

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County
Honorable Thomas A. Russo, Circuit Court Judge

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SC Court of Appeals

THE STATE,

Respondent,

vs.

MATTHEW FRAZIER,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

The trial judge properly denied Appellant's motion to suppress because the search warrant affidavit provided a sufficient probable cause basis for the issuance of the search warrant. Furthermore, the Franks issue regarding false information in the search warrant affidavit is not preserved for review. Regardless of preservation, no Franks violation occurred.

STATEMENT OF THE CASE

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

On May 25, 2011, Appellant proceeded to trial. Ian Deysach and Matthew Walker represented Appellant, and Assistant Solicitors Bill Shipley and Meredith Bannon represented the State.

On May 26, 2011, the jury found Appellant guilty of trafficking cocaine, possession with intent to distribute crack-cocaine, and simple possession of marijuana. The jury found Appellant not guilty on all three possession with intent to distribute within the proximity of a park charges and the possession of a weapon charge. The Honorable Thomas A. Russo sentenced Appellant to fifteen years of imprisonment for the possession with the intent to distribute crack-cocaine conviction; ten years of imprisonment for the trafficking cocaine conviction; and thirty days of imprisonment on the simple possession of marijuana conviction.

This appeal follows.

STATEMENT OF FACTS

Before the trial began, Appellant's trial counsel moved to suppress the evidence found during the execution of the search warrant. (R. p. 10.) During the suppression hearing, Officer James Carmany testified for the State. (R. p. 12.)

During the month of September 2010, Officer Carmany received a tip from a confidential informant stating that there was drug activity coming from Martha Brown Circle from within a burgundy Dodge Intrepid. (R. p. 15.)¹ On multiple occasions, Officer Carmany personally observed people going to the vehicle, getting in the vehicle, making hand-to-hand motions consistent with drug activity and then immediately leaving the scene. (R. p. 17.)

Within seventy-two hours of obtaining a search warrant, Officer Carmany used a confidential informant to make multiple controlled purchases from the burgundy Dodge Intrepid. (R pp. 15-17.) The police monitored the CI by audio and video. (R. p. 16.) Furthermore, before the controlled purchase, the police searched the CI for drugs. (R. p. 35.) Although the police could not obtain visual confirmation of the controlled purchase, the police heard a drug transaction take place. (R. p. 30.) When the CI came back to the police, the CI had drugs on his person and stated he bought the drugs from Appellant. (R. pp. 35-36.)

On October 2, 2010, Officer Carmany presented an affidavit to Beaufort County Magistrate Ralph E. Tupper. (R. p. 13.) The purpose of the warrant was to search "a 1999

¹ Office Carmany testified that at least once a month he would receive a tip stating that Appellant was dealing drugs. (R. pp. 34-35.)

burgundy four-door Dodge Intrepid with South Carolina registration GJU-683[,]” located on Martha Brown Circle. (R. pp. 13-14.)

On October 11, 2011, the police executed the search warrant. (R. p. 14.) Corporal Rodriquez left a copy of the search warrant on the dashboard of the vehicle for the registered owner of the vehicle, Derrick Fields. (R. p. 15.)

ARGUMENT

I.

The trial judge properly denied Appellant's motion to suppress because the search warrant affidavit provided a sufficient probable cause basis for the issuance of the search warrant. Furthermore, the Franks issue regarding false information in the search warrant affidavit is not preserved for review. Regardless of preservation, no Franks violation occurred.

Appellant contends the trial judge erred in refusing to suppress the drugs obtained pursuant to an allegedly defective search warrant. Appellant argues the warrant was defective because it was based upon false and unreliable information. However, the search warrant contained sufficient information for a finding of probable cause and complied with the statutory requirements of S.C. Code Ann. § 17-13-140. Furthermore, Appellant's trial counsel never argued that a Franks² violation occurred; therefore, the Franks issue is not preserved. Regardless of preservation, there is no evidence that the officer provided false information. Thus, Appellant's conviction should be affirmed.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The reviewing court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111(2000). 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. Keith, 356 S.C. 219, 223,

² Franks v. Delaware, 438 U.S. 154, 156 (1978).

588 S.E.2d 145, 147 (Ct. App. 2003). The magistrate's probable cause determination should be afforded great deference on appeal. State v. Rutledge, 373 S.C. 312, 316, 644 S.E.2d 789, 791 (Ct. App. 2007). The appellate court is limited to considering only the information brought to the magistrate's attention. State v. Martin, 347 S.C. 522, 527, 556 S.E.2d 706, 709 (Ct. App. 2001).

A. The search warrant affidavit provided probable cause for the issuance of the search warrant.

Appellant asserts that the search warrant was not based upon probable cause because the reliability of the CI was not established. However, this is not a situation where the police obtained a search warrant based solely upon a tip. After the police received the tip, the police independently verified the tip by setting up multiple controlled purchases. Moreover, on multiple occasions, the police observed hand to hand drug transactions, which were conducted from within the burgundy Dodge Intrepid. Thus, the search warrant was supported by probable cause.

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 must contain sufficient underlying facts upon which the magistrate can base a probable cause determination. State v. Smith, 301 S.C. 371, 373, 393 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. Under S.C. Code. Ann. § 17-13-140, a magistrate shall only issue a search warrant if satisfied “the grounds for the application exist or that there is probable cause to believe that they exist.” 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 (1973)).

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 to the extent that an otherwise marginal search may be justified if it meets a realistic standard of probable cause.” Id. Moreover, “[s]uppression is appropriate in only a few situations, including when an affidavit is ‘so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.’ ” State v. Weston, 329 S.C. 287, 293, 494 S.E.2d 801, 804 (1997) (quoting United States v. Leon, 468 U.S. 897, 923 (1984)).

In the case at hand, the search warrant affidavit contained sufficient facts to establish a probable cause basis to search the vehicle. This was not a situation where the police received a tip and obtained a search warrant based solely upon that tip. In order to confirm the tips the police received regarding drug dealing out of the burgundy Dodge Intrepid, the police set up multiple controlled purchases. Within seventy-two hours of obtaining the search warrant, the CI conducted multiple controlled purchases from Appellant within the burgundy Dodge Intrepid. The police monitored the CI by audio and video. (R. p. 16.) Furthermore, the police searched the CI beforehand for drugs. (R. p. 35.)

Although the police could not obtain visual confirmation of the controlled purchase, the police heard a drug transaction take place. (R. p. 30.) When the CI came back to the police, the CI had contraband on his person and stated he bought the drugs from Appellant. 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.”). Moreover, on multiple occasions, Officer Carmany personally observed people going to the vehicle, getting in the vehicle, making hand-to-hand motions consistent with drug activity, and then immediately leaving the scene. (R. p. 17.) Based upon the totality of the circumstances, there was sufficient probable cause to support the issuance of the warrant. See Dupree, 354 S.C. at 691, 583 S.E.2d at 445 (“We hold that if a controlled buy is properly conducted, the *controlled buy alone* can provide facts sufficient to establish probable cause for a search warrant.” (italics in original)).

The warrant in this case was clearly not “ ‘so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.’ ” Weston, 329 S.C. at 293 (quoting Leon, 468 U.S. at 923). The logical and common sense interpretation of the warrant in this case along with the deference that must be given to the magistrate’s decision overcomes any asserted deficiency. See Keith, 356 S.C. at 225, 588 S.E.2d at 148 (“We find a common sense and logical interpretation of the affidavit accompanying the search warrant in this case and the deference, which must be accorded the magistrate, overcomes any asserted deficiency.”). Recognizing warrants are typically prepared by non-lawyers, the magistrate properly viewed the warrant in a realistic and common sense manner without applying an overly rigid analysis and found probable cause based on the totality of the circumstances

Warrants are not required to be perfect. The search warrant in this case meets a realistic standard of probable cause. Sufficient facts were presented for a prudent magistrate to believe the offense had been committed and the evidence sought would be recovered based on the totality of the circumstances. Furthermore, the warrant

sufficiently identified the relevant evidence sought and the non-invasive manner to be used in its recovery. The trial judge properly afforded great deference to the magistrate's determinations. The warrant was not so defective as to warrant the suppression of the evidence obtained from the vehicle. See also State v. Mollison, 319 S.C. 41, 47, 459 S.E.2d 88, 92 (Ct. App. 1995) (finding where an appellant failed to argue prejudice suffered due to a defective warrant and the record lacked discernible prejudice, the defective warrant did not require suppression of seized evidence). In summary, the search warrant affidavit was sufficient to provide probable cause.

B. The Franks issue is not preserved. Regardless, no Franks violation occurred.

To the extent Appellant is alleging a Franks violation based on paragraph 1 of the search warrant affidavit, this argument was never raised to the trial judge and was not preserved for appellate review. See State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (stating a party cannot argue one ground for a motion at trial and an alternate ground on appeal). At trial, Appellant moved to quash the search warrant on the ground that the affidavit in support of the search warrant did not contain sufficient information to support probable cause. Appellant did not assert to the trial court that false information was recklessly included in the affidavit. See State v. Davis, 354 S.C. 348, 360-61, 580 S.E.2d 778, 784-85 (Ct. App. 2003) (holding Franks issue was not preserved for review when the defendant did not assert below that false information was intentionally or recklessly included in the affidavit and the trial judge made no ruling on that issue); see also Rutledge, 373 S.C. at 318, 644 S.E.2d at 792 ("There is a presumption of validity with respect to the affidavit supporting the search warrant.") (quoting Franks v.

Delaware, 438 U.S. at 171); State v. Missouri, 337 S.C. 548, 554, 524 S.E.2d 394, 397 (1999) (stating a defendant's attack on a search warrant must include "allegations of deliberate falsehood or reckless disregard for the truth, and those allegations must be accompanied by an offer of proof[.]").

Regardless, even if the issue was preserved, the information included in the affidavit was not false.³ Appellant claims that paragraph 1 of the search warrant affidavit was false and unreliable because it stated the following: "Multiple confidential and reliable sources provided information about a subject selling drugs . . . out of a burgundy Dodge Intrepid on Martha Brown Circle." (R. p. 75-76.) Appellant asserts that this statement was false because "there was only one CI and his reliability had not been properly established." (App. Br. p. 12.) However, Officer Carmany testified that at least once a month for five years he would receive tips that Appellant was dealing drugs out of a burgundy Dodge Intrepid. (R. pp. 34-35.) Thus, paragraph 1 of the search warrant affidavit was not false and unreliable.

³ In Franks v. Delaware, 438 U.S. 154, 156 (1978), the United States Supreme Court held: "[W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, 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."

Moreover, even if a Franks violation did occur, there was still sufficient information in the affidavit to establish probable cause even if the statement regarding the multiple confidential and reliable sources was omitted. As noted before, the police conducted multiple controlled purchases after they received the tips. Thus, even if paragraph 1 of the search warrant affidavit was omitted, the remaining provisions of the search warrant affidavit were sufficient to establish probable cause.

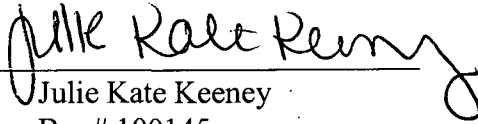
CONCLUSION

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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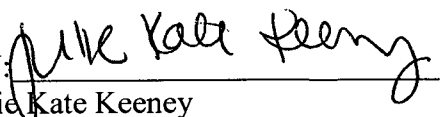
Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

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PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Final Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 9th day of January, 2013.



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