STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Aiken County

Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KELVIN JONES,

APPELLANT

APPELLATE CASE NO 2016-001835

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SC Court of Appeals

FINAL BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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1. Did the court err in refusing to suppress drugs seized as the result of a search warrant lacking probable cause?

2. Did the trial judge err in allowing testimony that indicated law enforcement had prior knowledge of Appellant?

3. Did the trial judge err in qualifying an investigator as an expert in cocaine valuation and how cocaine is packaged and sold?

4. Did the trial judge err in failing to grant a new trial based on the State's refusal to provide Appellant with a copy of a complaint filed against the detective who obtained and executed the search warrant?

STATEMENT OF THE CASE

In January of 2012 the Aiken County Grand Jury indicted Appellant, Kelvin Jones, for trafficking cocaine, possession with intent to distribute cocaine within proximity of a park and possession of ecstasy, indictments #2012-GS-02-132, 133, 134. In 2014, the State obtained superseding indictment #2014-GS-02-1182 for trafficking cocaine. On August 11, 2014, Appellant appeared before the Honorable Edgar Dickson and moved for a change of venue and moved to suppress drugs seized. Mario Pacella, Alexandra Benevento and Bakari Sellers represented Appellant at the hearing. The case was prosecuted the South Carolina Attorney General's office because of a conflict. Solicitor Strom Thurmond, Jr. and another lawyer from the Second Circuit Solicitor's Office were doing a "ride along" with law enforcement when the search warrant in the present case was executed. Judge Dickson granted the change of venue motion but denied the motion to suppress. (R. p. 10, Order Denying Defendant's Motion to Suppress in Stipulation).

On February 17, 2015, Appellant pled guilty to the possession of ecstasy charge, indictment #2012-GS-02-134, and proceeded to jury trial for the trafficking and proximity charges, indictments #2014-GS-02-1182 and #2012-GS-02-133. Both the plea and the trial took place in Dorchester County before the Honorable R. Lawton McIntosh. Alexandra Benevento and Bakari Sellers represented Appellant at the plea and trial. Megan Burchstead and Michael Ross, both of the South Carolina Attorney General's Office, represented the State. The jury returned verdicts of guilty and Judge McIntosh sentenced Appellant to twenty-five (25) years for trafficking, ten (10) years concurrent for the proximity charge, and one year concurrent for the ecstasy charge.

On February 24, 2015, Appellant timely filed a timely notice of intent to appeal. On February 26, 2015, two days after the notice of intent to appeal was filed, Judge McIntosh contacted Appellant's trial counsel, Bakari Sellers, along with Assistant Attorney General Michael Ross and disclosed to the parties that it had come to his attention that the BEST bag containing the cocaine had been opened during jury deliberations. (R. p. 470-493; R. p. 494). On that same day, defense counsel Sellers filed a motion for a mistrial based on the information disclosed by Judge McIntosh and requested a hearing on the matter.

On April 16, 2015, a hearing was held before Judge McIntosh on Appellant's motion for a mistrial. After hearing from the parties, Judge McIntosh ultimately issued a written order filed June 15, 2015. In his order, Judge McIntosh found there was "a need to further investigate the extent of any actions on the part of the jurors which led to the opening of the 'BEST Kit' containing the drug evidence in this case." The judge indicated that "[s]uch investigation is necessary to determine whether there was any improper influence upon the jurors, or whether there was any resulting prejudice to the defendant." The judge ordered that a qualified individual at SLED examine the drug evidence to determine whether the evidence was accessed, handled, or tampered with by the jury during its deliberations. The judge further ordered that SLED report its findings concerning the drug evidence to the court as soon as such findings became available. (R. p. 494).

On September 18, 2015, Appellant moved to dismiss the direct appeal without prejudice pending the SLED investigation and a ruling on Appellant's motion for a mistrial. On November 25, 2015, the South Carolina Court of Appeals dismissed the appeal without prejudice to allow Judge McIntosh to rule on the post-trial motion. (R. p. 497). On April 4, 2016, Appellant filed a motion for a new trial based on the State's failure to disclose that a complaint had been filed against the detective who obtained and executed the search warrant. (R. p. 498).

On July 6, 2016, Judge McIntosh held a hearing in Anderson County on the two outstanding motions. In regard to the drug evidence, Judge McIntosh requested that SLED re-weigh the drugs. In regard to the non-disclosed complaint, the judge asked for briefs from both sides. In an order signed July 22, 2016, Judge McIntosh denied both motions. (R. p. 550). A motion for relief from judgment was filed on August 16, 2016, and denied on August 25, 2016. A timely notice of intent to appeal was served on September 2, 2016. This appeal follows.

ARGUMENTS

1. The court erred in refusing to suppress drugs seized as the result of a search warrant lacking probable cause.

On April 19, 2011, Detective John C. Medlin of the Aiken Department of Public Safety requested from a magistrate a search warrant for a residence located at 462 Morgan Street NW, in Aiken, South Carolina. The affidavit in support of the search warrant in the case was based in large part on a trash pull. The affidavit provides:

> Det. Sawyer received complaints of short-term traffic at 462 Morgan St NW that is consistent with the sale of narcotics. On April 18, 2011 Det. Medlin coordinated with Bill Martin, Solid Waste Supervisor with the Aiken Department of Public Works, to collect trash from 462 Morgan St NW. Mr. Martin did so on Monday, April 18, 2011, which is the normal trash collection day for that residence. Mr. Martin found the can and contents at the curb beside the driveway in a manner consistent with the trash being ready for collection. Mr. Martin brought the can and the contents to Det. Medlin at the ADPS headquarters. Det. Medlin and Det. Sawyer searched the contents of the can and found the following items: 1 – the burnt remains of a cigar that contained a green leafy material believed to be marijuana; 2-numerous twisted and torn baggies (indicating the packaging of marijuana for resale); 3 – empty cigar tube wrappers; 4 – cigars that had been torn open to remove the tobacco (a common tactic for smoking marijuana covertly;) 5 – mail addressed to 462 Morgan St. NW Aiken SC. Based on my experience and training, the items listed indicate the use and repackaging of narcotics for resale. Detective Royster, a certified marijuana analyst, tested the plant material found in the trash and confirmed it to be marijuana. This officer verily believes that probable cause exists as to the presence of narcotics at this residence. See Attachment B for photographs of the items found. (Exhibit #3 attached).

(R. p. 563). The affidavit was not supplemented with sworn verbal testimony. (R. p. 563).

On April 21, 2011, officers with the Aiken Department of Public Safety, including Detective Medlin and Captain Sawyer, executed the search warrant. According to Captain Sawyer, prior to entering the house, he observed Appellant enter the house carrying a blue sling backpack. (R. p. 117, lines 13-22). Officers entered the house five to seven minutes later. (R. p. 156, lines 16-20). Once inside the house officers found Ricky Lloyd in the bathroom attempting to flush a white powder substance. (R. p. 247, lines 10-21). Lloyd also had cash and scales. (R. p. 247, lines 23-25). Officers found Appellant in the kitchen. (R. p. 248, lines 1-7). Captain Sawyer admitted that there were four to five other adults and a few juveniles in the house when the officers entered. (R. p. 157, lines 11-20). In another room under a couch Detective Medlin found a handgun, a pickle jar with a green leafy substance in it, cash and a blue string bag. (R. p. 227, line 17 – p. 228, lines 1-12). Inside the blue string bag officers found three ziplock bags with a white powder material and a set of scales. (R. p. 228, lines 13-19). According to Captain Sawyer, Appellant was wearing this blue sling bag earlier. (R. p. 140, lines 7-10). The room where officers found the white powder substance under the couch was closer to the bathroom where they found Lloyd than the kitchen where they found Appellant. (R. p. 160, lines 21-25).

Prior to trial, on August 11, 2014, Appellant submitted a written motion to suppress. (R. p. 1). On that same day the Honorable Edgar Dickson heard the motion to suppress as well as a motion for change of venue. Judge Dickson granted the change of venue motion but, in a written order, denied the motion to suppress. (R. p. 10, Written Order Denying Motion to Suppress). A portion of the August 11, 2014, hearing was produced and made a part of the record on appeal. (R. p. 14-27). The portion of the transcript dealing with the suppression motion, however was not available. (R. p. 560-561, Official Letter from Court Reporter). For purposes of the appeal, the parties stipulated as to the arguments made at the suppression hearing. (R. p. 562). The stipulation included nine agreed points, the written motion to suppress as exhibit #1, the search warrant, affidavit in support and attached exhibits, as exhibit #2 and Judge Dickson's written motion denying the motion to suppress as exhibit. #3. (R. p. 562-586).

Appellant argued that the affidavit in support of the search warrant lacked probable cause. First, the affidavit failed to establish the reliability of the complaints received by Captain Sawyer. (R. p. 3-5). The affidavit failed to indicate the basis for any conclusion that the complaints of short-term traffic were consistent with narcotics sales. (R. p. 5). The affidavit failed to provide a time frame in regard to the short-term traffic. (R. p. 5). Second, the items recovered from the single trash pull did not provide probable cause to believe that narcotics would be found inside the house. (R. p. 5-8). Additionally, Appellant argued that the good faith exception to the requirement of a warrant based on probable cause did not apply. (R. p. 8-9).

The judge denied the motion to suppress writing, "Although the reliability of the tipsters was never established, the officers corroborated the tip by finding twisted, torn baggies and the remnants of marijuana cigars in the trash. See State v. Rutledge, 644 S.E.2d 789 (Ct.App. 2007)(Finding probable cause for search warrant where a trash pull corroborated a tip). Therefore, probable cause existed for the magistrate to issue the warrant." (R. p. 10-12). The judge erred.

The trial was held six months later on February 17, 2015, before a different judge, the Honorable R. Lawton McIntosh. Judge McIntosh was aware of the previous order by Judge Dickson denying the motion to suppress. (R. p. 37, lines 1-8). Appellant renewed the objection to the order denying the motion to suppress. (R. p. 37, lines 11-15). Appellant again renewed the objection to the evidence and the motion to suppress prior to opening statements. (R. p. 82, line 16 – p. 83, lines 1-7). The judge ruled, "All right. Very Good. I note that objection. The ruling will stand as is." (R. p. 83, lines 8-9). When the State moved to admit the drugs in evidence as State's Exhibit #22, Appellant did not object. (R. p. 286, lines 8-13). Appellant renewed the objection at the close of the State's case. (R. p. 344, lines 12-17). The issue is preserved for appellate review even though Appellant did not object when the drugs were admitted. Judge Dickson's ruling on the motion to suppress was a final ruling. Judge McIntosh did not hear the motion to suppress and would not have changed Judge Dickson's ruling without hearing the motion.

In State v. Atieh, 397 S.C. 641, 646–47, 725 S.E.2d 730, 733 (Ct. App. 2012), the South Carolina Court of Appeals wrote:

> A ruling in limine is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review. See State v. Wannamaker, 346 S.C. 495, 499, 552 S.E.2d 284, 286 (2001). An exception to this rule is when the motion in limine is made "immediately prior to the introduction of the evidence in question." State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001). The South Carolina Supreme Court expanded this exception in State v. Wiles, [1] holding that even when the evidence does not immediately follow the motion in limine, if the trial court clearly indicates its ruling is final, rather than preliminary, the issue is preserved for appellate review. 383 S.C. 151, 157, 679 S.E.2d 172, 175 (2009). In Wiles, the trial court had commented to the jury about the evidence that was the subject of the motion in limine before any evidence was admitted. Id.

The issue is preserved for appellate review.

"'On appeals from a motion to suppress based on Fourth Amendment grounds, ... this Court [the appellate court] reviews questions of law de novo.' State v. Adams, 409 S.C. 641, 647, 763 S.E.2d 341, 344 (2014). As to a circuit court's finding of fact, we must affirm 'if there is any evidence to support it," and "may reverse only for clear

[1] 383 S.C. 151, 679 S.E.2d 172 (2009).

error.' State v. Brown, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012)." State v. Bash, 419 S.C. 263, 268, 797 S.E.2d 721, 723–24 (2017).

In State v. Kinloch, 410 S.C. 612, 616–17, 767 S.E.2d 153, 155 (2014)(fn #4 omitted), the South Carolina Supreme Court wrote:

> The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const. amend. IV. A search or seizure does not violate the Fourth Amendment if it is authorized by a warrant that is supported by probable cause. Id.; see State v. Baccus, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006), cert. denied, 555 U.S. 1074, 129 S.Ct. 733, 172 L.Ed.2d 735 (2008). A warrant is supported by probable cause if, given the totality of the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place. Baccus, 367 S.C. at 50, 625 S.E.2d at 221 (citing Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)).

"When reviewing a magistrate's decision to issue a search warrant, we must consider the totality of the circumstances. See State v. Missouri, 337 S.C. 548, 524 S.E.2d 394 (1999)(citing Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)). Although great deference must be given to a magistrate's conclusions, a magistrate may only issue a search warrant upon a finding of probable cause. See State v. Bellamy, 336 S.C. 140, 519 S.E.2d 347 (1999)." State v. Jones, 342 S.C. 121, 126, 536 S.E.2d 675, 678 (2000)(fn #1 omitted).

In State v. Bellamy, 336 S.C. 140, 143–44, 519 S.E.2d 347, 348–49 (1999)(fn #1 omitted), the South Carolina Supreme Court wrote:

> In Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527, 548 (1983), the United States Supreme Court adopted a "totality-of-the-circumstances" test for probable cause determinations:
>
> 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. See also State v. Williams, 297 S.C. 404, 377 S.E.2d 308 (1989). Gates departed from the strict two-prong approach of Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) and Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637

> (1969). Aguilar and Spinelli required that separate findings be made of the informant's veracity or reliability and his basis of knowledge. The Supreme Court wrote in *Gates* that it did not agree with the lower court's reasoning that the *Aguilar-Spinelli* elements should be construed as entirely separate and independent requirements to be rigidly exacted in every case. Rather, "they should be understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is 'probable cause' to believe that contraband or evidence is located in a particular place." Gates, 462 U.S. at 230, 103 S.Ct. at 2328, 76 L.Ed.2d at 543. These are "relevant considerations in the totality-of-the-circumstances analysis." *Id.* at 233, 103 S.Ct. at 2329, 76 L.Ed.2d at 545. Gates went on to declare that a deficiency in one of the elements 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.

"An affidavit must contain sufficient underlying facts and information upon which a magistrate may make a determination of probable cause. State v. Viard, 276 S.C. 147, 276 S.E.2d 531 (1981). Mere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient. "[H]is action cannot be a mere ratification of the bare conclusions of others." Illinois v. Gates, 462 U.S. 213, 239, 103 S.Ct. 2317, 2333, 76 L.Ed.2d 527, 549 (1983)." State v. Smith, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990).

Considering the totality of the circumstances, the affidavit failed to provide probable cause to believe that narcotics would be found in the house. The affidavit failed to establish the veracity or reliability of the complaints of short-term traffic. The affidavit failed to establish a basis of knowledge of short-term traffic. It is unclear if the complaints were made confidentially or anonymously. The affidavit failed to provide a time frame in regard to alleged short-term traffic. The affidavit failed to establish how short-term traffic was consistent with narcotics sales. Instead, the affidavit provided that Detective Sawyer received complaints of short-term traffic that is consistent with the sale of narcotics, a conclusory statement that gave the magistrate no basis to make a judgment regarding probable cause.

The remaining information contained in the affidavit involved items discovered during the single trash pull on April 18, 2011. The items found were listed in the affidavit as follows:

> 1 – the burnt remains of a cigar that contained a green leafy material believed to be marijuana;
> 2-numerous twisted and torn baggies (indicating the packaging of marijuana for resale);
> 3 – empty cigar tube wrappers;
> 4 – cigars that had been torn open to remove the tobacco (a common tactic for smoking marijuana covertly;)
> 5 – mail addressed to 462 Morgan St. NW Aiken SC.
>
> Based on my experience and training, the items listed indicate the use and repackaging of narcotics for resale. Detective Royster, a certified marijuana analyst, tested the plant material found in the trash and confirmed it to be marijuana. This officer verily believes that probable cause exists as to the presence of narcotics at this residence.

(R. p. 563)

The evidence found in the single trash pull failed to suggest a pattern of continuous drug activity and failed to support a reasonable conclusion that additional contraband would be found in the house. State v. Rutledge, 373 S.C. 312, 644 S.E.2d 789 (Ct.App. 2007), the case relied upon by the judge in his written order denying the motion to suppress, is distinguished from the present case. In Rutledge the affidavit provided the following information:

> The affiant has received information that William Rutledge and two other subjects only known as Steve and Richie are selling marijuana from 162 Bailey Ave., Rock Hill, South Carolina. Within the past 72 hours officers of the YCMDEU conducted a narcotics investigation focused on 162 Bailey Ave., Rock Hill, SC. As a result of this investigation, officers recovered marijuana, marijuana seeds and marijuana stalks from 162 Bailey Ave. A Criminal Records check of William Rutledge found that Rutledge has prior convictions for marijuana. Officers of the YCMDEU confirmed through Rock Hill Utilities that William Rutledge is drawing power at 162 Bailey Ave.

Rutledge, 373 S.C. at 315, 644 S.E.2d at 790. The confidential informant in Rutledge provided specific information about the crime being committed and the names of the people involved in the crime. The anonymous or confidential tip in the present case did not provide information about a crime at all, simply short-term traffic. Additionally the tip in the present case did not provide names of the people involved. The affidavit in Rutledge also included information linking the defendant to the residence and providing the defendant's prior criminal record involving marijuana. No such information was provided in the affidavit in the present case.

As persuasive authority in Raulerson v. State, 714 So. 2d 536, 537 (Fla. Dist. Ct. App. 1998), the police, after receiving an anonymous tip that residents at Raulerson's address were involved in drug activity, pulled six bags of trash from the curb in front of the home. Inside the bags the police found two cannabis cigarette butts, stems, seeds, and pieces of suspected cannabis. A field test of the pieces tested positive for cannabis. The police obtained a search warrant based on the trash pull and anonymous tip. The Florida Court of Appeals reversed and wrote, "Although the affidavit contained relevant information that the substance found in the one-time trash pull tested positive for cannabis, we believe the affidavit lacked other sufficient material facts to indicate a fair probability that cannabis would be found in Raulerson's home." Raulerson , 714 So. 2d at 537. See also Cruz v. State, 788 So.2d 375 (Fla. Dist. Ct. App. 2001); Serrano v. State, 123 S.W.3d 53 (Tex. App. 2003).

In Gesell v. State, 751 So. 2d 104, 105 (Fla. Dist. Ct. App. 1999), the court found that a single trash pull, revealing the presence of a residual amount of marijuana in a plastic bag, coupled with an anonymous tip of suspected drug activity that is uncorroborated by the officers' observations, was insufficient to constitute probable cause for issuance of a search warrant.

In United States v. Elliott, 576 F. Supp. 1579, 1581 (S.D. Ohio 1984), the court granted the motion to suppress writing:

> We conclude that the discovery of the discarded contraband, standing alone, is insufficient to support a determination of probable cause. Despite the prompt action of the agent in seeking the warrant the day after the garbage was examined, the evidence in the garbage did not render the continued presence of marijuana

> probable. The affidavit does not indicate a large quantity of discarded contraband which might indicate its continued presence in the house. Instead, all we can ascertain is that at least two partially smoked marijuana cigarettes and several stems had left the home at some point in time.

The affidavit in the present case did not provide the magistrate with a substantial basis for determining the existence of probable cause to believe that contraband would be found inside the house. The evidence in the trash did not render the continued presence of contraband probable.

The good faith exception to the warrant requirement, found in United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.ed.2d 677 (1984), does not apply under the facts of this case. In State v. Johnson, 302 S.C. 243, 248, 395 S.E.2d 167, 170 (1990), the South Carolina Supreme Court wrote:

> In Leon, the Supreme Court held that "the Fourth Amendment exclusionary rule does not bar the admission of evidence obtained by officers acting in reasonable reliance on a search warrant which was issued by a detached and neutral magistrate but ultimately found to be invalid." The dispositive issue here is 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." Leon specifically precludes the application of the good faith exception in this situation. [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.'

In State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997), the South Carolina Supreme Court found that the affidavit in support of the search warrant did not provide a substantial basis to find probable cause. Finding that the good faith exception did not apply, the court wrote, "Suppression is appropriate in only a few situations, including when an affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." Leon, 468 U.S. at 923, 104 S.Ct. at 3421, 82 L.Ed.2d at 699. We find the affidavit in this case lacked any indicia of probable cause. Weston, 329 S.C. at 293, 494 S.E.2d at 804.

The affidavit in the present case is so lacking in indicia of probable to cause to believe that contraband would be found inside the house. As discussed above, the affidavit failed to suggest a pattern of continuous drug activity and failed to support a reasonable conclusion that additional contraband would be found in the house. The Leon good faith exception does not apply in this case. The judge erred in refusing to suppress based on the search warrant lacking probable cause.

2. The trial judge erred in allowing testimony that indicated law enforcement had prior knowledge of Appellant.

Prior to trial Appellant objected to the admission of a statement made by Appellant to Captain Sawyer indicating that law enforcement had prior knowledge of Appellant. (R. p. 57, line 4 – p. 58, lines 1-2). Captain Sawyer testified that during the execution of the search warrant Appellant said, "Sawyer, Sawyer, I need to talk to you. I need to talk to you." (R. p. 48, lines 5-7). Appellant argued that this statement should be excluded because it was the equivalent of admitting prior bad act testimony and, pursuant to Rule 403, SCRE, was more prejudicial than probative. (R. p. 57, line 4 – p. 58, lines 1-2). The State argued that the statement went to identification. (R. p. 58, lines 7-11). The judge asked the prosecutor, "Well, how can you escape the innuendo of him having a prior record by you having him call him out, and that kind of testimony?" (R. p. 58, lines 12-14). After hearing further argument, the judge withheld ruling. (R. pp. 58-61). Later the judge overruled the objection to the admission of the statement. (R. p. 94, line 14 – p. 95, 96, lines 1-15).

During the trial the State went further asking Captain Sawyer if he knew Appellant. (R. p. 111, lines 13-16). Captain Sawyer testified that he knew Appellant and had several interactions with him sometimes lasting 30-45 minutes. (R. p. 111, lines 17-25). Captain Sawyer then testified, before the jury, that during the execution of the search warrant Appellant said, "Sawyer, Sawyer, Sawyer, I need to talk to you." (R. p. 125, lines 16-17). Appellant did not contemporaneously object but Captain Sawyer was the first witness to testify after the ruling admitting the statement over objection. (R. p. 94, line 14 – p. 95, 96, lines 1-15). State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) (where a judge makes a ruling on the admission of evidence on the record immediately prior to the introduction of the evidence in question, the aggrieved party does not need to renew the objection. The issue is preserved). The objection to the statement is preserved for appellate review.

Captain Sawyer's testimony about interactions with Appellant and the statement allegedly made by Appellant indicate that law enforcement had prior knowledge of Appellant. The clear inference is that the prior interactions and knowledge were the result of Captain Sawyer knowing Appellant from prior criminal activity. The testimony was the equivalent of improperly admitting prior bad act evidence. The testimony was highly prejudicial and lacking probative value.

In State v. Fletcher, 379 S.C. 17, 23–24, 664 S.E.2d 480, 483 (2008), the South Carolina Supreme Court wrote:

> Under Rule 404(b), SCRE, evidence of other crimes, wrongs, or acts is generally not admissible to prove the defendant's guilt for the crime charged. Such evidence is, however, admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006); State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing. Id.; State v.

Beck, 342 S.C. 129, 135–36, 536 S.E.2d 679, 682–83 (2000). Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Rules 403 and 404(b), SCRE (although relevant, evidence may be excluded if its probative value is substantially outweighed 4 by the danger of unfair prejudice); State v. Gillian, 373 S.C. 601, 646 S.E.2d 872 (2007); State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001). The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case. State v. Bell, 302 S.C. 18, 393 S.E.2d 364, cert. denied, 498 U.S. 881, 111 S.Ct. 227, 112 L.Ed.2d 182 (1990).

Captain Sawyer's testimony did not meet an exception under rule 404(b). The testimony was not necessary to show identity and was not logically related to the trafficking charge. Captain Sawyer could competently identify Appellant without referencing the purported statement and prior interactions. Any possible probative value in the testimony was substantially outweighed by the danger of unfair prejudice. The error was not harmless. The State's case against Appellant was based on constructive possession. The inference that Appellant was involved in a prior criminal activity was highly prejudicial.

3. The trial judge erred in qualifying an investigator as an expert in cocaine valuation and how cocaine is packaged and sold.

As the final witness in the State's case, the State recalled Captain Sawyer and moved to qualify him as an expert in narcotics investigations. (R. p. 315, lines 23-25). Appellant objected. (R. pp. 315-331). After hearing arguments from both sides, the judge found Captain Sawyer qualified as an expert in cocaine valuation and how cocaine is packaged and sold. (R. p. 332, lines 2-4). Captain Sawyer testified as an expert subject to the prior objection. (R. p. 331, line 20). The trial judge erred.

Rule 702, SCRE, provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to **understand the evidence or to determine a fact in issue**, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

(emphasis added). Captain Sawyer's testimony did not assist the trier of fact to understand the evidence or determine a fact in issue. Valuation and packaging were not issues in this case. Appellant was charged with trafficking and proximity. There was no evidence, based on the amount of cocaine found, of a lesser included offense and the judge properly did not charge a lesser included offense. Valuation and packaging are not elements of trafficking.

S.C. Code Ann. 44-53-0370(e)(2)(e) provides that:

> Any person who knowingly sells, manufactures, cultivates, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, cultivate, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of:
>
> (2) ten grams or more of cocaine or any mixtures containing cocaine, as provided in Section 44-53-210(b)(4), is guilty of a felony which is known as "trafficking in cocaine" and, upon conviction, must be punished as follows if the quantity involved is:
>
> (e) four hundred grams or more, a term of imprisonment of not less than twenty-five years nor more than thirty years with a mandatory minimum term of imprisonment of twenty-five years, no part of which may be suspended nor probation granted, and a fine of two hundred thousand dollars;

The statute is silent as to value; evidence of weight alone controls the severity of the crime. Packaging is irrelevant as to the crime of trafficking. The trial judge erred in admitting the expert testimony as to valuation and packaging because it was not necessary. In this trafficking trial, the testimony about valuation and packaging did not qualify as expert testimony because the testimony did not assist the trier of fact to understand the evidence or determine a fact in issue.

In State v. Robinson, 396 S.C. 577, 582, 722 S.E.2d 820, 822 (Ct. App. 2012), aff'd as modified, 410 S.C. 519, 765 S.E.2d 564 (2014), the South Carolina Court of Appeals found that a law enforcement officer was properly qualified as an expert in how crack cocaine is packaged, sold, the going price, the typical intoxicating dose, and the different habits between the typical addict, the user, and the typical drug dealer. The challenge in Robinson went solely to the qualification of the witness. In the present case the expert testimony was improper because testimony about valuation and packaging was irrelevant as to trafficking. An additional distinguishing factor between the present case and Robinson is the fact that Robinson was charged with possession with intent to distribute cocaine rather than trafficking. Valuation and packaging may have been relevant to show intent to distribute in Robinson. In the preset case the State did not need to prove intent to distribute to prove trafficking.

"A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006)." State v. White, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009). An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law. State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). The admission of testimony by an expert when the subject of the testimony did not qualify as expert testimony constitutes an error of law. The error was not harmless

4. The trial judge erred in failing to grant a new trial based on the State's refusal to provide Appellant with a copy of a complaint filed against the detective who obtained and executed the search warrant

Prior to trial Appellant moved for production of employment records of certain officers, specifically Detective Medlin among others. (R. pp. 61-66). As discussed in issue one, Detective Medlin obtained and executed the search warrant and found the cocaine. The judge stated, "I'm going to instruct the State to make a review of those records. If there's any type of disciplinary matters . . ." (R. p. 65, lines 19-21). The judge then stated, ". . . that's why I'm asking you to make sure – I want them to turn them into me. I'll look at them in camera. If I feel there may be something that could be used , then I - - I will make sure it's produced over to the defense." (R. p. 65, line 23 – p. 66, lines 1-2). Later, the judge reviewed the employment records provided and found nothing relevant to the case. (R. p. 153, lines 12-18).

On April 4, 2016, after the trial but during the pendency of a motion for a mistrial based on the fact that the BEST bag containing the cocaine was opened during jury deliberations, Appellant filed a motion for a new trial based on the State's failure to disclose that a complaint had been filed against Detective Medlin on October 3, 2014, prior to the trial held in February of 2015. (R. p. 467). The complaint alleged that Detective Medlin conducted a roadside body cavity search of an individual.

On July 6, 2016, a hearing was held in regard to the motion for new trial. (R. pp. 518-545). During that hearing Appellant referenced an article from the Washington Post titled "Video Shows White Cops Performing Roadside Cavity Search of Black Man." (R. p. 520, lines 1-6). The article was about Detective Medlin with the Aiken Department of Public Safety. (R. p. 520, lines 8-9). Appellant argued that the refusal to provide the defense with a copy of the complaint constituted a Brady[2] violation. (R. p. 538, lines 3-17). Appellant argued that the complaint showed a violation of the policies and procedures of the Aiken Department of Public Safety. (R. p. 538, lines 11-17). The judge commented, "What is ridiculous is that they have an order to disclose information and they unilaterally decided they weren't going to do it. and at no fault of the AG's office." (R. p. 541, lines 1-4).

[2] Brady v. Maryland, 373 U.S. 83 (1963).

In an order signed July 22, 2016, Judge McIntosh wrote, "The state should have turned this matter over as impeachment under Brady. Gibson v. State, 334 S.C. 515, 514, 5 SED 320 (1999)." (R. p. 552). The judge, however, denied the motion for new trial based on the Brady violation. (R. p. 552). The judge erred.

In Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999)(fn #3 omitted), the South Carolina Supreme Court wrote:

> A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Kyles v. Whitley, 514 U.S. 419, 432–42, 115 S.Ct. 1555, 1565–69, 131 L.Ed.2d 490, 505–10 (1995); Brady, 373 U.S. at 87, 83 S.Ct. at 1196, 10 L.Ed.2d at 218; State v. Von Dohlen, 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996). This rule applies to impeachment evidence as well as exculpatory evidence. United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481, 490 (1985); State v. Von Dohlen, supra.

There are three categories of Brady violations: "(1) cases that include [non-disclosed] evidence of perjured testimony about which the prosecutor knew or should have known, (2) cases in which the defendant specifically requested the [non-disclosed] evidence, and (3) cases in which the defendant made no request or only a general request for Brady material." Gibson v. State, 334 S.C. 515, 524–25, 514 S.E.2d 320, 325 (1999). In the present case Appellant specifically requested employment records of Detective Medlin. The complaint meets the four requirements of Brady. The complaint was impeachment evidence favorable to Appellant, in possession of law enforcement,[3] suppressed by the State and material.

[3] Information known to investigative agencies may be imputable to prosecutor, but prosecutor has no duty to go on fishing expedition to find exculpatory or impeachment evidence. Von Dolen.

In State v. Moses, 390 S.C. 502, 517, 702 S.E.2d 395, 403 (Ct. App. 2010), the South Carolina Court of Appeals wrote:

> Moreover, "[e]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); accord Kyles v. Whitley, 514 U.S. 419, 433–34, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); see also Riddle, 369 S.C. at 45, 631 S.E.2d at 73 ("The question is not whether petitioner would more likely have been acquitted had this evidence been disclosed, but whether, without this impeachment evidence, he received a fair trial 'resulting in a verdict worthy of confidence.' " (quoting Kyles, 514 U.S. at 434, 115 S.Ct. 1555)); State v. Hill, 368 S.C. 649, 661, 630 S.E.2d 274, 280–81(2006) (stating evidence is material if the cumulative effect of the suppressed evidence results in a reasonable probability that had the evidence been disclosed, the result of the proceeding would have been different); Fradella v. Town of Mount Pleasant, 325 S.C. 469, 479, 482 S.E.2d 53, 58 (Ct.App.1997) ("A defendant shows a Brady violation by demonstrating that 'favorable evidence could [have been presented] to put the whole case in such a different light as to undermine confidence in the verdict.' ").

The non-disclosed complaint against Detective Medlin was material. Detective Medlin was one of the State's key witnesses. He obtained and executed the search warrant and found the cocaine. As argued, Appellant should have been allowed to question the detective about the complaint as a clear violation of the Department's policies and procedures. There is a reasonable probability that had the complaint been disclosed, the result of the proceeding would have been different. Again, the State's case was based on a theory of constructive possession. The refusal to disclose the complaint, after the specific request to do so, undermines confidence in the verdict. Appellant did not receive a fair trial based on the Brady violation. The judge erred in failing to grant a new trial.

CONCLUSION

Based on the above arguments, this Court should reverse Appellant's convictions and sentence.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of October, 2018.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability this Final Brief of Appellant 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."

October 5th, 2018

Kathrine H. Hudgins

Kathrine H. Hudgins
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

ATTORNEY FOR APPELLANT

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