

ORIGINAL.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Oconee County

Alexander S. Macaulay, Circuit Court Judge

RECEIVED

SEP 29 2014

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

DAN TEMPLE,

APPELLANT.

APPELLATE CASE NO. 2013-000663

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The Trial Court erred in denying Appellant's motion to suppress the drug evidence seized during the execution of the search warrant where the affidavit for the search warrant was based on information from a confidential informant that he had received drugs from Appellant and where such affidavit contained no information about the reliability of this informant.

STATEMENT OF THE CASE

On January 23, 2013, Appellant Dan Lavert Temple was indicted by the Oconee County Grand Jury for (1) possession of intent to distribute crack cocaine, third offense in violation of S.C. CODE ANN. § 44-53-375; and (2) possession of a controlled substance, second offense, in violation of S.C. CODE ANN. § 44-53-370. R.269.

Appellant was tried before the Honorable Alexander S. Macaulay and a jury on March 18-21, 2013. R. 1. Appellant was represented by R. Delane Rosemond, and the State was represented by Assistant Solicitors Lindsey S. Simmons and Blair S. Stoudemire. Tr. 1.

On March 21, 2013, the jury found Appellant guilty of (1) the lesser included offense of possession of crack cocaine; and (2) possession of a controlled substance. R. 244, ll. 8-18. Judge Macaulay sentenced Appellant to ten years for possession of crack cocaine, third offense and one year for possession of a controlled substance, second offense. Judge Macaulay also sentenced Appellant to five years for a probation violation. The sentences are to run consecutive to each other for a total of sixteen years. R. 255, ll. 4-25.

Appellant timely filed and served a Notice of Appeal on March 23, 2013.

STATEMENT OF FACTS

On July 24, 2012, Officer Tim Hunnicutt of the Seneca Police Department obtained a search warrant to search Room 103 of the Town and Country Motel located at 320 Bypass 123, Seneca, South Carolina. R. 107, l. 14 – 108, l. 20. Officer Hunnicutt testified that he expected to find Appellant at this location. R. 108, l. 24 – 109, l. 1. In his affidavit supporting the search warrant, Officer Hunnicutt averred:

3. That on July 17, 2012 an undercover operative working under the direction of the Seneca Police Department was distributed a quantity of crack cocaine from [Appellant] in the area of the 100 block of Bypass 123 Seneca, SC.
4. That on July 17, 2012 an undercover operative working under the direction of the Seneca Police Department/Oconee Sheriff's Office was distributed a quantity of crack cocaine from [Appellant] in the area of the 100 block of Bypass 123 Seneca, SC.
5. That on July 23, 2012 an undercover operative working under the direction of the Seneca Police Department was distributed a quantity of crack cocaine from [Appellant] in the area of the 1000 block of Bypass 123 Seneca, SC.
6. Within the last 72 hours an undercover operative working under the direction of the Seneca Police Department was distributed a quantity of lortabs from [Appellant] at 318 Bypass 123 in Seneca, SC. [Appellant] was seen walking to and from the Town & County Motel.
7. Within the last 72 hours an undercover operative working under the direction of the Seneca Police Department was given a counterfeit 100 dollar bill by [Appellant] at 318 Bypass 123. He asked the undercover operative to take it to a store and exchange it for real US currency. The undercover operative turned the counterfeit money over to agents. Agents gave the undercover operative 100 dollars in documented funds. The undercover operative met with [Appellant] at the Town & Country Motel and gave [Appellant] the documented funds. [Appellant] was observed by agents exiting and re-entering room 103 at Town & County Motel.

8. Based upon the Undercover Operation on the above listed dates, establishing a continuing criminal enterprise, the affiant believes illegal drugs, proceeds from illegal drug transactions, and drug paraphernalia and counterfeit money will be present at this residence.

R.264 (Court's Ex. 1).

The next day, on July 25, 2012 at approximately eight in the morning, officers executed the search warrant at Room 103 of the Town and Country Motel. R. 35, l. 22 – 111, l. 19; 108, ll. 21-22; 264 [Return to Search Warrant (Court's Ex. 1)]. The officers rammed their way into the motel room and found Appellant lying in bed on the side closest to the door. R. 37, ll. 12-24. The officers yelled at Appellant to put his hands up. R. 38, ll. 106. Officer Mike Teramano then jumped on the bed to secure Appellant. R. 41, ll. 2-25. At that point, Investigator B.J. McClure observed either a purplish or bluish-color prescription bottle fall out of the bed onto the floor closest to the door. R. 38, ll. 5 – 10. Investigator McClure did not see exactly where this pill bottle came from and only remembered that this pill bottle fell from the bed. R. 40, l. 23 – 41, l. 1; 42, ll. 3-7. Officer Hunnicutt also observed this pill bottle on the floor but he too did not see from what direction the bottle came. R. 142, ll. 7-19. It was later determined that this pill bottle contained 1.10 grams of crack cocaine. R. 52, ll. 24-25; 85, ll. 18-22. Officers did not have this bottle examined for fingerprints. R. 68, ll. 18-23.

Officers found a single rock-like substance on the nightstand on the opposite side of the bed where officers saw Appellant. R. 52, ll. 14-21; 55, l. 25 – 131, l. 4; R. 110, ll. 2 -5; 127, ll. 7-10. Officer Hunnicutt also observed two crack pipes on this nightstand, along with ten yellow pills of alprazolam, also known as Xanax. R. 110, ll. 5-6; 128, ll. 7-13; 161, ll. 1 – 18. None of Appellant's personal items were found on the nightstand with the rock-like

substance, crack pipes, and Xanax pills. R. 56, ll. 8-24. The rock-like substance found was determined to be 0.12 grams of crack cocaine. R. 160, ll. 11-16.

Officers found Appellant's girlfriend, Crystal Henry, behind the door to the motel room. R. 42, ll. 18-25. Crystal Henry testified that she had been in a relationship with Appellant and had been with him for a little over a year and a half at the time officers executed the search warrant. R. 60, ll. 7-13. She and Appellant lived together in Room 103 of the Town & Country Motel. R. 60, ll. 14-15. Following the execution of the search warrant, Crystal Henry was also charged with possession with intent to distribute crack cocaine and possession of Xanax. R. 64, l. 25 – 65, l. 3.

On the day officers executed the search warrant, Crystal Henry had been getting high. She testified that a crack pipe found in the room by officers did belong to her. R. 61, ll. 10-18. She further testified that the piece of crack found on the nightstand beside the bed also belonged to her. R. 61, ll. 19-21; 63, ll. 16-19; 67, ll. 2-4; 72, ll. 4-5. She denied that any other drugs found in the room, including the other crack cocaine and Xanax, belonged to her. R. 61, l. 19 – 62, l. 12.

James Willie Walker also testified at trial. He had been a classmate of Appellant and had known him for a long time. R. 181, ll. 8-21. He testified that on July 24, 2012, the night before officers executed the search warrant at Appellant's motel room, Crystal Henry asked him to take her to Pendleton, South Carolina to buy some crack. R. 181, l. 22 – 183, l. 2. Walker drove Crystal Henry and Appellant to Pendleton where Crystal Henry purchased two grams of crack. R. 183, ll. 3-12.

Appellant and Crystal Henry were both charged with possession with intent to distribute crack cocaine and possession of a controlled substance. R. 64, l. 25 – 65, l. 3.

Appellant was convicted by the jury on the lesser included offense of possession of crack cocaine and possession of a controlled substance. Crystal Henry's charges were still pending at the time of Appellant's trial. R. 65, ll. 13 – 18.

ARGUMENT

The Trial Court erred in denying Appellant's motion to suppress the drug evidence seized during the execution of the search warrant where the affidavit for the search warrant was based on information from a confidential informant that he had received drugs from Appellant and where such affidavit contained no information about the reliability of this informant.

During pre-trial motions, defense counsel for Appellant moved to suppress the drugs found in Appellant's motel room where the affidavit in support of the search warrant was not supported by probable cause and lacked any information as to the informant's reliability. R. 10, ll. 7-16; 14, l. 7 – 15, l. 2. The search warrant was based solely upon the alleged receipt of drugs from Appellant to a confidential informant:

3. That on July 17, 2012 an undercover operative working under the direction of the Seneca Police Department was distributed a quantity of crack cocaine from [Appellant] in the area of the 100 block of Bypass 123 Seneca, SC.
4. That on July 17, 2012 an undercover operative working under the direction of the Seneca Police Department/Oconee Sheriff's Office was distributed a quantity of crack cocaine from [Appellant] in the area of the 100 block of Bypass 123 Seneca, SC.
5. That on July 23, 2012 an undercover operative working under the direction of the Seneca Police Department was distributed a quantity of crack cocaine from [Appellant] in the area of the 1000 block of Bypass 123 Seneca, SC.
6. Within the last 72 hours an undercover operative working under the direction of the Seneca Police Department was distributed a quantity of lortabs from [Appellant] at 318 Bypass 123 in Seneca, SC. [Appellant] was seen walking to and from the Town & County Motel.
7. Within the last 72 hours an undercover operative working under the direction of the Seneca Police Department was given a counterfeit 100 dollar bill by [Appellant] at 318 Bypass 123. He asked the undercover operative to take it to a store and exchange it for real US currency. The undercover operative turned the counterfeit money over to agents. Agents gave the undercover operative 100 dollars in documented funds. The undercover operative met with [Appellant]

at the Town & Country Motel and gave [Appellant] the documented funds. [Appellant] was observed by agents exiting and re-entering room 103 at Town & County Motel.

8. Based upon the Undercover Operation on the above listed dates, establishing a continuing criminal enterprise, the affiant believes illegal drugs, proceeds from illegal drug transactions, and drug paraphernalia and counterfeit money will be present at this residence.

R.264 (Court's Ex. 1).

Defense counsel further argued that there was no indication in the search warrant that the informant received drugs from Appellant in a properly conducted controlled buy. R. 16, l. 13 – 17, l. 10. The Trial Court disagreed and denied Appellant's motion to suppress the drug evidence. R. 25, ll. 2-3.

In a case with comparable facts, State v. Philpot, 317 S.C. 458, 454 S.E.2d 905 (Ct. App. 1995) this Court held that a search warrant affidavit was insufficient to establish probable cause for a search of the defendant's residence. In Philpot, an officer of the Pickens County Sheriff's Department signed an affidavit to obtain a search warrant for marijuana and marijuana paraphernalia at the residence of the defendant. The affidavit contained the following statement:

Within the past 72 hours, a confidential informant has seen a quantity of marijuana in the residence to be searched. Also in the past, agents with the Special Operations Div. of the Pickens County Sheriff's Office have received information the [sic] one of the persons who lives at the residence, Jim Philpot, is involved in illicit activity.

317 S.C. at 460, 454 S.E.2d at 906.

Based upon this affidavit, the magistrate issued the search warrant. Officers of the sheriff's department executed the search warrant and seized evidence of marijuana manufacturing and possession. Id.

The defendant moved to suppress the evidence seized during the search because the name of the confidential informant had not been disclosed and the affidavit for the search warrant was

devoid of information as to the informant's reliability. The trial court denied the motion. During cross-examination, the defense counsel asked the officer presenting the affidavit whether he told the magistrate why this informant was dependable and reliable. The officer replied that he had presented the magistrate with a statement from the informant. Defense counsel moved for a production of the statement, and the trial court reviewed the statement and ruled there was nothing in it which would assist the defense and denied the motion to produce. Id. at 460, 454 S.E.2d at 906-07.

On appeal, the defendant asserted that the evidence seized during the execution of the search warrant should have been suppressed because the warrant was not supported by probable cause. More specially, the defendant attacked the failure of the affidavit to address the veracity of the confidential informant. This Court agreed with the defendant's position. Id. at 460, 454 S.E.2d at 907.

This Court first set forth the law regarding the issuance of search warrants by magistrates. "The task of a magistrate when determining whether to issue a warrant is to make a practical, common sense decision as to whether, under the totality of the circumstances set forth in the affidavit, there is a fair probability that evidence of a crime will be found in a particular place. State v. Adolphe, 314 S.C. 89, 441 S.E.2d 832 (Ct. App. 1994). This decision includes consideration of the veracity of the person supplying the information and the basis of his or her knowledge. Id. The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause. Mere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient. State v. Smith, 301 S.C. 371, 392 S.E.2d 182 (1990). If the affidavit alone is insufficient to establish probable cause, it may be supplemented by sworn oral testimony before the magistrate. State v. Johnson, 302 S.C. 243, 395

S.E.2d 167 (1990) An appellate court reviewing the decision to issue the warrant should decide whether the magistrate had a substantial basis for concluding probable cause existed. Adolphe, 314 S.C. 89, 441 S.E.2d 832.” Philpot, 317 S.C. at 461, 454 S.E.2d at 907.

This Court then concluded that the search warrant should not have been issued. The record indicated that the magistrate only had the officer’s affidavit and the written statement of the confidential informant before him. This Court found that the affidavit and written statement contained absolutely no showing of the confidential informant’s reliability. Furthermore, the officer testified at the pre-trial suppression hearing that the magistrate had no information regarding the reliability of the informant making a remand unnecessary under State v. Johnson. This Court held there was no substantial basis for the magistrate to conclude that probable cause for the search existed. Therefore, the evidence obtained as a result of the search warrant was inadmissible. Philpot, 317 S.C at 461, 454 S.E.2d at 907.

The facts of this case are akin to the facts in the Philpot case. Here, the officer’s affidavit was based solely upon information received from an undisclosed confidential informant. The affidavit contained absolutely no information about the reliability of this informants. R.264 (Court’s Ex. 1). In addition, Officer Hunnicutt testified that he took the search warrant to Judge Derrick’s home in Seneca to have the warrant signed. Officer Hunnicutt did not testify that he provided Judge Derrick with any additional information about the informant other than what was in the affidavit. R. 124, ll. 4-24.

The entire investigation of Appellant and the search warrant ultimately issued stemmed from this unreliable informant. There was no substantial basis for the magistrate in this case to have concluded that probable cause existed. Accordingly, the evidence obtained from Appellant’s

motel room during the execution of the search warrant should be suppressed and Appellant's convictions for possession of crack cocaine and a controlled substance reversed.

During the pre-trial hearing, the State relied upon State v. Dupree, 354 S.C. 676, 583 S.E.2d 437 (Ct. App. 2003) in support of its argument that the magistrate had a substantial basis for concluding probable cause existed to issue the search warrant. R. 15, ll 4-17.

In Dupree, the affidavit supporting the search warranted provided: "Within the past (72) hours, a confidential and first time informant of the Richland County Sheriff's Department has purchased crack cocaine from the described location. The informant was searched before and after the purchase and was observed by narcotics agents while making the purchase entering and exiting the location." 354 S.C. at 681, 583 S.E.2d at 439-40. The magistrate issued the search warrant and during the execution of the warrant the officers found crack cocaine. Id. at 681, 583 S.E.2d at 440. Defense counsel moved the trial court to suppress the crack cocaine seized pursuant to the search warrant arguing that the warrant was not supported by probable cause and lacked any indicia of reliability as to the informant's veracity or reliability. The trial court denied the defendant's motion to suppress. Id. at 681-82, 583 S.E.2d at 440.

In affirming the trial court's denial of the motion to suppress, this Court observed that "[a]n informant's controlled buy of drugs can constitute probable cause sufficient for a magistrate to issue a warrant." Id. at 687, 583 S.E.2d at 443. This Court further went on to state: "If the controlled buy was properly conducted, it alone can provide facts sufficient to establish probable cause for a search warrant." Id. at 689, 583 S.E.2d at 444. Based upon the totality of the circumstances, this Court held the affidavit in Dupree provided the magistrate with a substantial basis for finding probable cause to search the mobile home. This Court found that information provided by the confidential informant was corroborated by an independent police investigation where officers had set up a

controlled buy. The affidavit indicated that an officer searched the informant prior to the controlled buy. The officer observed the informant enter and exit the mobile home. The informant was searched again after the buy. These facts constituted sufficient police corroboration of the informant's information based upon the controlled buy, and the controlled buy was evidence of the credibility and trustworthiness of the informant. *Id.* at 690-91, 583 S.E.2d at 444-45. This Court therefore upheld the trial court's denial of the defendant's motion to suppress the crack cocaine and reiterated that "if a controlled buy is properly conducted, the *controlled buy alone* can provide facts sufficient to establish probable cause for a search warrant." *Id.* at 691, 583 S.E.2d at 445 (emphasis in original).

Unlike Dupree, there was no controlled buy in Appellant's case establishing probable cause for the search warrant. There was no indication in the affidavit that the confidential informant was searched prior to and after meeting Appellant. There was no indication in the affidavit that law enforcement observed the informant meeting with Appellant or even observed the informant leaving to meet with Appellant. From the limited information provided in this affidavit, there is no way of knowing whether the confidential informant in fact obtained any drugs from Appellant. The informant could have already been in possession of the drugs when he claimed to law enforcement that he received drugs from Appellant. The affidavit Officer Hunnicutt used to seek the search warrant of Appellant's motel room therefore lacks any indication of the confidential informant's reliability and did not provide the magistrate with a substantial basis for issuing the search warrant of Appellant's motel room.

The State also relied upon State v. Bellamy, 336 S.C. 140, 519 S.E.2d 347 (1999) in its argument to the Trial Court during the pre-trial hearing on the motion to suppress. R. 15, ll. 4-17. This case, like Dupree, is also distinguishable from the facts in Appellant's case.

In Bellamy, the police chief of Atlantic Beach requested the assistance of the State Law Enforcement Division ("S.L.E.D.") concerning a break-in at the Atlantic Beach Police Department in which weapons were stolen from the department. The police chief informed S.L.E.D. that an individual named Luther Stanley, who was already in jail on unrelated charges, had information about the missing weapons. 336 S.C. at 141, 519 S.E.2d at 347. A field officer with S.L.E.D. interviewed Stanley, and Stanley stated he had seen the weapons in a particular apartment in Atlantic Beach. Stanley, who had lived at the apartment for days at a time, gave the officer the names of the people who would normally be in the apartment, including the defendant's name. Id. The officer submitted the following affidavit in support of the search warrant:

At 1420 hours, July 08, 1993, Luthor Spencer Stanley, after being advised of his rights, stated that [during] the early morning hours of July 08, 1993, Stanley observed Lamont Gause fire two shots from a 25 mm pistol, while standing outside of the above described premises. [A]ccording to Stanley, he then observed Gause immediately take the 25 mm pistol inside the premises and left it. Stanley further stated that on July 06, 1993, he observed Lamont Gause take a 38 cal pistol and a 22 cal Derringer into the above described premises. These three weapons are the same [description] as weapons stolen from the Atlantic Beach Police department located in Atlantic Beach, S.C. on or about June 23, 1993. [Stanley] further stated that cocaine is usually kept in above residence, inside the refrigerator or the microwave oven.

Id. at 142, 519 S.E.2d at 348.

The magistrate issued the search warrant and when officers executed the warrant, they found drugs in the apartment and arrested the defendant. The defendant argued the officer's affidavit lacked sufficient probable cause for issuance of the search warrant. The South Carolina Supreme Court disagreed. Id. The Court found that (1) the informant, whose identity was disclosed, was a witness to the events described in the affidavit; (2) the informant described the events with great specificity; and (3) the affidavit was confirmed to the extent the weapons described by the informant matched those weapons stolen from the police department days earlier. Id. at 144-45, 519 S.E.2d at

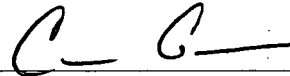
349. Accordingly, in upholding the sufficiency of the affidavit, the Supreme Court noted: “Although the affidavit is weak on the element of the reliability of the informant, this deficiency is compensated for by the strong showing of specificity, first-hand observation, and partial corroboration.” Id. at 145, 519 S.E.2d at 349.

Unlike the affidavit presented in Bellamy, the affidavit in Appellant’s case contains no specificity of the confidential informant’s encounters with Appellant and is not corroborated in the very least by law enforcement. The affidavit used in Appellant’s case is insufficient and fails to establish probable cause because there is no information supporting the confidential informant’s reliability. The drug evidence obtained pursuant to the search warrant should be suppressed and Appellant’s convictions reversed.

CONCLUSION

For the reasons set forth herein, Appellant Dan Lavert Temple requests this Court to reverse his convictions.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'C. Ganjehsani', written over a horizontal line.

Carmen V. Ganjehsani
Appellate Defender

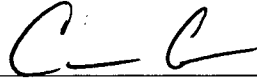
ATTORNEY FOR APPELLANT

This 29th day of September, 2014.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

September 29, 2014



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