

IN THE SOUTH CAROLINA COURT OF APPEALS

Appellant Case No. 2012-213141

The State, Respondent

v.

Alphonso Chaves Thompson, Appellant.

REPLY BRIEF OF APPELLANT

Michael P. Scott
NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, SC 29402
PHONE: 843.577.9440
FACSIMILE: 843.414.8254
MScott@nexsenpruet.com

Robert M. Dudek
Chief Appellate Defender
South Carolina Commission on Indigent Defense,
Appellate Division
1330 Lady Street, Suite 401
P.O. Box 11589
Columbia, SC 29201-1589
PHONE: 803.734.1330
FACSIMILE: 803.734.1397
rdudek@sccid.sc.gov

Attorneys for Appellant

RECEIVED

SEP 23 2014

SC Court of Appeals

IN THE SOUTH CAROLINA COURT OF APPEALS

Appellant Case No. 2012-213141

The State, Respondent

v.

Alphonso Chaves Thompson, Appellant.

REPLY BRIEF OF APPELLANT

Michael P. Scott
NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, SC 29402
PHONE: 843.577.9440
FACSIMILE: 843.414.8254
MScott@nexsenpruet.com

Robert M. Dudek
Chief Appellate Defender
South Carolina Commission on Indigent Defense,
Appellate Division
1330 Lady Street, Suite 401
P.O. Box 11589
Columbia, SC 29201-1589
PHONE: 803.734.1330
FACSIMILE: 803.734.1397
rdudek@sccid.sc.gov

Attorneys for Appellant

RECEIVED
SEP 23 2014
SC Court of Appeals

TABLE OF CONTENTS

STATEMENT OF ISSUES ON APPEAL	1
INTRODUCTION.....	2
ARGUMENTS.....	4
I. The State’s response likely establishes probable cause for Appellant’s arrest, Inv. Raymond’s affidavit, did not.	4
II. The State has not and cannot establish that Judge Hayes had a “substantial basis” upon which to conclude that drugs would be found in the River Drive Home at the time of the search.	7
A. Links to the River Drive Home.....	7
B. Staleness.....	8
C. Reliability and Veracity of Knowledge	9
III. Inv. Raymond’s and S/A Davis’s judge shopping is the antithesis of good faith.	11
A. Inv. Raymond’s conduct was not objectively reasonable because he knew, or should have known, the affidavit was deficient.	11
B. South Carolina law dictates that the exception is not applicable here.....	12
IV. The State’s response utterly fails to demonstrate that Appellant constructively possessed a firearm or that there was a nexus between Appellant, a firearm, and the cocaine.	15
A. The State failed to produce sufficient evidence that Appellant constructively possessed any firearm.....	15
B. The State has failed to establish the requisite nexus between possession of the firearm and the underlying offense of trafficking cocaine.	17
CONCLUSION	20

TABLE OF AUTHORITIES

CASES

<u>Brown v. Illinois</u> , 422 U.S. 590 (1975).....	8
<u>Illinois v. Gates</u> , 462 U.S. 213 (1983)	4, 9
<u>Lopez v. United States</u> , 373 U.S. 427 (1963)	2
<u>Riley v. California</u> , 134 S. Ct. 2473 (2014).....	3
<u>State v. Austin</u> , 306 S.C. 9, 409 S.E.2d 811 (Ct. App. 1991).....	13
<u>State v. Covert</u> , 382 S.C. 205, 675 S.E.2d 740 (2009)	9
<u>State v. Gentile</u> , 373 S.C. 506, 646 S.E.2d 171 (S.C. Ct. App. 2007).....	6
<u>State v. Halyard</u> , 274 S.C. 397, 264 S.E.2d 841 (1980)	16
<u>State v. Heath</u> , 370 S.C. 326, 635 S.E.2d 18 (2006).....	15, 16
<u>State v. Jenkins</u> , 398 S.C. 215, 727 S.E.2d 761 (Ct. App. 2012).....	3
<u>State v. Johnson</u> , 302 S.C. 243, 395 S.E.2d 167 (1990)	9, 11, 12
<u>State v. Martin</u> , 347 S.C. 522, 556 S.E.2d 706 (Ct. App. 2001).....	12
<u>State v. McHoney</u> , 344 S.C. 85, 544 S.E.2d 30 (2001)	15
<u>State v. Nance</u> , 2013-UP-215, 2013 WL 8538653 (S.C. Ct. App. May 22, 2013).....	18
<u>State v. Robinson</u> , 408 S.C. 268, 758 S.E.2d 725 (Ct. App. 2014)	3, 10, 11, 14
<u>State v. Tabory</u> , 260 S.C. 355, 196 S.E.2d 111 (1973).....	16
<u>State v. Weaver</u> , 374 S.C. 313, 649 S.E.2d 479 (2007).....	3
<u>State v. Whitesides</u> , 397 S.C. 313, 725 S.E.2d 487 (2012).....	17
<u>United States v. Calandra</u> , 414 U.S. 338 (1974).....	14
<u>United States v. Ceballos-Torres</u> , 218 F.3d 409 (5th Cir. 2000)	19
<u>United States v. Leon</u> , 468 U.S. 897 (1984).....	8, 9, 10, 14
<u>United States v. McCall</u> , 740 F.2d 1331 (4th Cir. 1984).....	4, 7
<u>United States v. Wilhelm</u> , 80 F.3d 116 (4th Cir. 1996).....	13
<u>Wright v. Virginia</u> , 670 S.E.2d 772 (Va.Ct.App.2009)	17, 19
<u>Zurcher v. Sanford Daily</u> , 436 U.S. 547 (1978).....	12

STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in denying Appellant's motion to suppress all fruits of an illegal search where the search warrant was supported by a woefully inadequate affidavit that failed to show the reliability of the informants, was based on stale information and conclusory statements, and failed to demonstrate why there was reason to believe drugs existed in the place to be searched?
2. Did the trial court err in denying Appellant's motion to suppress his "confession" where that "confession" was coerced and flowed from an illegal arrest unsupported by probable cause?
3. Did the trial court err in denying Appellant's directed verdict motion as to the weapons charge where the State produced no evidence of constructive possession or, in the alternative, did not establish that a sufficient nexus existed between any weapon and a violent offense?

INTRODUCTION

The primary question raised by the State's response is this: does the good faith exception permit officers to fill an affidavit with a great deal of essentially useless and outdated facts and then shuttle that affidavit to several different judges before finding one that sticks? The answer to this question is undoubtedly "no." This "no" is of fundamental importance because the requirements of the Fourth Amendment "are not technical or unreasonably stringent;" they are "the bedrock rules without which there would be no effective protection of the right to personal liberty." Lopez v. United States, 373 U.S. 427, 464 (1963). Indeed, "[t]he Fourth Amendment was the founding generation's response to the reviled 'general warrants' and 'writs of assistance' of the colonial era." Riley v. California, 134 S. Ct. 2473, 2494 (2014). "Opposition to such searches was in fact one of the driving forces behind the Revolution itself." Id.

These bedrock privacy rules, which offer an even greater level of protection in South Carolina, State v. Weaver, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007), are especially important in cases such as this, when a neutral and detached magistrate is led astray by "officer[s] engaged in the often competitive enterprise of ferreting out crime." State v. Jenkins, 398 S.C. 215, 224, 727 S.E.2d 761, 766 (Ct. App. 2012). Competitive policing is most prevalent in the war on drugs and its danger is at its zenith when task force officers, who have access to both federal and state magistrates, judge shop.

As this Court has recently explained, where a warrant is issued without "any basis on which the issuing judge could find the information in the affidavit reliable" and "is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable" the good faith exception is "inapplicable" and the evidence "*must be*

suppressed.” State v. Robinson, 408 S.C. 268, 758 S.E.2d 725, 730 (Ct. App. 2014) (emphasis added, some internal quotation marks omitted). That is what occurred in this case.

Appellant agrees with the State that his case presents a “significant constitutional issue”—see State’s Fourth Extension request—and submits that his convictions should be reversed.¹

¹ At the outset, Appellant calls attention to the State’s recitation of facts. Although they span 6 pages, the vast majority of the State’s facts are entirely irrelevant. There is no reasonable dispute that this is a search and arrest warrant case and, therefore, the relevant facts are those found in the affidavits presented to the issuing judges. Curiously—or perhaps not—all but one sentence of the State’s facts section focuses exclusively on what was found at the River Drive Home *after* the search. Of course, in cases such as these “*something illegal*” is *always* found. The Fourth Amendment protects defendants from police conduct *before* that “*something*” is found. Indeed, if *nothing* was found, there would be no need for a defendant to invoke the Fourth Amendment. Consequently, the State’s attempt to provide a post hoc justification for its search should be given no weight whatsoever. See U.S. v. Foster, 634 F.3d 243, 249 (4th Cir. 2011) (“[T]he Government cannot rely upon post hoc rationalizations to validate those seizures that happen to turn up contraband.”); United States v. Martinez-Fuerte, 428 U.S. 543, 565 (1976) (explaining that the purpose of the Fourth Amendment is to “prevent hindsight from coloring the evaluation of the reasonableness of a search or seizure”); U.S. v. Montoya de Hernandez, 473 U.S. 531, 559 (1985) (Brennan, J. dissenting) (“Although we now know that De Hernandez was indeed guilty of smuggling drugs internally, such post hoc rationalizations have no place in our Fourth Amendment jurisprudence. . . .”).

ARGUMENTS

Investigator Raymond's affidavits are quiet simply indefensible. The reader who looks past the sheer volume of words immediately discovers that his search warrant affidavit has no substance whatsoever. And, his arrest warrant affidavit essentially says "he did it." But, Appellant did not "do it" because his arrest was based on a drug deal that Inv. Raymond admitted (and the State concedes) *did not occur*. This arrest—not the search of the River Drive Home—is what led to Appellant's confession.

The State—as did the U.S. Attorney's Office—appears to recognize the untenable situation its officers have created and asks this Court to apply the good faith exception to the exclusionary rule. Appellant will first briefly address the affidavits before turning to the State's position that its officers acted in good faith.

I. The State's response likely establishes probable cause for Appellant's arrest, Inv. Raymond's affidavit, did not.

Inv. Raymond submitted an affidavit and was given an arrest warrant based upon a drug deal on May 12, 2010 that did not occur. The State concedes this point but argues that probable cause for arrest was nonetheless established based on several facts that *were not* in the affidavit. (Resp. Br. p. 19). Specifically, the State submits that on May 12, "Appellant accepted \$9,000 as payment for 9 ounces of cocaine which he was to deliver to Jones." (Resp. Br. p. 19). This amount, says the State, "would equate to just over 255 grams, satisfying the amount "between 200 and 400 grams." (*Id.* at n.11). Thus, "[w]hile delivery of the cocaine had not yet been made, the cocaine had been sold." (*Id.*)

According to the State, the cocaine had been sold because "Jones had informed police that this was Appellant's "M.O.," that he would deliver cocaine within days of

collecting advance payment.” (*Id.*) And; the State explains, “Officers had observed the delivery of the money and Appellant’s promise to deliver the package the following day.” Therefore, the State concludes, “there was probable cause to believe that Appellant had done exactly what the arrest warrant said he had done that is “knowingly sell, manufacture, bring into the state and/or possess between 200 and 400 grams of cocaine.” (*Id.* at pp. 19-20).

Appellant accepts, for arguments sake, that even though no drugs were exchanged on May 12 the “cocaine had been sold” and, that the above facts established “probable cause to believe that Appellant had done exactly what the arrest warrant said he had done.” (*Id.*) The problem, for the State, is that *none* of the information it now submits established probable cause *is actually in the affidavit*. Again, the following is the entirety of Inv. Raymond’s arrest warrant affidavit:

Description of Offense: Drugs/Trafficking Cocaine, 200g or more, but less than 400 g.

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts.

That on May 12, 2010 in the county of Spartanburg, one Alphonso Chaves Thompson did knowingly sell, manufacture, bring into the state and/or possess between 200 and 400 grams of cocaine a Schedule II controlled substance without authority to do so.

Affiants belief is based upon police investigation.²

(R. p. 1). This affidavit says nothing about Appellant accepting \$9,000, his M.O., or any observations made by anyone. Indeed, it does not even mention Mr. Jones or any other

² Recall that different judges signed the arrest and search warrants and neither had access to or reviewed the other affidavit.

alleged buyer. Instead, it simply concludes that Appellant sold, manufactured, brought into the state, or possessed drugs on May 12. As noted in Appellant's opening brief, it would be difficult to conceive of a more barebones affidavit.³

The State also concedes that Appellant was arrested pursuant to the arrest warrant—not the drugs later found at the River Drive Home. Thus, without this affidavit and his subsequent arrest, Appellant could not have been in police custody and could not have later “confessed” to the drugs found at the River Drive Home. In short, even if the *search* of the River Drive Home was lawful—and it was not—Appellant's *seizure* was patently unlawful. Without Appellant's seizure, there is no confession. Without Appellant's confession, his convictions must be reversed because the only evidence presented at trial linking Appellant to the drugs—as the assistant solicitor admitted—was his confession.⁴ As such, even if this Court were inclined to find the affidavit supporting the search warrant sufficient, Appellant's convictions should be reversed based on this fatally deficient arrest warrant.⁵

³ Inv. Raymond did not supplement his affidavit with sworn testimony and the State has not argued otherwise.

⁴ Again, Appellant's written and recorded confessions do not mention any weapons.

⁵ Appellant's argument on this issue is preserved. At the suppression hearing and at trial, trial counsel repeatedly argued that the search was improper *and* that Appellant's confession was not freely and voluntarily made. Indeed, the State agrees. (Resp. Br. p. 19). Even a cursory review of the lengthy suppression hearing reveals that the trial court understood trial counsel was objecting to literally every step of the State's investigation. And, certainly, a confession following an illegal arrest is not freely and voluntarily made. Accordingly, the issue is preserved. See *State v. Miller*, 397 S.C. 630, 635-46, 725 S.E.2d 724, 727 (Ct. App. 2012) (noting a similarly unpersuasive preservation argument and explaining that “[e]rror preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review”).

II. The State has not and cannot establish that Judge Hayes had a “substantial basis” upon which to conclude that drugs would be found in the River Drive Home at the time of the search.

This Court must ensure that the issuing judge had a substantial basis upon which to conclude that drugs would be found in the River Drive Home at the time of the search. State v. Baccus, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006).⁶ A reviewing Court can conclude that a “substantial basis” existed by examining the totality of the circumstances, including the reliability and veracity of informants, links to the property to be searched, basis of knowledge, and timeliness.

Although this test is not to be “rigidly exacted in every case,” State v. Bellamy, 323 S.C. 199, 203, 473 S.E.2d 838, 841 (Ct. App. 1996), Inv. Raymond’s affidavit simply provided no basis—let alone a substantial basis—to conclude that drugs would be found at the River Drive Home on the day of the search. As such, the warrant was deficient and Appellant’s convictions should be reversed.

A. Links to the River Drive Home

Both parties seem to be in agreement that out of the entire page and a half affidavit, the only information linking drugs and the River Drive Home is Diaz-Arroyo’s claim that his brother in law would deliver drugs to Appellant at River Drive. (Resp. Br. at p. 14). Indeed, the River Drive Home is mentioned only three times in the affidavit and only once regarding drugs.

⁶ In its response, the State skews this standard of review when it states, “[g]iven all the circumstances set forth in the affidavit, clearly there was a fair probability that evidence of a crime would be found at River Drive.” (Resp. Br. at p. 9). Of course, an affidavit cannot simply set forth a fair probability that evidence of some amorphous crime would be found at the River Drive Home. Instead, the standard is whether the magistrate had a *substantial basis* to conclude that *drugs* would be found at the home *at the time of the search*.

Furthermore, there is no indication in the affidavit that police witnessed Appellant *receiving* cocaine at the River Drive Home, as alleged by Diaz-Arroyo, nor is there any evidence that police or anyone else witnessed Appellant *selling* cocaine out of the River Drive Home. In fact, nothing in the affidavit ever indicates that Appellant conducted *any* drug transactions at the River Drive Home. This leaves the State with Diaz-Arroyo, a drug dealer who allegedly told them 15 months prior that his brother-in-law delivered drugs to the River Drive Home. This statement cannot be and is not, enough. See State v. Gentile, 373 S.C. 506, 514, 646 S.E.2d 171, 175 (S.C. Ct. App. 2007) (“Even though the officers verified the pattern of traffic at Gentile's residence, this, without additional investigation into the residence, was not sufficient to establish that narcotics activity was taking place.”).

B. Staleness

In determining whether information is stale, “the critical issue is whether there was probable cause to believe that the evidence was *then located* at the premises named in the warrant.” U.S. v. McCall, 740 F.2d 1331, 1337 (4th Cir. 1984). The information regarding the delivery of drugs to the River Drive Home—provided by Diaz-Arroyo in February 2009—was received 15 months prior to Inv. Raymond’s warrant application. (R. p. 4). In response, the State relies on Appellant’s conduct in the two days prior to the search to support its argument that the alleged drug activity “was ongoing.” (Resp. Br. at p. 13). However, the “drug activity” immediately preceding the warrant application—in which the State concedes no drugs were actually exchanged, *id.*—did not occur at or in the vicinity of the River Drive Home. Thus, the only evidence presented in the affidavit connecting Appellant to the River Drive Home in the six months prior to the search was

Inv. Raymond's observations that he frequently came and went from his parents' house. This was not sufficient to establish probable cause to believe that *at the time the warrant was executed* drugs would be found *at the River Drive Home*. See, e.g., State v. Adolphe, 314 S.C. 89, 91-92 (Ct. App. 1994) (rejecting affidavit where confidential informant identified individual as having sold cocaine within previous 48 hours). The only information placing such drugs at the River Drive Home, more than a year old at the time of the search was stale and cannot serve as the basis for probable cause.

C. Reliability and Veracity of Knowledge

Taking the same position as the Assistant Solicitor in this case, the State's reliability argument focuses almost entirely on various criminal informants corroborating each other about who Appellant was and what type of truck he drove. Even accepting that these two details could provide sufficient indicia of reliability, and they do not, nothing in the State's response explains why the informants were to be believed or—perhaps more importantly—that the informants themselves believed that drugs *were in the River Drive Home*.

The State attempts to establish reliability by claiming that “it *appears* each of these nine individuals knew the information about Appellant firsthand from their own dealings with him.” (Resp. Br. at p. 12 (emphasis added)). However, the State is merely speculating as to the personal knowledge of the informants. Notably, the affidavit includes no information to suggest that either of the informants linking Appellant to the River Drive Home had personal dealings with him. For example, the affidavit states that “in late 2008 Spartanburg City Police had an informant who came forward and stated the ‘Poo Bear’ had a residence at the end of River St. on the left hand side and that ‘Poo

Bear' was a large scale cocaine Trafficker.” (R. p. 4). No explanation for who this informant was, how he knew Appellant was a “large scale cocaine trafficker” or whether this informant had ever provided any truthful information in the past.

Although Inv. Raymond submitted a lengthy affidavit, he did not provide the issuing judge with a substantial basis upon which to find probable cause existed as to the place to be searched and the things to be searched for. Appellant's convictions should be reversed.

III. Inv. Raymond's and S/A Davis's judge shopping is the antithesis of good faith.

Seeking to cure its deficient affidavit, the State relies on the good faith exception to the exclusionary rule. (Resp. Br. at p. 15). In United States v. Leon, the Supreme Court held that suppression of evidence is not mandated if such evidence is obtained “by officers reasonably relying on a warrant issued by a detached and neutral magistrate.” United States v. Leon, 468 U.S. 897, 913 (1984). However, an officer’s belief must be *objectively* reasonable in order for the good faith exception to apply, meaning a court’s “good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate’s authorization.” Id. at 922 n.23. “In making this determination, all of the circumstances—including whether the warrant application had previously been rejected by a different magistrate—may be considered.” Id. (emphasis added).

Furthermore, the good faith exception does not apply where a warrant is based on an affidavit that is “so lacking indicia of probable cause as to render official belief in its existence entirely unreasonable.” Leon, 468 U.S. at 923 (quoting Brown v. Illinois, 422 U.S. 590, 610-11 (1975)); see also State v. Johnson, 302 S.C. 243, 248–49, 395 S.E.2d 167, 170 (1990).

A. Inv. Raymond's conduct was not objectively reasonable because he knew, or should have known, the affidavit was deficient.

Investigator Raymond’s conduct in obtaining the search warrant was by no means objectively reasonable. Having been denied by not one, but two federal magistrates, (R. p. 10, ll.13–18), Inv. Raymond knew, or should have known, that the affidavit was deficient. Yet, he and his team continued to search until they found a judge willing to

approve their request. Although the State argues that he followed the technical statutory requirements for obtaining the warrant, this does not mean he acted in good faith in doing so, as he knew or should have known the affidavit was lacking probable cause even though he eventually found a judge to sign it. See State v. Covert, 382 S.C. 205, 211, 675 S.E.2d 740, 744 (2009) (“[T]he good faith exception to the exclusionary rule applies in cases where officers make *a good faith attempt* to comply with the statute’s affidavit requirements.” (emphasis added)).

B. South Carolina law dictates that the exception is not applicable here.

This Court has recently addressed whether the good faith exception applied in a factually similar case. In State v. Robinson, this Court rejected the State’s argument that the good faith exception was applicable because the affidavit serving as the basis for the warrant failed to establish the informant’s credibility. Robinson, 408 S.C. 268, 758 S.E.2d 725.

On all fours with this case, the officer in Robinson failed to include any evidence in the affidavit from which the magistrate could assess the reliability of the information. Id., 758 S.E.2d at 729–30. Thus, “given the lack of any basis on which the issuing judge could find the information in the affidavit reliable, the affidavit [was] so lacking in

indicia of probable cause as to render official belief in its existence entirely unreasonable” and the good faith exception was inapplicable. *Id.*, 758 S.E.2d at 730.⁷

Similarly, in *State v. Johnson*, our Supreme Court held that the good faith exception did not apply where the affidavit did not include sufficient details about the reliability of information supplied by an informant. 302 S.C. 243, 395 S.E.2d 167 (1990). The affidavit that served as the basis for the search warrant in *Johnson* stated that “a confidential informant had seen a quantity of cocaine in Johnson’s home within the past seventy-two (72) hours.” *Id.* at 245, 395 S.E.2d at 168. Notably absent from the affidavit and, again, on all fours with this case, was any indication that such information was reliable or had been corroborated. *Id.* at 247, 395 S.E.2d at 169. Thus, the good faith exception did not validate the otherwise unlawful search. *Id.*, 395 S.E.2d at 170

The affidavit in this case, like the ones in *Robinson* and *Johnson*, is so deficient that it lacks any indicia of probable cause, and *Leon* expressly precludes application of the good faith exception. While Investigator Raymond cleverly submitted a lengthier affidavit than those in both *Robinson* and *Johnson*, it nonetheless lacked any information regarding the reliability of the informants and completely fails the totality of the circumstances test. See, e.g., *State v. Austin*, 306 S.C. 9, 18, 409 S.E.2d 811, 816 (Ct. App. 1991) (holding that the good faith exception was inapplicable because “the affidavit

⁷ On page 16 of its brief, the State argues that whether the factual discrepancies between the DEA-6’s and the affidavit are probative of good faith is “not preserved for review.” (Resp. Br. at p. 16). Appellant is unsure how to address this argument except to note that it would be impossible to specifically raise an argument regarding the good faith exception to the exclusionary rule where—as here—the trial court *did not* suppress the evidence. In other words, the good faith exception is an argument for the State to make when evidence *is* suppressed. In any event, the State plainly agrees that the trial court reviewed the DEA-6’s and they are in the record. As such, this Court can consider them in any way it deems appropriate.

contained no information, circumstantial or otherwise, regarding the reliability of the informant. Nor did the affidavit say any of the information supplied by the informant had been corroborated").⁸

⁸ If ever a case called for the deterrent effect of the exclusionary rule, this is that case. After being rebuffed at least twice, Inv. Raymond continued to search for a rubber stamp. Allowing such forum shopping to stand, and upholding a search for which no probable cause existed, will set a dangerous precedent for future police behavior.

IV. The State's response utterly fails to demonstrate that Appellant constructively possessed a firearm or that there was a nexus between Appellant, a firearm, and the cocaine.

“A defendant is entitled to a directed verdict when the State fails to present evidence of the offense charged.” State v. Heath, 370 S.C. 326, 329, 635 S.E.2d 18, 19 (2006) (citing State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001)). The State has failed to present any evidence that Appellant constructively possessed any firearm, much less that he did so during the commission of a violent offense.⁹ Thus, the trial court erred by declining to grant Appellant's directed verdict motion as to the charge of possession of a weapon during a violent crime.

A. The State failed to produce sufficient evidence that Appellant constructively possessed any firearm.

To demonstrate constructive possession, “the State must show a defendant had dominion and control, or the right to exercise dominion and control” over the firearm. State v. Halyard, 274 S.C. 397; 400, 264 S.E.2d 841, 842 (1980). “Mere presence is insufficient to prove constructive possession.” Heath, 370 S.C. at 329, 635 S.E.2d at 19 (citing State v. Tabory, 260 S.C. 355, 364, 196 S.E.2d 111, 113 (1973)).

In Heath, our Supreme Court addressed a similar factual scenario. The defendant had been convicted of trafficking crack cocaine based on the discovery of the drug in a car-washing mitt near the back door of the house where he lived. Heath, 370 S.C. at 329, 635 S.E.2d at 19. The Court held that the State failed to produce sufficient evidence indicating that the defendant exercised dominion and control over the area where the drugs were found. Id. at 330, 635 S.E.2d at 19. While the defendant resided at the house,

⁹ The State has conceded that there was no actual possession. (Resp. Br. at p. 26). Thus, there must be constructive possession for the conviction to stand.

his mother was the actual owner. Id. Thus, the Court found that, arguably, the defendant “merely had a *right to access* the area where the crack was found, not actual dominion and control of the property.” Id. (emphasis added).

Here, the State similarly failed to demonstrate that Appellant constructively possessed any of the firearms found at the River Drive Home. The State bases its erroneous conclusion that Appellant constructively possessed a firearm on the following pieces of evidence: Appellant’s statement that the gun was his (though he subsequently said he had given it to his father), a piece of mail addressed to Appellant (at a different address) found in the bedroom where the firearm was located, that Appellant had some personal belongings at the Home, that Appellant had a key to the Home, and that Appellant admitted he had access to the Home. (Resp. Br. at p. 26). However, this evidence only demonstrates that Appellant had the right to access the home, not that he exercised dominion and control over the property.

The State concludes—incorrectly—that because “the weapons were found in areas of the home accessible to anyone with the free access to the home which Appellant enjoyed,” there was enough evidence to support an inference of constructive possession. Id. (emphasis added). Yet, Heath clearly distinguishes mere access from the control and dominion required to establish constructive possession. Like in Heath, Appellant may have had a right to access the home, but his parents retained ultimate control and dominion over the property. Thus, the trial court should have granted Appellant’s motion for directed verdict.

B. The State has failed to establish the requisite nexus between possession of the firearm and the underlying offense of trafficking cocaine.

Even assuming Appellant constructively possessed a firearm—which he did not—the State failed to prove the requisite nexus between possession of a firearm and the underlying violent crime. In State v. Whitesides, 397 S.C. 313, 725 S.E.2d 487 (2012), our Supreme Court explained that the nexus requirement can be established by showing that the firearm (1) “furthered, advanced, or helped” in the commission of the crime; (2) was “accessible to the trafficker” and provided a defense against potential robbers; or (3) if the trafficker let everyone know that he was armed; to lessen the chances that a robbery would even be attempted.

Only one case in this state has addressed this nexus issue since Whitesides. In State v. Nance, 2013-UP-215, 2013 WL 8538653 (S.C. Ct. App. May 22, 2013),¹⁰ Nance was convicted of possessing a firearm during the commission of a violent crime, in this case two counts of second-degree violent burglary. Id. at *1, *2. The police found the gun, along with stolen property, in Nance’s car, while he was in the process of burglarizing two businesses. Id. at *3. This Court held that the State had sufficiently established a nexus between the defendant’s possession of a firearm and the violent crime because Nance “kept the handgun within reach *as he put stolen goods into the car.*” Id. (emphasis added). Thus, “the gun ‘furthered, advanced, or helped in the commission’ of the burglaries by providing a possible defense against anyone who either confronted Nance *during* the crime or attempted to take the stolen property away from him.” Id.

¹⁰ Appellant recognizes that Nance is unpublished and, as such, is not binding precedent. Appellant cites it here only for illustrative purposes.

(emphasis added). Not only was the handgun easily accessible to Nance, but it was also recovered during the commission of the actual violent offense.

Neither of these links—or any similar link—was provided here. Here, the weapons were found at Appellant’s parents’ home, while Appellant was not present, meaning the firearm was not readily accessible to Appellant, as it was in Nance. (R. p. 118, ll.3-5, p. 132 ll.18-21). Moreover, the weapons were not recovered during the commission of any crime. The State contends that the presence of guns and other security measures indicates that “the weapons were in place to protect the illicit business of trafficking narcotics.” (Resp. Br. at 27). This argument is unavailing for several reasons.

First, the State attempts to tie all the weapons in to this overall security scheme. Yet, the only gun the State even attempted to link to Appellant—the pistol—was not found in the master bedroom, where the other guns and security system were. (R. p. 172, l.3). Instead, the unloaded pistol¹¹ was found in a bedroom closet. Additionally, the pistol—and all the weapons for that matter—were located nowhere near the cocaine, which was found in a *detached* garage. Thus, the weapons and the drugs were not in

¹¹ At trial, Lieutenant Cooper testified that the pistol, the firearm the State attributes to Appellant, was found along with a magazine that fits in the butt of the gun, as well as 9mm bullets that came from the magazine. (R. p. 118, ll.3–18). However, there is no testimony indicating that the gun was actually loaded at the time it was found. In fact, later testimony by Lieutenant Cooper clearly identified “shotgun shells that were with the shotgun *loaded* in the gun.” (R. p. 121, ll. 4 -5) (emphasis added). Presumably, if the magazine and bullets found with the pistol were actually *loaded* in the pistol, Lieutenant Cooper would have said as much, like he did when discussing the shotgun. Additionally, nothing in the State’s Brief indicates otherwise.

close proximity to one another.¹² The evidence does not establish that any weapon was easily accessible to Appellant for the purpose of protecting the cocaine located in the detached garage.¹³

¹² The cases cited by the Court in Whitesides both focus on the proximity of the gun to the drugs. In Wright v. Com., the Court of Appeals of Virginia upheld a weapons conviction under a nearly identical statute, noting that police “found [Appellant’s] loaded firearm in a holster attached to the head of his bed, just where appellant said it would be, within easy reach of where he slept . . . [and] police found a substantial quantity of cocaine—over 100 grams—in close proximity in the pocket of a jacket in the bedroom’s closet.” Wright, 670 S.E.2d at 782. The Court of Appeals held that the evidence provided “the necessary nexus between appellant’s constructive possession of the handgun and drugs, which were *in close proximity* to one another in his bedroom.” Id. (emphasis added). In U.S. v. Ceballos-Torres, the Court of Appeals of the Fifth Circuit upheld a weapons conviction under a similar federal statute. In Ceballos, the Fifth Circuit identified several factors that are useful when considering whether possession of a gun furthers advances or helps a drug trafficking offense, including “the type of drug activity that is being conducted, accessibility of the firearm, the type of weapon, whether the weapon is stolen, the status of the possession (legitimate or illegal), whether the gun is loaded, *proximity to drugs or drug profits*, and the time and circumstances under which the gun is found.” United States v. Ceballos-Torres, 218 F.3d 409, 414–15 (5th Cir. 2000) (emphasis added). In that case, the Fifth Circuit noted that the evidence sufficiently established that the firearm was used in furtherance of drug trafficking:

The weapon was loaded and easily accessible in Ceballos's apartment, and he confessed to ownership of the firearm. It was possessed illegally. And it was possessed in the apartment along with a substantial amount of drugs and money. Together, these factors reasonably support a finding that Ceballos's gun protected his drugs and money against robbery.

Id. at 415. In the present case, the gun was not loaded or easily accessible to Appellant, the gun was not found in Appellant’s residence, Appellant’s confession made no mention of the weapons, there is no evidence that the gun was possessed illegally, and the gun was not found in close proximity to the cocaine, which was located in a detached garage. All of these factors distinguish the present case from Nance, Wright, and Ceballos, and indicate that there is no nexus between the gun and the underlying offense of trafficking cocaine in this case.

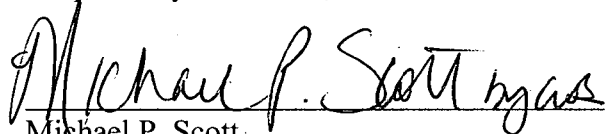
¹³ The only drugs found anywhere near the pistol was marijuana, but the weapons charge was based on the cocaine trafficking, not the possession of the marijuana. (R. pp. 358-59)

The State fails to provide any evidence that Appellant had access to the gun during any alleged cocaine trafficking, or that Appellant ever told others that he carried a gun in order to let it be known that he was armed during drug transactions. Thus, the State has not established a sufficient nexus between the firearm and the underlying violent crime of cocaine trafficking so as to warrant conviction on that charge. Therefore, Appellant was entitled to a directed verdict as to the charge of possessing a weapon during the commission of a violent crime.

CONCLUSION

For the reasons set forth herein and in his opening brief, Appellant requests that his convictions be REVERSED.

Respectfully submitted,



Michael P. Scott
NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, SC 29402
PHONE: 843.577.9440
FACSIMILE: 843.414.8254
MScott@nexsenpruet.com

Robert M. Dudek
Chief Appellate Defender
South Carolina Commission on Indigent
Defense, Appellate Division
1330 Lady Street, Suite 401
P.O. Box 11589
Columbia, SC 29201-1589
PHONE: 803.734.1330
FACSIMILE: 803.734.1397
rdudek@sccid.sc.gov

Attorneys for Appellant

IN THE SOUTH CAROLINA COURT OF APPEALS

Appellant Case No. 2012-213141

The State, Respondent

v.

Alphonso Chaves Thompson, Appellant.

PROOF OF SERVICE FOR FINAL REPLY BRIEF OF APPELLANT

I, Michael P. Scott, hereby certify that I have served a copy of the PROOF OF SERVICE FOR FINAL REPLY BRIEF OF APPELLANT upon counsel for the other parties by mailing copies to them at the address below via the United States Mail this 22nd day of September, 2014.

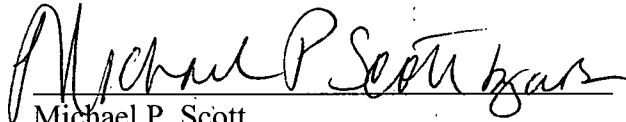
Mr. Alphonso Chaves Thompson, #349414
McCormick Correctional Institution
386 Redemption Way
McCormick, SC 29899

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Mary S. Williams, Esquire
Assistant Attorney General
Office of the Attorney General
PO Box 11549
Columbia, SC 29211

Robert M. Dudek
Chief Appellate Defender
South Carolina Commission on Indigent
Defense
Appellate Division
1330 Lady Street, Suite 401
PO Box 11589
Columbia, SC 29201-1589

RECEIVED
SEP 23 2014
SC Court of Appeals



Michael P. Scott

NEXSEN PRUET, LLC

205 King Street, Suite 400 (29401)

P.O. Box 486

Charleston, SC 29402

PHONE: 843.577.9440

FACSIMILE: 843.414.8254

MScott@nexsenpruet.com

Attorney for Appellant