

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ALEX ROBINSON,

APPELLANT

APPELLATE CASE NO. 2011-203769

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err by failing to quash the search warrant and suppress the evidence found during the execution of the search warrant when the sworn affidavit was stale as well as contained false and unreliable information, thereby misleading the trial court into issuing the search warrant?
- II. Did the trial court err in refusing to reveal the identity of the confidential informant when it was essential to a fair determination of Appellant's case?
- III. Did the trial court err in refusing to recuse himself, upon motion by Appellant, when the trial court's impartiality might be questioned by ruling on the validity of a search warrant he previously issued?
- IV. Did the trial court err in refusing to grant a new trial where the cumulative effect of the errors were so prejudicial as to deprive Appellant of a fair trial?

STATEMENT OF THE CASE

On August 27, 2009, Appellant Alex Robinson was indicted by the Horry County Grand Jury for trafficking between one-hundred and two-hundred grams of cocaine and failing to stop for a blue light.

On November 7, 2011, Appellant proceeded to trial before the Honorable Edward B. Cottingham and a jury. R. 1. Appellant was represented by John Hilliard and Julia Bass, and the State was represented by Assistant Solicitor Brad Richardson. Pre-trial, the trial court granted defense counsel's motion to sever the charges, and the State proceeded to trial on the trafficking cocaine charge. R. 3, l. 24 – 19, l. 21.

On November 9, 2011, the jury found Appellant guilty of trafficking between one-hundred and two-hundred grams of cocaine. R. 524, ll. 20-25. The trial court sentenced Appellant to twenty-five years imprisonment pursuant to S.C. Code Ann. § 44-53-370(e)(2)(c) (2008). R. 534, l. 10 – 535, l. 8.

ARGUMENT

- I. The trial court erred by failing to quash the search warrant and suppress the evidence found during the execution of the search warrant because the sworn affidavit was stale as well as contained false and unreliable information, thereby misleading the trial court into issuing the search warrant.

Relevant Facts

Pre-trial, defense counsel challenged the sufficiency of the search warrant that was previously issued by the trial court and moved to suppress the evidence found during the execution of the search warrant on September 25, 2008. R. 11, ll. 4-11; R. 30, ll. 6-10. The probable cause section of the search warrant affidavit provides:

A confidential and reliable informant working for the Horry County Police Department purchased a quantity of off white powder substance represented as being cocaine and field-testing positive for cocaine attributes from the occupants of the house identified as [redacted] Stoneybrook Dr in Conway, SC. That the informant has been able to make recent continuous purchases of illegal drugs from this residence

R. 27, ll. 19-25; State's Exhibit # 1 (Search Warrant). Defense counsel argued that, under the totality of the circumstances, the search warrant affidavit and the supplemental oral testimony failed to establish sufficient information to support the trial court's finding of probable cause where: (1) the affiant knew information in the affidavit was false (e.g., the CI did not actually observe the alleged drug transaction); (2) there was no evidence presented to the trial court to verify the reliability of the confidential informant (CI); and (3) the prior alleged observations by the CI were made without listing a single date of when the alleged drug transactions occurred. R. 11, l. 24 – 30, l. 13; R. 47, l. 2 – 57, l. 19.

Contrary to the information contained in the search warrant affidavit, Officer Kent Donald of the Horry County Police Department admitted that the CI *never* purchased

cocaine from the occupants of the residence at Stoneybrook Drive. R. 23, l. 22 – 39, l. 2. Specifically, Officer Donald stated that the CI gave Christopher Oliver the “police buy money” and that on three separate occasions the CI stayed in the car while Oliver allegedly purchased cocaine from individuals inside the Stoneybrook residence. R. 24, l. 14 – 29, l. 25. Officer Donald also revealed that the alleged drug transactions occurred on the following dates: August 15, 2008; August 22, 2008; and September 12, 2008. R. 25, ll. 3-24. Officer Donald further noted that the Return for the search warrant was not signed within the ten day requirement. R. 32, ll. 6-20.

On cross-examination, Officer Donald admitted that, although he prepared and signed the sworn search warrant affidavit, he did *not* inform Judge Cottingham that the CI *never* entered the Stoneybrook residence, or that the CI was *not* the person who allegedly purchased the cocaine from the Stoneybrook residence. R. 37, l. 11 – 40, l. 10. Officer Donald also admitted that he failed to provide Judge Cottingham with any information establishing the reliability of CI as well as the dates for when the alleged drug transactions occurred. R. 40, ll. 11-22; R. 44, l. 24 – 45, l. 2. Officer Donald further noted that he *never* “patted down” Oliver—as required—for drugs prior to the alleged drug transactions. R. 45, l. 3 – 46, l. 8.

After defense counsel listed numerous cases in support of the motion to quash the search warrant and suppression of the evidence,¹ the trial court rejected defense counsel’s argument that the State failed to prove the reliability of the CI and stated: “I’ll be glad for you [defense counsel] to put your cases on the record but I’m not gonna [sic] sit here and have a review of all the cases that I’ve read for the last twenty-seven years.” R. 47, l. 2 – 50,

¹ Court’s Exhibit #1 (Case law submitted by the Defendant).

l. 22. The trial court also gave a further explanation of his ruling:

I'm familiar generally with the cases that you [defense counsel] cited but I respectfully disagree with your position. This affidavit in my opinion then and now is complete and in accordance with the law regarding search warrants. This affiant to the best of his knowledge told the truth. Now, he [Officer Donald] may have told it not exactly as you would have it but he said I'm basing it on reliable information that I received that drugs have been sold from this place on several occasions.

R. 52, ll. 5-12. In response, defense counsel argued, "Your Honor, we would move on three grounds, number one, that there [was] patently on the face of this search warrant incorrect information provided to Your Honor." R. 52, ll. 21-23.

The trial court ruled, "Respectfully rejected. It's not patently information wrong [sic]. *I dealt with that twice now and I'm not gonna [sic] go there again.*" R. 52, l. 24 – 53, l. 1 (emphasis added). Defense counsel also argued that "the information [in the search warrant affidavit was] stale" because "[Officer Donald] did not put any dates in [affidavit]" to prove that the search warrant was issued within the seventy-two hour requirement. R. 53, ll. 2-5. The trial court maintained, "*I don't think the dates were necessary . . . I reject that.*" R. 53, ll. 6-7 (emphasis added). Defense counsel further argued that a police report indicated at least one of the drug transactions occurred at an address other than the address listed in the search warrant affidavit. R. 53, ll. 8-10. The trial court replied:

Now, what he [Officer Donald] may or may not have said in some prior report doesn't concern me. I'm concerned with the truth and accuracy of what he said on this occasion and he said Stoneybrook. . . . As the issuing judge, I'm concerned with what he said today or in that instance.

R. 53, ll. 11-25. The trial court then noted, "My concern, [defense counsel], is whether or not this affiant to the best of his knowledge was telling me the truth on that day. He says he

got this from a reliable and confidential informant.” R. 55, ll. 10-13.

The trial court ruled, “I conclude that [the search warrant affidavit] contains sufficient information for me to issue a bench warrant, I mean, a search warrant, which I did. And I respectfully deny your motion to quash the indictment [search warrant].” R. 55, ll. 16-19. To further support his ruling, the trial court stated, “I think it’s sufficient for me to conclude that the affidavit of this affiant was sufficient and the totality of the information provided is sufficient for the search warrant. *Now, I don’t need any more on this question.*” R. 57, ll. 2-6 (emphasis added).

The cases cited in support of defense counsel’s motion to suppress were later entered into evidence as Court’s Exhibit #1. R. 83, l. 1 – 84, l. 17. After the close of the State’s case, defense counsel noted, “I did not object to the introduction of the powder cocaine into evidence, what I intended and what I meant by that was I did not object to the chain of custody aspect of it. I preserve and reserve my previous objections.” R. 359, ll. 8-12. In response, the trial court stated, “*No, you are protected on the record as to that issue clearly and I understood that it was subject to that objection in fairness to you.*” R. 359, ll. 20-22 (emphasis added). After the jury found Appellant guilty of trafficking cocaine, defense counsel renewed the motion to quash the search warrant and suppression of the evidence found during the execution of that search warrant. R. 531, ll. 2-8. The trial court denied the motion. R. 531, ll. 9-23.

Discussion

A. The affiant knew the information in the search warrant affidavit was false.

In this case, the trial court was misled by the information contained in the search warrant affidavit because the affiant, Officer Donald, knew the information was false. R. 23,

l. 22 – 39, l. 2; State’s Exhibit # 1 (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. Notably, the South Carolina 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 probable cause can be found by an officer of the court, and a search warrant issued.” *State v. Jones*, 342 S.C. 121, 128, 536 S.E.2d 675, 678 (2000); U.S. Const. amend. IV. 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 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). Evidence obtained in

violation of the Fourth Amendment is inadmissible in both state and federal court. *See State v. Forrester*, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001).

In terms of a circuit court's review of a magistrate's finding of probable cause, "[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). However, "[i]n reviewing the validity of a warrant, an appellate court may consider only information brought to the magistrate's attention." *State v. Thompson*, 363 S.C. 192, 200, 609 S.E.2d 556, 560 (Ct. App. 2005).

In this case, Officer Donald admitted on cross-examination that, although he prepared and signed the sworn search warrant affidavit, he *never* told Judge Cottingham that the CI did *not* enter the Stoneybrook residence, or that the CI was *not* the person who

allegedly purchased the cocaine from the Stoneybrook residence. R. 37, l. 11 – 40, l. 10.

Yet, the probable cause section of the search warrant affidavit provides:

A confidential and reliable informant working for the Horry County Police Department purchased a quantity of off white powder substance represented as being cocaine and field-testing positive for cocaine attributes from the occupants of the house identified as [redacted] Stoneybrook Dr in Conway, SC. That the informant has been able to make recent continuous purchases of illegal drugs from this residence

R. 27, ll. 19-25; State's Exhibit # 1 (Search Warrant). Accordingly, the trial court erred by not suppressing the evidence obtained during the execution of the search warrant because the trial court was misled by information in the sworn affidavit that the affiant knew was false. R. 55, ll. 16-19; R. 57, ll. 2-6; *See Leon*, 468 U.S. at 923 (citing *Franks*, 438 U.S. 154 (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)); *see also Forrester*, 343 S.C. at 643, 541 S.E.2d at 840.

B. The State failed to establish the reliability of the confidential informant.

When a confidential informant is involved, it is necessary to examine the reliability and credibility of the informant for determining the existence of probable cause. *See 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. *Id.* 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.* As previously noted by our Supreme Court:

The 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.

State v. Weston, 329 S.C. 287, 290-91, 494 S.E.2d 801, 802-03 (1997) (quoting *Gates*, 462 U.S. 213).

In *United States v. Ross*, 456 U.S. 798, 800-801 (1982), the United States Supreme Court found that probable cause existed where a confidential informant, who had *proved to be reliable previously*, provided specific detailed information and officers *observed corroborating evidence*. Specifically, the informant gave a detailed description of the drug dealer, the drug dealer's nickname, the specific address where the drug sales took place, the fact that the informant just witnessed a buy, and a statement by the dealer to the informant that the trunk of the car contained additional drugs. The officers were also able to confirm that a car matching the description provided by the informant was at the address given, the car was registered to an individual who used the alias provided by the informant, and the person seen driving the car matched the description provided by the informant.

In *State v. Peters*, 271 S.C. 498, 500-502, 248 S.E.2d 475, 476-477 (1978), our Supreme Court determined that probable cause existed to search a car where a confidential informant, who had *provided reliable information previously*, told police that a yellow Grand Prix automobile with a white top and a South Carolina license tag with the digits "308" would leave Folly Beach soon with a quantity of marijuana and officers observed a car fitting the description leaving the beach and recognized the driver and passenger as having been involved in illicit drug use previously. *Id.*

In this case, the trial court erroneously found the CI reliable for two reasons. First, the State presented absolutely no evidence to establish the CI's reliability (e.g., whether the CI had previously provided reliable information to law enforcement regarding illegal activity). Second, the trial court committed reversible error by refusing to reveal the CI's identity, so that defense counsel could cross-examine the CI about the alleged drug transactions. R. 47, l. 2 – 50, l. 22. The trial court stated: "I'll be glad for you [defense counsel] to put your cases on the record but I'm not gonna [sic] sit here and have a review of all the cases that I've read for the last twenty-seven years." R. 47, l. 2 – 50, l. 22. The trial court also gave an explanation of his ruling:

I'm familiar generally with the cases that you [defense counsel] cited but I respectfully disagree with your position. This affidavit in my opinion then and now is complete and in accordance with the law regarding search warrants. *This affiant to the best of his knowledge told the truth.* Now, he [Officer Donald] may have told it not exactly as you would have it but he said *I'm basing it on reliable information that I received that drugs have been sold from this place on several occasions.*

R. 52, ll. 5-12 (emphasis added). Therefore, the reliability of the CI was *never* established because the trial court could not make a "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*, [that] there [was] a fair probability that contraband or evidence of a crime will be found [at the address listed in the search warrant]." *Weston*, 329 S.C. at 290-91, 494 S.E.2d at 802-03 (quoting *Gates*, 462 U.S. 213).

C. The search warrant affidavit failed to list the dates of the alleged drug transactions.

In this case, defense counsel also argued that "the information [alleged in the search warrant affidavit was] stale" because "[Officer Donald] did not put any dates in [affidavit]"

to prove that the search warrant was issued within the seventy-two hour requirement. R. 53, ll. 2-5. The trial court erroneously held, “*I don’t think the dates were necessary . . . I reject that.*” R. 53, ll. 6-7 (emphasis added).

At the suppression hearing, Officer Donald revealed that the alleged drug transactions occurred on the following dates: August 15, 2008; August 22, 2008; and September 12, 2008. R. 25, ll. 3-24. Officer Donald further noted that the Return for the search warrant was not signed within the ten day requirement. R. 32, ll. 6-20. The search warrant was issued by the trial court on September 17, 2008, and executed by law enforcement on September 25, 2008. *See* State’s Exhibit # 1 (Search Warrant).

Based on those dates, the trial court should have found the evidence alleged in the search warrant affidavit stale and insufficient to establish probable cause. *See United States v. Doyle*, 650 F.3d 460, 471 (4th Cir. 2011) (“A valid search warrant may issue only upon allegations of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause *at that time.*”) (emphasis in original); *see also United States v. McCall*, 740 F.2d 1331, 1336 (4th Cir. 1984) (“[E]vidence seized pursuant to a warrant supported by ‘stale’ probable cause is not admissible in a criminal trial to establish a defendant’s guilt.”); *United States v. Laylor*, 996 F.2d 1578, 1582 (4th Cir. 1993) (finding “a time frame should have been disclosed. This court has already cautioned the police about the need to specify time periods in warrant applications.”).

D. The search warrant affidavit was not sufficient to support a finding of probable cause by the trial court.

The totality of the circumstances test is used to evaluate whether the information offered in an affidavit is a sufficient basis for probable cause. *See State v. Johnson*, 302 S.C. 243, 247, 395 S.E.2d 167, 169 (1990); *see also Missouri*, 337 S.C. 548, 524 S.E.2d 394

(citation omitted) (noting when reviewing a magistrate's decision to issue a search warrant, an appellate court must consider the totality of the circumstances); *Baccus*, 367 S.C. at 50, 625 S.E.2d at 221 (“[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.”).

In this case, defense counsel properly argued that, under the totality of the circumstances, the search warrant affidavit and the supplemental oral testimony failed to establish sufficient information to support the trial court’s finding of probable cause where: (1) the affiant knew information in the affidavit was false (e.g., the CI did not actually observe the alleged drug transaction); (2) there was no evidence presented to the trial court to verify the reliability of the confidential informant (CI); and (3) the prior alleged observations by the CI were made without listing a single date of when the alleged drug transactions occurred. R. 11, l. 24 – 30, l. 13; R. 47, l. 2 – 57, l. 19.

The good faith exception to the exclusionary under the Fourth Amendment does not apply here because Officer Donald knowingly tainted the search warrant affidavit with false information. See *Weston*, 329 S.C. at 292-93, 494 S.E.2d at 804 (explaining the three situations where deference to a magistrate’s finding of probable cause is not warranted under *Leon*, 468 U.S. 897). Additionally, without further investigation, the stale and knowingly false information provided in the search warrant affidavit was insufficient to establish a fair probability that drugs would be found at the residence listed in the affidavit. See *State v. Gentile*, 373 S.C. 506, 515-516, 646 S.E.2d 171, 175-176 (Ct. App. 2008) (finding additional investigation into residence was required to establish probable cause because the search warrant affidavit was not sufficient to support a finding of probable cause when the police found marijuana on a visitor who had just left Gentile’s residence).

“Under a *Franks* analysis, probable cause did not exist under the Fourth Amendment of the United States Constitution[.]” *Jones*, 342 S.C. at 127, 536 S.E.2d at 678. Accordingly, Appellant was prejudiced by the trial court’s failure to quash the search warrant and suppress the evidence obtained as tainted fruit. *See Mapp v. Ohio*, 367 U.S. 643 (1961); *see also Philpot*, 317 S.C. at 461, 454 S.E.2d at 907.

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II. The trial court erred in refusing to reveal the identity of the confidential informant because it was essential to a fair determination of Appellant's case.

Relevant Facts

Pre-trial, defense counsel cited *State v. Diamond*, 280 S.C. 296, 299, 312 S.E.2d 550, 551 (1984) and requested, "Judge, we need the confidential informant in order to have the hearing." R. 17, l. 20 – 19, l. 17. The trial court ruled, "Not gonna [sic] require the CI to be here." R. 19, l. 18 – 20, l. 8. In support of his ruling, the trial court provided the following explanation:

We're not gonna [sic] have a prot[ected] hearing on that issue; I'm gonna [sic] have a limited hearing with his [Officer Kent Donald's] testimony. It's clear to me that you [defense counsel] knew this case was [coming up] for trial and I conclude you're deliberately trying to delay it and I'm not gonna [sic] permit you to do it

R. 20, ll. 11-15.

During Officer Donald's testimony at the suppression hearing, defense counsel moved again under *State v. Diamond* "for the CI's name because the CI would be a witness that we [defense counsel] would *need to call in our defense*." R. 37, ll. 1-3 (emphasis added); U.S. Const. amend. VI. The trial court noted, "*I'll rule on that if I conclude it's necessary. I don't think at this point it complies with State v. Diamond because the CI was not a part of this deal but go ahead.*" R. 37, ll. 4-7 (emphasis added). Defense counsel subsequently argued, "[W]e have absolutely no choice under State versus Diamond but to ask that the CI be produced so she can be cross examined." R. 54, ll. 2-5. The trial court ruled, "No, ma'am. I'm not gonna [sic] do that either. Diamond doesn't go that far. I'm concerned with the truth or falsity of what this witness said to me on that occasion." R. 54, ll. 6-8.

Furthermore, the trial court admitted, “[T]he CI was not a participant in this particular case; search warrant.” R. 54, ll. 11-13. Defense counsel argued, “That’s our point, Your Honor. What you just said is exactly what I’ve been saying. That’s the whole point, the CI did not participate . . . That’s why we’re asking for suppression.” R. 54, ll. 14-18. The trial court maintained, “You’re not entitled to it. You want to be heard on that, [Assistant Solicitor]? . . . you [the State] don’t allege that the CI was there at the time of the search warrant, do you?” R. 54, ll. 19-22. Defense counsel interjected, “That’s why I want to question her [the CI].” R. 54, ll. 23-24. The trial court replied:

My concern, [defense counsel], is whether or not this affiant to the best of his knowledge was telling me the truth on that day. He [Officer Donald] says he got this from a reliable and confidential informant. *Now, if you think that I’m gonna [sic] let you call every reliable and confidential informant on the truth and accuracy of his statement, you’re mistaken.* I conclude that this statement is true.

R. 55, ll. 10-19 (emphasis added).

The trial court found that “Diamond is totally different” and did not apply to this case. R. 56, l. 4 – 57, l. 6. Defense counsel further argued, “If you’ll please make a note of the record because at this point, I don’t see how Mr. Robinson [Appellant] can get a fair trial if I [defense counsel] can’t cross-examine a person [the CI] that’s accusing him of something when he wasn’t even there.” R. 57, ll. 7-11. The trial ultimately ruled:

No, he’s not accusing - - he’s not accusing him at this time. He was only used [sic] a confidential informant, that’s a different issue. *I’ve ruled on it and you can take it up with the appellate court. If I’m wrong, they can tell me so.* All of us judges have examined State v. Diamond ten thousand times and it’s not applicable to the issues in this case and I say that most respectfully.

R. 57, ll. 12-18 (emphasis added).

Discussion

The United States Supreme Court has held, “Where the disclosure of an informer’s identity . . . is *relevant and helpful* to the defense of an accused, or is *essential to a fair determination* of a case, the privilege must give way.” *Roviaro v. United States*, 353 U.S. 53 (1957) (emphasis added). Our Supreme Court has held, “Public policy considerations for nondisclosure of an informant’s identity are absent where the informant openly participates in the criminal transaction.” *State v. Diamond*, 280 S.C. 296, 299, 312 S.E.2d 550, 551 (1984); *See McLawhorn v. North Carolina*, 484 F.2d 1 (4th Cir. 1973) (finding disclosure is required where an informant is an actual participant, particularly where he sets up the criminal transaction); *see also State v. Blyther*, 287 S.C. 31, 33, 336 S.E.2d 151, 152-53 (Ct. App. 1985) (finding “where . . . the informant is either a *material witness* to the crime or directly participates in it, disclosure may be required, particularly where, in a drug related crime, he is the *only witness to the transaction other than the buyer and the defendant*”) (internal citation omitted) (emphasis added).

In this case, contrary to the information contained in the search warrant affidavit, Officer Kent Donald of the Horry County Police Department admitted that the CI *never* purchased cocaine from the occupants of the residence at Stoneybrook Drive. R. 23, l. 22 – 39, l. 2. Specifically, Officer Donald stated that the CI gave Christopher Oliver the “police buy money” and that on three separate occasions the CI stayed in the car while Oliver allegedly purchased cocaine from individuals inside the Stoneybrook residence. R. 24, l. 14 – 29, l. 25. Therefore, the trial court erred in refusing to reveal the identity of the confidential informant because it was essential to a fair determination of Appellant’s case. *See Roviaro*, 353 U.S. 53; *see also McLawhorn*, 484 F.2d 1 (finding disclosure is required

where an informant is an actual participant, particularly where he sets up the criminal transaction); *Diamond*, 280 S.C. at 299, 312 S.E.2d at 551.

III. The trial court erred in refusing to recuse himself, upon motion by Appellant, when the trial court's impartiality might be questioned by ruling on the validity of a search warrant he previously issued.

Relevant Facts

Pre-trial, defense counsel argued, “[O]ur threshold problem with [the search warrant] is if we have the issuing judge making a determination about the sufficiency of the warrant[.]” R. 13, ll. 12-14. The trial court maintained that defense counsel should have raised this issue with a different judge, and defense counsel replied, “[T]he reason I didn’t do it is I don’t get to pick when the case gets called for trial[.]” R. 13, l. 24 – 23, l. 1. The trial court stated, “I’m not going to delay this trial with a jury waiting on a bunch of motions that you [defense counsel] could’ve heard last week on this issue.” R. 15, ll. 1-6.

Defense counsel recalled, “I couldn’t believe that he [the solicitor] was actually gonna [sic] call the case in front of you because . . . it never occurred to me in a million years that a judge who signed the search warrant could make a determination as to the validity of the search warrant.” R. 16, ll. 3-17. The trial court then noted that he believed defense counsel was trying to delay the trial and denied defense counsel’s motion. R. 16, l. 20 – 26, l. 7. In response, defense counsel stated, “Well, the motion you’re denying is to recuse yourself from consideration of the search warrant” and the trial court replied, “Which I decline to do.” R. 17, ll. 9-11.

The trial court ruled, “I conclude that I can certainly be impartial on a truth or falsity matter even though I was the issuing judge with regards to the search warrant. The issues are totally different. And I respectfully deny your motion. I decline to recuse myself” R. 21 ll. 3-11. After the jury found Appellant guilty of trafficking cocaine, defense counsel renewed the motion to recuse the trial court from determining the validity of the search

warrant, and the trial court denied the motion. R. 531, ll. 2-23.

Discussion

Rule 501, SCACR, Code of Judicial Conduct, Canon 3(E)(1) provides that “[a] judge should disqualify himself or herself in a proceeding in which the judge’s impartiality might be reasonably be questioned” In *Brent v. State*, 929 So.2d 952 (Miss. Ct. App. 2005), the Mississippi Court of Appeals held, “The trial judge committed manifest error in failing to recuse himself, despite his subjective pronunciations that he held no bias against [the defendant]” when that same trial judge “issued the search warrant that lead to [the defendant’s] arrest, and ultimately to the subsequent indictment that brought [the defendant] before [the trial judge.]”); *Cf. Floyd v. State*, 303 S.C. 298, 299 400 S.E.2d 145, 146 (1991) (granting a new PCR hearing because the judge who presided over his PCR hearing also presided over the trial from which PCR was sought and finding “a per se rule of recusal . . . will eliminate even the suggestion of partiality”).

The *Brent* Court found that Canon 3(E)(1) of the Code of Judicial Conduct disqualifies judges “in proceeds in which their impartiality might be questioned by a reasonable person knowing all the circumstances or for other grounds provided in the Code of Judicial Conduct or as otherwise provided by law[.]” *Brent*, 929 So.2d at 954. The *Brent* Court also found that Canon 3(E)(a) provides for disqualification “where a judge has personal knowledge of ‘disputed evidentiary facts concerning the proceedings.’ *Id.* Ultimately, the *Brent* Court held, “The problem created by this scenario is patently obvious. Not only *might* a reasonable person harbor doubts about the impartiality of the judge in this situation, we find that any reasonable person *should* have such doubts.” *Id.* at 955.

Here, Defense counsel argued prior to trial, “[O]ur threshold problem with [the search warrant] is if we have the issuing judge making a determination about the sufficiency of the warrant[.]” R. 13, ll. 12-14. The trial court subsequently ruled, “I conclude that I can certainly be impartial on a truth or falsity matter even though I was the issuing judge with regards to the search warrant. The issues are totally different. And I respectfully deny your motion. I decline to recuse myself” R. 21, ll. 3-11.

The same rationale applied in *Floyd v. State* can be applied in this case. Thus, the trial court erred in refusing to recuse himself, upon motion by Appellant, when the trial court’s impartiality might be questioned by ruling on the validity of a search warrant he previously issued. *See Brent*, 929 So.2d 952; Canon 2, CJC, Rule 501, SCACR (providing “a judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities”); Canon 3(E)(1), CJC, Rule 501, SCACR (providing “[a] judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned”).

IV. The trial court erred in refusing to grant a new trial because the cumulative effect of the errors were so prejudicial as to deprive Appellant of a fair trial.

In *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999), our Supreme Court held that an appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine. Specifically, the errors must adversely affect a defendant's right to a fair trial to qualify for reversal. *Id.* Yet, the Court has "stressed on more than one occasion, the Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Id.* (quoting *State v. Mitchell*, 330 S.C. 189, 199–200, 498 S.E.2d 642, 647–48 (1998)).

Even if this Court finds that the three previous errors do not require reversal, the cumulative effect of those errors in light of the Court's improper comments and rulings were so prejudicial as to deprive Appellant of a fair trial. *See Johnson*, 334 S.C. at 93, 512 S.E.2d at 803. For example: (1) the trial court permitted testimony and allowed the State to enter the videotape from the failure to stop for a blue light charge into evidence, despite that the charge was severed from this case; (2) the trial court denied defense counsel's motion for a mistrial during defense counsel's opening statement; (3) the trial court denied defense counsel's motion for a mistrial based on the trial court's comments regarding the courtroom disturbance; and (4) the trial court denied defense counsel's motion to dismiss based on the admitted destruction of evidence by the State. R. 7, l. 8 – 19, l. 21; 58, l. 21 – 97, l. 25; 110, l. 13 – 114, l. 2; 121, ll. 7-24; 123, ll. 9-13; 178, l. 8 – 179, l. 25; 456, l. 9 – 458, l. 19; 503, l. 4 – 532, l. 24; State's Exhibit #10 (Dash Cam Video). Accordingly, the trial court erred in refusing to grant a new trial because the cumulative effect of the errors were so prejudicial as to deprive Appellant of a fair trial. R. 531, l. 2 – 532, l. 21; *See Johnson*, 334 S.C. at 93, 512 S.E.2d at 803.

CONCLUSION

For the foregoing reasons, Appellant Alex Robinson respectfully requests that this Court reverse his conviction and sentence and remand this case to the Horry County Court of General Sessions for a new trial.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of June, 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."

June 18th, 2013



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

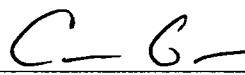
ALEX ROBINSON,

APPELLANT

APPELLATE CASE NO. 2011-203769

CERTIFICATE OF SERVICE

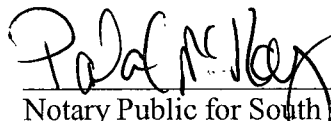
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Columbia, SC 29201 this 18th day of June, 2013.



Carmen C. Ganjeheh
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 18th day of June, 2013.



(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.