Delaware, the United States Supreme Court held that a defendant had the right in certain circumstances to challenge the veracity of a warrant affidavit after the warrant had been issued and executed. State v. Missouri, 337 S.C. 548, 553, 524 S.E.2d 394, 396 (1999). Franks outlined a two-part test for challenging the warrant affidavit's veracity. See Franks v. Delaware, 438 U.S. 154, 155–56 (1978). First, to mandate an evidentiary hearing, there must be "allegations of deliberate falsehood or of reckless disregard for the truth [as to statements included in the warrant affidavit], and those allegations must be accompanied by an offer of proof." Id. at 171. At the hearing, the defendant has the burden of proving the allegations of perjury or reckless disregard for the truth by a preponderance of the evidence. Id. at 155–56; see State v. Jones, 342 S.C. 121, 126–27, 536 S.E.2d 675, 678 (2000). Second, if deliberate falsehood or reckless disregard for the truth has been established, the court must consider the affidavit's remaining content, with the affidavit's false material set to one side, to determine if it is sufficient to establish probable cause. Id. If the court determines probable cause does not exist after the false material is omitted from the analysis, "the search warrant must be voided and the fruits of the search excluded to the same

extent as if probable cause was lacking on the face of the affidavit." Franks, 438 U.S. at 155–56; see Missouri, 337 S.C. at 553–54, 524 S.E.2d at 396–97.

"[T]here is 'a presumption of validity with respect to the affidavit supporting the search warrant.'" State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 195, 525 S.E.2d 872, 882 (2000) (quoting Franks v. Delaware, 438 U.S. 154 (1978)). Therefore, a defendant's attack on a search warrant affidavit must be more than conclusory; there must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. State v. Missouri, 337 S.C. 548, 554, 524 S.E.2d 394, 397 (1999).

In Appellant's case, the "Reason for Affiant's Belief that the Property Sought is on the Premises" section of the search warrant affidavit states as follows:

> The affiant, D.H. Clevenger, who is a certified law enforcement officer assigned to the York County Multijurisdictional Drug Unit (YCMDEU) and has several years experience to include narcotics investigations, states the following facts to support probable cause to search [Appellant's address]. The affiant received information from a confidential informant (CI) that [Appellant] is selling cocaine at the residence. Within the past 72 hours, the affiant utilizing the same CI was able to make a controlled cocaine purchase from [Appellant] while at the residence of [Appellant's residence]. The CI was given government currency and fitted with a body wire. The CI and the CI's vehicle were searched with no contraband being found. Surveillance officers followed the CI to and from the residence and did recover the cocaine after the purchase. The officer did monitor the transaction via the body wires. The CI identified [Appellant] by name and a SCDMV photo. The CI communicated with [Appellant] via cell phones. Based on the affiant's training and experience in narcotics investigations, it is common practice for drug dealers to use and store information on cell phones such as text messages (sent and received), e-mails (sent and received) and all incoming and outgoing calls. The CI provided information that [Appellant] regularly carries a firearm. A firearm is visible in a video of the purchase. [Appellant's] criminal history has convictions for violence against police. For these reason, the affiant is requesting a no knock warrant.

R. p. 289.

The only portions of the affidavit Appellant alleges are false deal with the reasons the affiant requested a no-knock warrant and do not affect the underlying probable cause for the warrant itself. Appellant asserts that the misstatement in the affidavit regarding Appellant having prior convictions for violence against police officers constitutes a false statement that should invalidate the warrant.[4] Appellant also complains that the State never offered any proof of the statement in the affidavit that he regularly carried a gun. Br. of App. p. 11.

As to the mistake in the affidavit concerning Appellant's prior conviction, Appellant does not make any specific argument that the falsehood was deliberate nor has he presented any evidence supporting the proposition that the mistake in the affidavit was made either deliberately or with reckless disregard for the truth. While Investigator Clevenger made a mistake concerning Appellant's prior conviction, that mistake did not factor into the underlying probable cause. Further, as was acknowledged by the trial judge, there was still an adequate basis for the no-knock aspect of the warrant based on the firearm in the video and the fact that the confidential informant provided information that Appellant regularly carried a firearm.[5] Therefore, there is no evidence that Investigator Clevenger knowingly, intentionally, or recklessly provided incorrect or misleading information which was critical to probable cause in the affidavit.

As to Appellant's argument that the State failed to offer proof that he regularly carried a gun, as was alleged in the affidavit, Appellant misapprehends the State's burden in a Franks analysis. It is not incumbent on the State to prove every aspect of the affidavit is true; rather, it is the defendant's burden to establish the affidavit contained deliberate falsehoods or statements made with a reckless disregard for the truth. See State v. 192 Coin-Operated Video Game

[4] Despite the fact that no testimony was taken on the matter, Defense Counsel's account of the situation appears to be accurate. At the time he sought the warrant, Investigator Clevenger mistakenly thought Appellant had a prior conviction for violating S.C. Code Ann. § 16-9-320 (b), while Appellant actually had a conviction for resisting arrest in violation of S.C. Code Ann. § 16-9-320(a).

[5] After viewing the video, the trial judge confirmed there was a firearm in the video. R. p. 62.

Machines, 338 S.C. at 195, 525 S.E.2d at 882 (noting that "there is 'a presumption of validity with respect to the affidavit supporting the search warrant'") (quoting Franks v. Delaware, 438 U.S. 154 (1978)); State v. Missouri, 337 S.C. 548, 524 S.E.2d 394 (1999) (a defendant's attack on a search warrant affidavit must be more than conclusory; there must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof). Appellant's assertion that the statement in the affidavit that he regularly carried a firearm is false is therefore conclusory and without merit. Thus, because there was no Franks violation, Petitioner's argument must be rejected.

Alleged Rule 5 Violation

In his argument heading, Appellant argues, ". . . .which in turn meant further that this Rule Five violation that occurred also with respect to the unseen videotape deprived appellant of his Sixth Amendment right to present a complete defense during the Franks hearings regarding the defective affidavit and warrant held prior to trial and at trial in this case." Br. of App. p. 1. Aside from this conclusory statement, Appellant offers no substantive argument concerning a Rule 5 violation in his brief. Appellate courts will not consider arguments or issues raised on appeal in a conclusory or unsupported manner. Savannah Bank, N.A. v. Stalliard, 400 S.C. 246, 252, n. 3, 734 S.E.2d 161, 164 (2012). See also State v. Garner, 389 S.C. 61, 67, 697 S.E.2d 615, 618 (Ct. App. 2010) (holding a conclusory, unsupported argument was abandoned on appeal). This Court should, therefore, disregard Appellant's vague statements concerning Rule 5.

Error preservation concerns notwithstanding, there was no Rule 5 violation in Appellant's case. The rules encompassed in Brady and Rule 5 are separate and impose different duties. State v. Kennerly, 331 S.C. 442, 452, 503 S.E.2d 214, 219 (Ct. App. 1998). "Therefore, [a] separate analysis must be used to determine if either has been violated." Id. "The Brady disclosure rule

is grounded in the defendant's fundamental right to a fair trial mandated by the Due Process Clause of the Fifth and Fourteenth Amendments." Id. at 452, 503 S.E.2d at 219-220. "The requirements of Rule 5, as opposed to the constitutional dictates of Brady, are judicially created discovery mechanisms for use in criminal proceedings." Id. at 453, 503 S.E.2d at 220. "A violation of Rule 5 is not reversible unless prejudice is shown." State v. Landon, 370 S.C. 103, 108, 634 S.E.2d 660, 663 (2006).

Rule 5(a)(1)(C), SCRCrimP, "Documents and Tangible Objects," states as follows:

> Upon request of the defendant the prosecution shall permit the defendant to inspect and copy books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant.

The solicitor was under no obligation to disclose the videotape pursuant to Rule 5. The videotape of the controlled buy was neither "material to the preparation of his defense," nor was the videotape introduced during the State's case-in-chief. The videotape of the controlled buy was not material to the presentation of Appellant's defense because he did not face any charges stemming from his transaction with the confidential informant. As the trial judge astutely observed, Appellant wished only for a "fishing expedition" without having to provide just cause. While Defense Counsel contended the video was necessary for her to determine whether there was a gun in the video, the trial judge viewed the video *in camera* and confirmed there was a gun present. There was absolutely no evidence pertinent to Appellant's defense in the videotape. Had the trial judge allowed Appellant to view the videotape, he would simply be revealing the identity of the confidential informant in order to assuage Appellant's curiosity. Further, the video of the controlled buy was not introduced in the State's case-in-chief. The State did not rely on any evidence relating to the controlled buy when establishing Appellant's guilt. Instead, the State

relied on the valid search of the home, which revealed a gun and a substantial quantity of drugs in Appellant's possession, as well as Appellant's subsequent statements admitting the contraband was his. The State, therefore, was not obligated under Rule 5 to disclose the videotape of the controlled buy to Appellant.

The Good-Faith Exception

Finally, even if the search warrant affidavit had been deficient in some respect, suppression of the fruits of the search was not required because the good-faith exception applied. Generally, under the good-faith exception, reliable physical evidence will not be suppressed where the evidence was obtained by an officer acting with objective good faith in reliance upon a search warrant issued by a detached and neutral magistrate, even though the search warrant is later determined to be defective. U.S. v. Leon, 468 U.S. 897, 926 (1984)); see also State v. Weston, 329 S.C. 287, 292-93, 494 S.E.2d 801, 803-804 (1997). There are three situations in which the good-faith exception will not apply: (1) where the affiant knowingly or recklessly included false information in the search warrant affidavit; (2) where the magistrate failed to perform his neutral and detached function and instead served as a rubber stamp for the police; and (3) where the affidavit is so lacking in indicia of probable cause that official belief in its existence would be entirely unreasonable. State v. Weston, 329 S.C. at 292-93, 494 S.E.2d at 803-804.

In this case, as discussed above, there is no evidence of deliberate dishonesty, reckless inclusion of false information, or bad faith on the part of Investigator Clevenger. Further, there is no evidence that the magistrate was involved in the investigation or failed to perform his neutral or detached function. Finally, the affidavit was facially valid and was not so lacking in indicia of probable cause that the officer's reliance upon it was unreasonable. See Leon, 468

U.S. at 926; U.S. v. Lalor, 996 F.2d 1578, 1583-84 (4th Cir. 1993) (good faith exception applied even though search warrant affidavit may have been prepared without full disclosure of all the facts, and even though it may have contained misstatements of fact tending to increase the apparent strength of the evidence presented, as long as the affidavit was not prepared in bad faith). Therefore, the good-faith exception applied and the fruits of the search need not be suppressed. Appellant's convictions and sentences should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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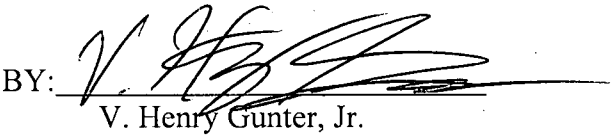
BY: 
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May 14, 2018

STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM YORK COUNTY
The Honorable John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2016-002538

THE STATE, ...RESPONDENT

v.

DENNIS DEMARIO OBRIAN KENNEDY,.....APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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