THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
General Sessions Court
Thomas L. Houston, Jr., Circuit Court Judge

Case No. 2016-GS-46-00756
Case No. 2016-GS-46-00757
Case No. 2016-GS-46-00758
Case No. 2017-GS-46-04770

Appellate Case No. 2017-002445

The State,

Respondent,

v.

Shawn Roseberry Bisnauth,

Appellant.

INITIAL REPLY BRIEF OF APPELLANT

Jack B. Swerling
1720 Main Street, Suite 301
Columbia, South Carolina 29201
Telephone: 803-765-2626
South Carolina Bar number 5457

Katherine Carruth Goode
229 South Congress Street
Post Office Box 1175
Winnsboro, South Carolina 29180
Telephone: 803-799-4440
South Carolina Bar number 8951

Attorneys for Appellant

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STATEMENT OF ISSUES ON APPEAL

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2. Did the trial court err in denying the motion to disclose the identity of the confidential informant?

3. Did the trial court err in denying the motion to sever the charge of failure to stop for a blue light from the trial of the drug offenses?

ARGUMENT IN REPLY

The state has filed a brief responding to the issues and arguments raised by appellant, Shawn Bisnauth, in this direct appeal. Appellant submits this reply brief to address certain facets of the state's arguments and to note certain arguments and authorities raised by appellant to which the state has chosen not to respond. Appellant stands by the arguments and authorities in his opening brief without repeating them here. As argued there, this Court should reverse his convictions and remand for a new trial on all the charges.

I. THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS THE EVIDENCE SEIZED AS THE RESULT OF AN INVALID SEARCH WARRANT.

Appellant challenges the sufficiency of the search warrant to establish probable cause for the search of the residence at 1660 Sandpiper Drive in Rock Hill, South Carolina. His primary contentions are that the warrant affidavit failed to provide any information whatsoever to establish the reliability, veracity, and basis of knowledge of the confidential informant and further failed to provide sufficient information to establish that drugs were likely to be found in the particular location to be searched, 1660

Sandpiper Drive. The state's brief cites a great deal of law related to search warrants and probable cause determinations, but it does not address these specific contentions or the authorities on which appellant relies in support of his claim that the warrant was not supported by probable cause.

With respect to the issue of the warrant affidavit's lack of information concerning the reliability of the informant, the state instead focuses its attention on the reliability of the North Carolina officer who provided information to Rayford Lewis Ervin, the officer who testified at the suppression hearing. However, Ervin's testimony about what Officer Lackey may have told him and his experience with Officer Lackey is irrelevant to an evaluation of the sufficiency of the warrant affidavit. As the state acknowledges, in determining the validity of the warrant, this Court may consider ***only the information presented to the magistrate***. *See State v. Gentile*, 373 S.C. 506, 513, 646 S.E.2d 171, 174 (Ct.App. 2007). The only information provided to the magistrate was the information contained in the warrant affidavit, executed by Marvin Brown. Any additional information elicited through Ervin's testimony in the suppression hearing cannot serve as the basis for a finding that the warrant affidavit was sufficient to support the magistrate's finding of probable cause.

At the heart of the warrant affidavit was information supplied by a confidential informant, also referred to as the "cooperating source" and "confidential source," who participated in the alleged controlled buy that led the officers to seek the warrant. In his opening brief, at pages 2-7, appellant points out the complete lack of information concerning the reliability, veracity, or basis of knowledge of the informant or any prior dealings between officers and the informant that may have supplied indicia of reliability.

The state does not even attempt to argue that information was supplied to the magistrate to establish the informant's reliability. Nor does the state address the authorities on which appellant relies in pointing out the insufficiency of the affidavit on this issue, principally, *State v. Philpot*, 317 S.C. 458, 461, 454 S.E.2d 905, 907 (Ct.App. 1995), and *Gentile*, 373 S.C. at 512-13, 646 S.E.2d at 174. Nor does the state address *State v. Clifton*, 302 S.C. 431, 433, 396 S.E.2d 831, 832 (Ct.App. 1990), *overruled on other grounds*, *Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999), which demonstrates the kind of evidence on which a determination can be made as to the reliability of an informant, in contrast to the complete lack of such information here. In keeping with the cited authorities, this Court should find the warrant was insufficient on the issue of the informant's reliability and could not support a finding of probable cause.

Similarly, the state does not address the argument appellant makes as to the lack of information in the warrant affidavit to establish the likelihood that drugs would be found in the residence at 1660 Sandpiper Drive, and the state does not address *State v. Thompson*, 419 S.C. 250, 256-57, 797 S.E.2d 716, 719 (2017), on which appellant relies to point out the deficiency of the affidavit on the nexus issue. Rather, the state cites federal decisions that allowed searches of defendants' residences. The state's argument, however, overlooks the lack of adequate information in the warrant affidavit to establish that 1660 Sandpiper Drive was in fact appellant's residence, the other information in the affidavit that showed a different location to be his residence, and the fact that the informant – whose reliability was not established at all – supplied part of the information concerning appellant's alleged residence on which the affidavit relied. As discussed in appellant's opening brief, at pages 7-9, and pursuant to the authority of the Supreme

Court's 2017 decision in *Thompson*, the warrant affidavit failed to supply a sufficient nexus to the place to be searched, 1660 Sandpiper Drive, and it was therefore insufficient to support a finding of probable cause for a search of that location.

Because the warrant was invalid, the search was unlawful and the evidence seized from 1660 Sandpiper Drive was inadmissible. *See* U.S. Const. amend. IV; S.C. Const. art. I, § 10. This Court should reverse the three drug convictions premised on this evidence.

II. THE TRIAL COURT ERRED IN DENYING THE MOTION TO DISCLOSE THE IDENTITY OF THE CONFIDENTIAL INFORMANT.

Appellant challenges the trial court's refusal to require the state to reveal the identity of the confidential informant. In response, the state cites decisions from other jurisdictions for the proposition that such disclosure is not required where the informant "merely provided information supplying probable cause." The federal and other state authorities on which the state relies addressed factual situations in which the informant's role was nothing more than providing information. *See, e.g., People v. Hobbs*, 873 P.2d 1246 (Cal. 1994); *United States v. Gray*, 47 F.3d 1359 (4th Cir. 1995). Another of the state's authorities addressed an informant who was identified and whose only role was introducing the defendant to a government agent. *See United States v. Reardon*, 787 F.2d 512 (10th Cir. 1986). The state does not cite ***any*** decision that addressed the factual situation presented here – a warrant based on a controlled buy involving the active participation of the unidentified informant.

Even the authorities on which the state relies concerning informants who merely supply information do not support the court's refusal to require disclosure in this case. In *McCray v. Illinois*, 386 U.S. 300 (1967), cited by the state, the United States Supreme

Court declined to require disclosure of the informant, but the decision turned in large part on the fact that the officers had been acquainted with the informant for years and the informant had supplied information to the officers in excess of 20 times, information that had proved to be accurate and had resulted in convictions. The non-disclosure of the informant's identity was upheld in the context of evidence of the underlying circumstances from which it could be determined that the informant was credible and his information reliable. *See McCray*, 386 U.S. at 303-05. Here, no similar evidence was presented to the magistrate, or even the trial judge, about the informant's history with law enforcement officials and their knowledge of his reliability. The cases on which the state relies simply do not apply to the facts of this case.

The state argues that this Court should ignore the clear statement of our Supreme Court that the right to learn the identity of an informant pertains not only to the informant's testimony about the offense itself, but also to ***preliminary matters such as search and seizure.*** *See State v. Burns*, 294 S.C. 338, 340-41, 364 S.E.2d 465, 467 (1988). If this Court is inclined to do so, the state's argument still misses the mark, because of the ***factual*** difference in this case and all the authorities on which the state relies. In this case, the informant's involvement was far greater than merely providing information supplying probable cause. In this case, the informant was an active participant in the alleged criminal activity – the alleged controlled buy – and a material witness to the circumstances that led the officers to seek the search warrant.

Moreover, if this Court accepts the state's premise that disclosure is not required where the informant actively participated in the criminal activity leading to a search warrant, but is required only where he participated in the actual charged offense, that

situation is established by the facts of this case. Based on the totality of the state's allegations, the informant was a participant in the on-going chain of events that constituted the alleged trafficking offense. Ervin testified that part of the informant's payment during the controlled buy was for a "previous ounce that he had fronted him." Tr. p. 34. The state's theory of the case was that appellant was operating out of what the state alleged was his residence in Rock Hill, keeping drugs there, but making deliveries in Charlotte, including at least two to the confidential informant. Upon this theory of the case, the informant was clearly an active participant in both the controlled buy and in the trafficking offense, such that his identity should have been disclosed.

III. THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION TO SEVER THE TRIAL OF THE CHARGE OF FAILURE TO STOP FOR A BLUE LIGHT FROM THE TRIAL OF THE DRUG OFFENSES.

Appellant challenges the trial court's denial of his motion to sever the charge of failure to stop for a blue light from the trial of the drug offenses. The state agrees that the standard for joinder of offenses for trial is that set out in appellant's opening brief: charges may be tried together where they (1) arise out of a single chain of circumstances, (2) are proved by the same evidence, and (3) are of the same general nature, and where (4) no real right of the defendant has been prejudiced. *See State v. Beekman*, 415 S.C. 632, 636, 785 S.E.2d 202, 204 (2016); *State v. Tucker*, 324 S.C. 155, 164, 478 S.E.2d 260, 265 (1996).; *State v. McGaha*, 404 S.C. 289, 293-94, 744 S.E.2d 602, 604 (Ct.App. 2013); *State v. Rice*, 368 S.C. 610, 615, 629 S.E.2d 393, 395 (Ct.App. 2006); *State v. Tate*, 286 S.C. 462, 464, 334 S.E.2d 289, 290 (Ct.App. 1985). Although the state acknowledges this four-part test, it focuses on one prong of the test – that the charges arose out of the same circumstances. While the state claims there was "overlapping

evidence" between the drug charges and the charge of failure to stop for a blue light, it does not contend or establish that those charges are proved by the same evidence, another prong of the test. The state makes no claim whatsoever that the charges are of the same general character, and they are not. Drug charges and a charge of failure to stop for a blue light are of entirely different character and nature, and they are not proved by the same evidence.

The state asserts that appellant fled blue lights after police appeared by his house to set up surveillance, implying that appellant saw the police at the house they claimed was his residence and that he fled upon seeing them. This implication is contrary to the evidence. There is no evidence whatsoever that appellant saw the officers at the surveillance location. Instead, the evidence established that he did ***not*** act in any manner consistent with fleeing until some time later, at a point far removed from the surveillance location, when officers' blue lights were activated on Interstate 77. There is no testimony that, upon leaving the surveillance location, appellant drove at a high rate of speed. Indeed, the evidence is that he actually stopped at a service station before proceeding toward the interstate. There is no evidence from which it can be inferred that appellant was fleeing due to the surveillance activity and with guilty knowledge, as the state contends.

The unwarranted inference the state argues is the very reason that the fourth prong of the test is not satisfied. Appellant has the real right of due process and fundamental fairness that mandates his conviction be premised on the jury's belief that he is guilty of the crime charged. *See* U.S. Const. amend. V, XIV; S.C. Const. art. I, § 3. He was entitled to have his guilt on the drug charges determined by the evidence related thereto,

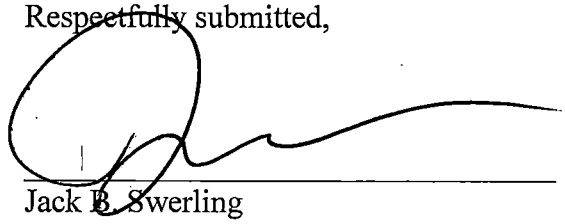
and not on the basis of an improper inference that is not supported by the evidence – that he was fleeing the surveillance location because he saw the officers there. The evidence does not support that inference, and trying the charges together resulted in the likelihood that the jury was influenced by that unwarranted inference in convicting appellant of all the charges.

Because none of the joinder criteria are met, the trial court abused its discretion in denying the motion to sever, and this Court should grant appellant a new trial on all the charges, with the drug offenses tried separately from the charge of failure to stop for a blue light.

CONCLUSION

For the foregoing reasons and the additional reasons set forth in appellant's opening brief, this Court should reverse his convictions and remand for new, separate trials of the drug offenses and the charge of failure to stop for a blue light.

Respectfully submitted,



Jack B. Swerling
1720 Main Street, Suite 301
Columbia, South Carolina 29201
Telephone: 803-765-2626
South Carolina Bar number 5457

Katherine Carruth Goode
229 South Congress Street
Post Office Box 1175
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Telephone: 803-799-4440
South Carolina Bar number 8951

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PROOF OF SERVICE

I certify that I have served the appellant's initial reply brief by mailing a copy, postage prepaid, to counsel for respondent, Senior Assistant Attorney General David Spencer, Office of the Attorney General, P.O. Box 11549, Columbia, South Carolina 29202, on December 20, 2018.

Kellie S. Reaves
Paralegal to Jack B. Swerling
1720 Main Street, Suite 301
Columbia, South Carolina 29201
Telephone: 803-765-2626

Law Offices of
Jack B. Swerling

1720 Main Street, Suite 301
Columbia, South Carolina 29201

Telephone 803-765-2626
Fax 803-799-4059

December 20, 2018

VIA HAND-DELIVERY
The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: The State v. Shawn Roseberry Bisnauth
Appellate Case No.: 2017-002445

Dear Ms. Kitchings:

Enclosed for filing are the original and one copy of the Initial Reply Brief of Appellant, along with the Proof of Service, in the above referenced matter.

By copy of this letter, I am serving David A. Spencer, Senior Assistant Attorney General, with a copy of same.

If you have any questions, do not hesitate to contact me.

Very truly yours,

Jack B. Swerling

JBS/ksr
Enclosures

cc: David A. Spencer, Senior Assistant Attorney General
Katherine Carruth Goode, Esquire
Shawn Roseberry Bisnauth #00323432
Terrance Bisnauth