ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MATTHEW FRAZIER,

APPELLANT.

Appellate Case No. 2011-193426

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

Did the trial court err by refusing to suppress the evidence found during the execution of a search warrant where the search warrant affidavit was facially insufficient to establish probable cause, based on false and unreliable information, which misled the Magistrate into issuing the search warrant?

STATEMENT OF THE CASE

On December 16, 2010, Appellant Matthew Frazier was indicted by the Beaufort County Grand Jury for possession with intent to distribute (PWID) crack-cocaine and PWID marijuana. R. 68. Appellant was again indicted by the Beaufort County Grand Jury on May 19, 2011, for: trafficking ten to twenty-eight grams of cocaine, first offense; three counts of PWID within the proximity of a park (cocaine, crack-cocaine, and marijuana); and possession of a weapon during the commission of a violent crime. R. 63.

On May 25, 2011, Appellant proceeded to trial before the Honorable Thomas A. Russo and a jury. R. 1. Appellant was represented by Ian Deysach and Matthew Walker, and the State was represented by Assistant Solicitors Bill Shipley and Meredith Bannon. R. 2.

On May 26, 2011, the jury found Appellant guilty of: (1) trafficking cocaine; (2) PWID crack-cocaine; and (3) the lesser-included offense of simple possession of marijuana. R. 56, ll. 1-14. The jury found Appellant not guilty on all three PWID within the proximity of a park charges and the possession of a weapon charge. R. 56, l. 15 – 57, l. 11. Judge Russo sentenced Appellant to: (1) fifteen years imprisonment on the PWID crack-cocaine conviction; (2) ten years imprisonment on the trafficking cocaine conviction; and (3) thirty days imprisonment on the simple possession of marijuana conviction. R. 60, l. 22 – 61, l. 21. The sentences were to run consecutively. R. 61, ll. 21-22.

This appeal follows.

STATEMENT OF FACTS

Suppression Hearing

Pre-trial, defense counsel moved to suppress the evidence found during the execution of the search warrant on October 10, 2010. R. 10, ll. 1-16. The State called Officer James Carmany to testify regarding the issuance and execution of the search warrant. R. 11, ll. 11-13. Thus, the following testimony was elicited at the suppression hearing. R. 12, l. 7 – 53, l. 15.

Officer Carmany

At the suppression hearing, Officer James Carmany recalled that he presented a search warrant affidavit to Beaufort County Magistrate Ralph E. Tupper and that Magistrate Tupper issued the search warrant on October 2, 2010. R. 12, l. 10 – 13, l. 21. Officer Carmany stated that the purpose of the warrant was to search "a 1999 burgundy four-door Dodge Intrepid . . . located on Martha Brown Circle within the Town of Bluffton [Beaufort County]." R. 13, l. 22 – 14, l. 12. Officer Carmany then noted that the search warrant was issued nine days later on October 11, 2010, and that the return was provided to Magistrate Tupper ten days later on October 12, 2010. R. 14, l. 13 – 15, l. 13. Officer Carmany further noted that a copy of items seized from the car was given to the registered owner of the vehicle, Derrick Fields.

Officer Carmany maintained, "During the month of September, 2010, . . . I received information from a confidential informant [CI], reliable source, of drug activity coming from Martha Brown Circle from within a burgundy Dodge Intrepid." R. 15, ll. 17-22. Officer Carmany also asserted that the "[CI] identified him [Appellant] by making controlled purchases [i.e., drug transactions] from the vehicle, from the defendant, at which

time he identified them through a picture that we provided and who we believed that person was and he identified him that way." R. 16, ll. 9-13. Officer Carmany further maintained that the CI conducted a drug transaction within seventy-two hours of obtaining the search warrant and that the CI identified a photograph of Appellant as the person from whom he bought drugs. R. 16, ll. 21-23. A copy of the search warrant affidavit, the search warrant, the return, and the inventory list was then marked as "Court's Exhibit Number 1." R. 18, ll. 4-25; R. 71 – 81.

On cross-examination, Officer Carmany presented conflicting testimony about whether the burgundy car moved while it was under surveillance by law enforcement. Initially, Officer Carmany maintained that the burgundy car never moved while it was under surveillance. R. 21, ll. 9-12. Later, Officer Carmany admitted that the burgundy car was not at Martha Brown Circle after the search warrant was issued: "We checked multiple times throughout the week. That was the delay [nine days] in serving the warrant." R. 25, ll. 14-23.

Defense counsel inquired, "What was it about the informant that made him reliable?" Officer Carmany replied, "Because he cooperated with us; he - - everything that - - based on what he told us was true and accurate; based on our own experiences and our own knowledge." R. 26, l. 23 – 27, l. 1. Based on his testimony, Officer Carmany believed the CI was reliable based on arrests he had made during the last five years that were related to drug activity, which had nothing to do with the CI. R. 27, ll. 1-17. In other words, Officer Carmany based the reliability of the CI on information that he already knew, not from information given by the CI that was subsequently verified. R. 27, l. 18 – 28, l. 7.

Defense counsel subsequently argued that "the search warrant itself is not based upon probable cause." R. 37, ll. 10-11. Defense counsel also argued that the Officer Carmany improperly listed the CI as a reliable informant. R. 37, l. 13 – 38, l. 20. Defense counsel further argued that the information provided in the search warrant affidavit was stale because the car was unable to be located for nine days after the search warrant was issued. R. 38, l. 21 – 39, l. 15. In sum, defense counsel reiterated, "I don't believe that the search warrant is based on probable cause, and anything found as a result of the execution of that search warrant should be suppressed." R. 39, ll. 16-19.

The trial court noted:

> [F]rom what I gathered from the testimony, the officers observed folks going into the vehicle, there being some motion and movement of exchange; correct? [Law enforcement] [d]idn't see drugs, didn't see money, but numerous times of people going in, there being some exchange going on and leaving, and based on their experience as law enforcement officers and dealing with drugs and stuff.

R. 51, ll. 9-16. The trial court denied the motion to suppress and stated, "I believe there has been substantial evidence shown - - or substantial testimony to support probable cause." R. 51, ll. 21-24.

Search Warrant Affidavit

Officer Carmany indicated in the affidavit: "*Multiple confidential and reliable sources provided information about a subject selling drugs . . . out of a burgundy Dodge Intriped on Martha Brown Circle.*" R. 71 – 81 (emphasis added).

ARGUMENT

The trial court erred by refusing to suppress the evidence found during the execution of a search warrant because the search warrant affidavit was facially insufficient to establish probable cause, based on false and unreliable information, which misled the Magistrate into issuing the search warrant.

During the suppression hearing, Officer Carmany maintained, "During the month of September, 2010, . . . I received information from a confidential informant [CI], reliable source, of drug activity coming from Martha Brown Circle from within a burgundy Dodge Intrepid." R. 15, ll. 17-22. On cross-examination, defense counsel inquired, "What was it about the informant that made him reliable?" Officer Carmany replied, "Because he cooperated with us; he - - everything that - - based on what he told us was true and accurate; based on our own experiences and our own knowledge." R. 26, l. 23 – 27, l. 1. Based on his testimony at the suppression hearing, Officer Carmany believed the CI was reliable based on arrests Carmany had made during the last five years that were related to drug activity, which had nothing to do with the CI. R. 27, ll. 1-17.

In other words, Officer Carmany based the reliability of the CI on *unrelated* information that he already knew, not from information given by the CI that was subsequently verified. R. 27, l. 18 – 28, l. 7. Notably, Officer Carmany indicated in the affidavit: "***Multiple confidential and reliable sources provided information about a subject selling drugs . . . out of a burgundy Dodge Intriped on Martha Brown Circle.***" R. 75 – 78 (emphasis added). Based on the testimony presented at the suppression hearing, defense counsel argued that "the search warrant itself is not based upon probable cause" because Officer Carmany improperly listed the CI as a reliable informant. R. 37, l. 10 – 38, l. 20.

Therefore, the trial court erred by refusing to suppress the evidence found during the execution of a search warrant because the search warrant affidavit was facially insufficient

to establish probable cause based on unreliable information, which misled the Magistrate into issuing the search warrant. *See United States v. Leon*, 468 U.S. 897, 923 (1984) (citing *Franks v. Delaware*, 438 U.S. 154 (1978) (noting that suppression remains an appropriate remedy if the magistrate issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth)); *Accord United States v. Colkley*, 299 F.2d 297 (4th Cir. 1990); *State v. Missouri*, 337 S.C. 548, 524 S.E.2d 394 (1999).

The Fourth Amendment of the United States Constitution guarantees "[t]he right of the people to be secure . . . [from] unreasonable searches and seizures." U.S. Const. amend. IV. The Fourth Amendment requires an oath or affirmation before probable cause can be found by an officer of the court, and a search warrant issued. U.S. Const. amend. IV. The South Carolina Code also 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). Evidence obtained in violation of the Fourth Amendment is inadmissible in both state and federal court. *See Forrester,* 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001).

"The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause. *State v. Philpot,* 317 S.C. 458, 454 S.E.2d 905 (Ct. App. 1995)). 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). 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).

In terms of a court's review of the magistrate's decision, "[t]he duty of the reviewing court is to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed." *State v. Baccus,* 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006). In determining whether a substantial basis exists, the crucial element is not whether the target of the search is suspected of a crime, but whether it is reasonable to believe that the items to be seized will be found in the place to be searched. *Zurcher v. Stanford Daily,* 436 U.S. 547, 556 & n. 6 (1978). "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). Oral testimony may also be used in this state to supplement search warrant affidavits which are facially insufficient to establish probable cause. *See State v. Weston,* 329 S.C. 287, 494 S.E.2d 801 (1997); *see also State v. Sachs*, 364 S.C. 541, 216 S.E.2d 501 (1975).

In this case, when Magistrate Tupper reviewed the validity of the search warrant, he was misled by the false and unreliable information contained in the affidavit because Officer Carmany indicated in the search warrant affidavit: "***Multiple confidential and reliable sources provided information about a subject selling drugs . . . out of a burgundy Dodge Intriped on Martha Brown Circle.***" R. 75 – 78. *See State v. Thompson,* 363 S.C. 192, 200, 609 S.E.2d 556, 560 (Ct. App. 2005) (noting that "[i]n reviewing the validity of a warrant, an appellate court may consider only information brought to the magistrate's attention."). Based Officer Carmany's testimony, the affidavit did not contain "sufficient underlying

facts and information" for Magistrate Tupper to properly determine the existence of probable cause. *See Philpot,* 317 S.C. 458, 454 S.E.2d 905.

Furthermore, it is necessary to examine the reliability and credibility of a confidential informant for determining the existence of probable cause. *Illinois v. Gates*, 462 U.S. 213, 230-235 (1983). In determining whether the information relied upon by law enforcement is reliable, no one factor is necessary or sufficient to establish probable cause. Instead, probable cause arises from the totality of the circumstances, and "[a] deficiency in one [factor] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." *Id.*

Here, the CI could not have been considered reliable because Officer Carmany relief improperly upon ***prior*** unrelated information and unsubstantiated claims by the CI. *Cf. United States v. Ross*, 456 U.S. 798, 800-801 (1982); *Cf. State v. Peters*, 271 S.C. 498, 500-502, 248 S.E.2d 475, 476-477 (1978); *Cf. State v. Bultron*, 318 S.C. 323, 327, 457 S.E.2d 616, 619 (Ct. App. 1995).

As previously noted by our Supreme Court,

> [t]he task of the issuing magistrate is simply to 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.

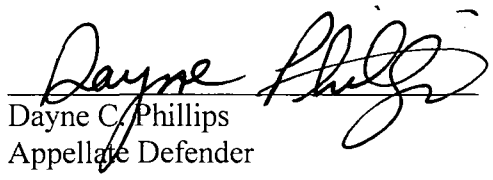
Weston, 329 S.C. at 290-91, 494 S.E.2d at 802-03 (quoting Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317 (1983) (emphasis added)). The "veracity" and "basis of knowledge" of the CI was inaccurately supplied to Magistrate Tupper, as there was only one CI and his reliability had not been properly established.

Accordingly, the trial court erred by refusing to suppress the evidence found during the execution of a search warrant because the search warrant affidavit was facially insufficient to establish probable cause based on unreliable information, which misled the Magistrate into issuing the search warrant. *See* U.S. Const. amend. IV; *see also* S.C.Code Ann. § 17-13-140 (1985); *Accord Leon*, 468 U.S. at 923 (citing *Franks*, 438 U.S. 154); *Jones*, 342 S.C. at 127, 536 S.E.2d at 678 ("Under a *Franks* analysis, probable cause did not exist under the Fourth Amendment of the United States Constitution[.]").

CONCLUSION

For the foregoing reasons, Appellant Matthew Frazier requests that this Court reverse his convictions and remand this case to the Beaufort County Court of General Sessions for a new trial.

Respectfully submitted,



Dayne C. Phillips
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of January, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

January 17, 2013

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Fnal Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 17th day of January, 2013.

Dayne C. Phillips
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 17th day of January, 2013.

Marion Hightower (L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.