STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Oconee County

Alexander S. Macaulay, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAN TEMPLE,

APPELLANT.

APPELLATE CASE NO. 2013-000663

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

I. Appellant's argument that the Trial Court erred in denying the motion to suppress the drug evidence is preserved for appellate review.

The State first contends that the issue on appeal – that 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 devoid of any information about the reliability of the confidential informant – is not preserved for this Court's review. The State argues that Appellant filed a motion *in limine* seeking the suppression of the drug evidence and that the Trial Court only issued a preliminary ruling denying Appellant's motion to suppress. The State then asserts that Appellant then did not renew his motion to suppress the drug evidence and stated that he had no objection when the drug evidence and a drug analysis report was admitted by the State through the testimony of chemist Meredith Lee Lanford who analyzed the drug evidence and determined the type and weight of the drugs. R. 6; 242, l. 2 – 163, l. 9.

The State is incorrect that the issue is not preserved for appellate review. Appellant moved to suppress the drug evidence which was the basis of the drug charges against Appellant because the drugs were seized as a result of an unlawful search warrant. R. 10, ll. 6-16. The Trial Court heard arguments on the motion to suppress from both Appellant and the State. R. 10, l. 6 – 25, l. 4. At the conclusion of both side's arguments, the Trial Court issued a final ruling that Appellant's motion to suppress the contraband found was denied and also remarked that "[t]he motion of the Defendant is duly noted." R. 25, ll. 2-4.

Where a trial judge indicates that his ruling was a final ruling, then a party need not renew his objection to the evidence during trial. State v. Wiles, 383 S.C. 151, 156-57, 679 S.E.2d 172, 175 (2009). In Wiles, the defendant made a motion *in limine* to exclude evidence of his escape. The Supreme Court held that the trial judge indicated his ruling was a final ruling rather than a preliminary one because he commented to the jury about the defendant's escape before any evidence was admitted. The Supreme Court also noted that the escape was referenced by both the State and the defendant's counsel in their opening statements. Because the trial judge's ruling on the admission of the evidence was a final ruling rather than a preliminary ruling, the defendant's argument on appeal that the evidence was improperly admitted was preserved for appellate review even though the defendant apparently did not renew his objection when the evidence was entered. Id.

In Appellant's case, the Trial Court issued a final ruling denying Appellant's motion to suppress the drug evidence. The Trial Court gave no indication that his ruling might change depending on how the evidence developed at trial. The Trial Court said that Appellant's motion was "duly noted" for the record. R. 25, ll. 2-4.

In addition, this is not a case where the parties were worried about the jury hearing about some piece of evidence. The purpose of a motion *in limine* is to prevent disclosure of potentially prejudicial matter to the jury. State v. Floyd, 295 S.C. 518, 369 S.E.2d 842 (1988). Here, the jury panel already knew at the very beginning of the case that the case was about drugs from Solicitor's description of the charges against Appellant: "We call 2013-GS-37-185, the State versus Daniel Lavert Temple, for possession of a controlled substance, a Schedule I through V, and 2013-GS-37-184, the State versus Daniel Lavert Temple, for possession with intent to distribute crack cocaine." R. 8, ll. 17-22. The Trial

Court also informed the jury panel of the charges pending against Appellant. R. 8, l. 23 – 9, l. 5.

During her opening statement to the jury, the Solicitor immediately informed the jury that Appellant was charged with possession with intent to distribute crack cocaine and the possession of Xanax. R. 26, ll. 17-20. She discussed the drugs found throughout her opening statement and likewise, Appellant's defense counsel also had to discuss the drug evidence during his opening statement. R. 26-34.

If the Trial Court's ruling on the motion to suppress the drug evidence had been a preliminary ruling only, as the State contends, then both the State and the defense would have been unable to say anything at all during their opening statements to the jury. They would have been prevented from discussing anything about the case. That is because the drug evidence is integral to the drug charges against Appellant. In fact, had the Trial Court granted Appellant's motion to suppress the drug evidence, as the Appellant is asking this Court to do in this appeal, then the charges against Appellant would have had to be dismissed because without evidence of the drugs, there can be no conviction against Appellant.

Appellant's issue to this Court that the Trial Court erred in denying his motion to suppress the drug evidence is preserved for this Court's review because the issue was (1) raised to and ruled upon by the Trial Court; (2) raised by Appellant; (3) raised in a timely manner; and (4) raised to the Trial Court with sufficient specificity. The Trial Court's denial of Appellant's motion to suppress the drug evidence was a final ruling. That Appellant did not object to the drug evidence and the drug analysis report during the chemist's testimony after the Trial Court had ruled with finality that the drugs were

admissible and that the case would not be dismissed and after the drug evidence had been discussed throughout the entire trial since the case involved drug charges is of no consequence. This Court should reject the State's argument that the Trial Court's error in denying the motion to suppress the drug evidence is not preserved for appellate review.

II. The good faith exception does not apply in cases where the affidavit supporting the search warrant fails to provide the magistrate with a substantial basis for probable cause and where the affidavit does not contain any information regarding the reliability of the informant.

The State also contends that the Trial Court properly declined to suppress the drug evidence because Officer Hunnicutt acted in good faith in obtaining the search warrant and acted in objectively reasonable reliance on the issuing judge's probable cause determination in conducting the search, relying upon the case of United States v. Leon, 468 U.S. 897 (1984).

In Leon, the United States Supreme Court established a good faith exception to the exclusionary rule, holding "that when an officer acting in objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope, a reviewing court should not order a suppression of the evidence based on a lack of probable cause." State v. Weston, 329 S.C. 287, 292, 494 S.E.2d 801, 803–04 (1997) (summarizing Leon). In Leon, the United State Supreme Court listed three situations in which the good faith exception cannot apply, one of which is reviewing courts will not defer to a warrant based on an affidavit "that does not provide the magistrate with a substantial basis for determining the existence of probable cause." 468 U.S. at 914–15.

In State v. Johnson, 302 S.C. 243, 248, 395 S.E.2d 167, 170 (1990), South Carolina's Supreme Court ruled "Leon specifically precludes the application of the good

faith exception" in a situation indistinguishable from Appellant's case. In Johnson, "the informant told South Carolina Law Enforcement agents that he had seen a large quantity of cocaine, cash and a gun in Johnson's home" "within the past seventy-two (72) hours." 302 S.C. at 245, 395 S.E.2d at 168. The affidavit supporting the search warrant, however, did not set forth any information as to the reliability of the informant, and the Supreme Court held that the affidavit by itself did not provide the magistrate with sufficient information concerning the informant's reliability upon which he could base a probable cause determination. Id. at 247-48, 395 S.E.2d at 169. The Supreme Court stated:

> Without any information concerning the reliability of the informant, the inferences from the facts which lead to the complaint will be drawn not by a neutral and detached magistrate, as the Constitution requires, but instead, by a police officer engaged in the often competitive enterprise of ferreting out crime, or, as in this case, by an unidentified informant.

Id. at 248, 395 S.E.2d at 169 (internal quotation marks omitted).

After concluding that the affidavit did not provide the magistrate with sufficient information to make a probable cause determination, the Supreme Court considered whether the good faith exception applied and whether "sufficient information was given to the magistrate to perform his 'neutral and detached' function rather than serve as a 'rubber stamp for the police.'" Id. at 248, 395 S.E.2d at 169-70. Quoting Leon, 468 U.S. at 915, our Supreme Court found the good faith exception inapplicable:

> [R]eviewing courts will not defer to a warrant based on an affidavit that does not provide the magistrate with a substantial basis for determining the existence of probable cause. Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others.

Johnson, 302 S.C. at 248, 395 S.E.2d at 170 (internal quotation marks omitted).

As in Johnson, Officer Hunnicutt's affidavit gave the issuing magistrate no information to assess the reliability of the informant or information on which probable cause could exist. Without such information, the issuing magistrate was forced to guess whether the events in the affidavit actually occurred, especially where there was no indication that the confidential informant was reliable. Under these circumstances, this court should not defer to the warrant because Officer Hunnicutt's affidavit did not provide the magistrate with a substantial basis for determining the existence of probable cause. The affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. There is no good faith of Officer Hunnicutt where he in the one that prepared the affidavit to obtain the search warrant and knew that there was nothing in that affidavit to indicate that the confidential informant was reliable.

This Court should hold the good faith exception inapplicable to Appellant's case and suppress the drug evidence where the affidavit for the search warrant contained absolutely no information about the reliability of the confidential informant who claimed he received drugs from Appellant.

CONCLUSION

For the reasons set forth herein and in the Appellant's Brief, Appellant Dan Lavert Temple respectfully requests this Court to reverse his convictions.

Respectfully submitted,

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 Reply 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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