STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from York County
Thomas L. Hughston, Circuit Court Judge

THE STATE,

Respondent,

vs.

SHAWN ROSEBERRY BISNAUTH,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

KEVIN SCOTT BRACKET
Solicitor, Sixteenth Judicial Circuit

Moss Justice Center
1675-1A York Highway
York, SC 29745
(803) 628-3025

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

STATEMENT OF ISSUES ON APPEAL

I.

A substantial basis existed for the magistrate to issue a search warrant after the York County law enforcement officer observed what in his experience appeared to be four drug transactions, including, based on information supplied by a North Carolina officer, a controlled sale of heroin; and law enforcement never lost sight of Appellant when he returned to the house afterwards that was the subject of the search warrant.

II.

The trial court did not err in declining to require the State to reveal the identity of the informant used by North Carolina police because the informant was not a participant in the South Carolina crimes and the York County law enforcement officer relied primarily on his own observations and information provided by a North Carolina police officer to establish probable cause for the search warrant.

III.

The trial court did not err in denying the motion for severance of the failure to stop for a blue light charge as the witness in support of the blue light charge was also a witness for the drug charges, and all the offenses arose out of the same set of circumstances.

STATEMENT OF THE CASE

Appellant Bisnauth was indicted for possession with intent to distribute cocaine (third offense), trafficking in heroin, trafficking in methamphetamine, and failure to stop for a blue light. A jury found Bisnauth guilty as charged following trial on November 14-16, 2017. The Honorable Thomas L. Hughston, Jr., sentenced Bisnauth to an aggregate twenty-five years imprisonment and a total of $250,000 in fines.

STATEMENT OF FACTS

On October 9, 2018, a magistrate issued a search warrant for Bisnauth, his home, and his Toyota, after Sergeant Rayford Ervin with the York County Drug Enforcement Unit (DEU) observed Bisnauth in Charlotte, North Carolina, engage in what appeared to be four drug transactions, including a controlled transaction monitored by the Charlotte Mecklenburg Police Department (CMPD). Law enforcement maintained contact with Bisnauth's Toyota as it returned to what the DEU believed was his Rock Hill home. On October 15, 2018, Sergeant Ervin attempted to set up surveillance of Bisnauth's home in order to execute the search warrant when Bisnauth left the house in his Toyota. Sergeant Ervin followed Bisnauth, who led Sergeant Ervin and another DEU vehicle on a high speed chase into North Carolina. Sergeant Ervin returned to Rock Hill to assist the other DEU agents in surveillance. When DEU executed the search warrant on the Rock Hill house, officers found heroin, methamphetamine, cocaine, and packaging materials inside the residence.

In camera hearing

Sergeant Ervin testified as the sole witness in camera in response to Bisnauth's motion to suppress the search warrant. He has been employed in law enforcement for twenty-five years and been with the DEU since 1999. R. p. 106. He testified Commander Marvin Brown told him to contact Officer Lackey from the Charlotte Mecklenburg Police Department about a York County man selling heroin in Charlotte. Sergeant Ervin met Officer Lackey at a predetermined location on October 9, 2015. Sergeant Ervin testified as follows:

> [Officer Lackey] advised me that they had a confidential source that can buy from [Bisnauth]. They set up a deal. We all started conducting surveillance around the location. [Bisnauth] showed up. The C.I. met. The C.I. gave him $800 for I think a previous ounce that he had fronted him and Shawn gave him another ounce.

R. p. 45, lines 11-16. Sergeant Ervin subsequently clarified that Officer Lackey provided him the

details of the transaction that was going to occur. R. p. 51, lines 6-12.

Sergeant Ervin saw the transaction between Bisnauth and the informant from 200 yards away. He did not have any contact himself with the informant. R. pp. 55-57. He observed the informant exit his vehicle and enter Bisnauth's vehicle for a short time and then leave. Bisnauth then drove to another parking lot in his vehicle, a grey Toyota, as law enforcement continued surveillance. Within the span of an hour, the officers observed three other people individually park and get out of their vehicles and into the Toyota for a minute or so, and then leave. Sergeant Ervin testified, based on his training and experience with narcotics, he believed he was watching three drug transactions. R. pp. 45-46; p. 54, lines 17-21.

Sergeant Ervin continued surveillance by following Bisnauth to I-77 south until Bisnauth exited in Rock Hill. Sergeant Ervin called Commander Brown who followed Bisnauth back to 1660 Sandpiper Drive. Ervin testified he conveyed information about the Charlotte transactions to Commander Brown so Commander Brown could obtain a search warrant. Sergeant Ervin confirmed the officers maintained constant visual contact with Bisnauth until he reached the Sandpiper Drive address. R. pp. 46-48.

Responding to defense counsel's argument that the State failed to show the informant was reliable, the trial court noted Officer Lackey was reliable and therefore, the magistrate was provided sufficient information to establish probable cause. R. p. 58.

Trial

Sergeant Ervin testified on October 15 at around 8:00 a.m., he drove by 1660 Sandpiper Drive because he had a search warrant for the house and Bisnauth. He saw Bisnauth in the yard as he drove by and returned to set up surveillance. Bisnauth shortly thereafter left the house in a grey Toyota. Then Bisnauth's girlfriend, McMoore, left in a black Mercedes. Sergeant Ervin followed

them in his undercover vehicle, which was equipped with blue lights and a siren. The Toyota and Mercedes drove to Cherry Road, stopped at a service station, and then continued on I-77 North towards North Carolina. R. pp. 93-94.

Bisnauth and McMoore took evasive measures when Sergeant Ervin put his blue lights and siren on as they drove through congested morning traffic on I-77. Sergeant Ervin explained on cross-examation that McMoore veered in front of Sergeant Ervin's vehicle to slow him down and keep him from catching up with Bisnauth. He was actually directly behind Bisnauth's vehicle for five seconds before McMoore's vehicle "zipped" back in his lane between Sergeant Ervin and Bisnauth – Sergeant Ervin needed to break hard to avoid hitting her. R. pp. 94-95; pp. 98-100; p. 108. He explained on cross-examination that Bisnauth "dusted" him within a half mile to mile on the interstate. R. p. 125. Once Bisnauth reached open road, he sped away at speeds around 100 m.p.h. Sergeant Ervin was left behind. Sergeant Jenkins, in his vehicle, was able to veer around both Sergeant Ervin and McMoore, and chased Bisnauth, but lost him in North Carolina. R. pp. 95-97. Sergeant Ervin returned to Rock Hill and the Sandpiper Drive address after further search for Bisnauth was unsuccessful. At that point, Sergeant Ervin returned to the residence to assist in setting up surveillance on the house, and when McMoore returned, the search warrant was executed. R. p. 97; pp. 120-25.

Commander Brown testified he had a search warrant for Bisnauth, his Toyota, and the house. Sergeant Ervin called and informed him that Bisnauth was in his front yard. Commander Brown drove to the house to meet Sergeant Ervin, but before they could execute the warrant, Bisnauth drove away. Commander Brown followed Bisnauth along with Sergeants Jenkins and Ervin, but returned to the house instead of being involved in the police chase previously described by Sergeant Ervin. Commander Brown determined through prior surveillance that Bisnauth lived at the residence with

McMoore. He explained on cross-examination he would see Bisnauth's vehicle at the residence at midnight and again at eight a.m. when he conducted surveillance in the week leading up to the execution of the search warrant. He waited three hours before McMoore showed up at the house. R. pp. 129-30; p. 164.

Commander Brown knew the Mercedes she drove was registered in Bisnauth's name. Neco Tucker was in the Mercedes with McMoore, and Commander Brown spoke with them. Meanwhile, Antonio Vasquez came out of the house. R. pp. 131-33. The two men told Brown they were from Danville, Virginia. R. p. 134.

During a search of the house, law enforcement found four pill bottles with Bisnauth's name on them and mail addressed to Bisnauth. He also found male and female clothing in the closet. The male clothes were Bisnauth's size. Further, McMoore described the bedroom as Bisnauth's bedroom and the paperwork as his paperwork. R. pp. 134-36; p. 158. Law enforcement found twelve boxes of baggies and a heat-sealing machine in the garage. In Commander Brown's experience, narcotics dealers will weigh and seal the drugs, which helps suppress the smell in case of drug dogs. R. p. 140. An empty box for digital scales, often used to weigh drugs, was also found. R. p. 140. Bisnauth carried $500 cash in his pocket when he turned himself in. He indicated he was unemployed. R. pp. 143-44. He provided the Sandpiper Drive address as his address during booking. R. p. 144. McMoore had $2,003, of which she later forfeited $1,000 to law enforcement, when she was arrested at the house. R. p. 192. Since he opened the door with his cross-examination, the jury learned Bisnauth forfeited by consent the entire $500 in his possession when he was arrested as drug proceeds. R. p. 220.

Officer Burkhart testified he was at the house to execute the search warrant at 11:00 a.m. on October 15, 2015. He acted as the evidence technician too. There was a shopping bag with a little

bit of cocaine in it on the bedroom floor. Officers found a Tupperware with an ounce of methamphetamine, half an ounce of heroin, and cocaine in the bedroom closet. There was a small amount of marijuana on the bedroom floor. R. pp. 231-32. There was a heat sealing machine in the garage. R. p. 233. Officers found credit cards and mail for Bisnauth in the bedroom. R. p. 233. Officer Burkhart also confirmed Brown's testimony about the medicine bottles found with Bisnauth's name. R. p. 236. He found the same kind of packaging material in the garage that was used to package the heroin. R. p. 238. There were also plastic bags with cocaine residue on them. R. p. 238.

Magistrate Lewis Danial Malphrus testified Bisnauth provided the Sandpiper Drive address as his address on the court forms. R. p. 293. Chemist Cynthia Mitchum testified the cocaine seized weighted 3.5 grams, the heroin 14.42 grams, and the methamphetamine 22.95 grams. R. pp. 311-13.

ARGUMENT

I.

A substantial basis existed for the magistrate to issue a search warrant after the York County law enforcement officer observed what in his experience appeared to be four drug transactions, including, based on information supplied by a North Carolina officer, a controlled sale of heroin; and law enforcement never lost sight of Appellant when he returned to the house afterwards that was the subject of the search warrant.

Bisnauth argues the trial court should have granted the motion to suppress because the magistrate did not have a substantial basis to issue a search warrant. Bisnauth argues law enforcement was required to show the informant involved in the controlled buy in North Carolina was reliable and further argues law enforcement failed to show a nexus between the evidence supplied in the warrant and his residence. However, because the search warrant was based on information Officer Lackey provided DEU and Sergeant Ervin's observations, and DEU maintained contact with Bisnauth from the time he engaged in what appeared to be four drug transactions until he returned to the Sandpiper Drive residence, the magistrate had a substantial basis to find probable cause to issue the search warrant.

Error preservation

Prior to taking in camera testimony on the search warrant issues, Bisnauth argued for suppression on the basis the State failed to show the reliability of the informant and there was insufficient evidence the controlled buy took place. R. pp. 40-43. He did not make the nexus argument he now raises on appeal. Following Sergeant Ervin's in camera testimony, the trial court indicated it would not suppress the search warrant. R. pp. 59-60. The trial court further explained, "When it comes up at this point anyway based on a bad search warrant. I think the search warrant is

sufficient **at least at this point.**" R. p. 60, lines 11-14. Bisnauth did not renew his objection to the fruits of the search during trial or make any further suppression arguments.

The issue is not preserved for review. An *in limine* ruling is not final and contemporaneous objection is required to preserved an issue for appeal. State v. Wannamaker, 346 S.C. 495, 499, 552 S.E.2d 284, 286 (2001). An *in limine* motion to suppress drugs must be renewed at the time drugs are admitted into evidence where court's ruling was not obtained immediately prior to admission. State v. King, 349 S.C. 142, 149-50, 561 S.E.2d 640, 643-44 (Ct. App. 2002).

Further, Bisnauth did not argue the lack of nexus to the residence searched, so that argument should not be reviewed by this Court. The argument advanced on appeal was not raised and ruled on below and therefore was not preserved for review. State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005); State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal.").

Standard of review

Further, the trial court did not err in denying the suppression motion, but instead accorded the magistrate the proper deference, by declining to suppress the seized evidence. When reviewing a decision to issue a search warrant, the reviewing court should decide whether the magistrate had a substantial basis for concluding probable cause existed. State v. Dupree, 354 S.C. 676, 683, 583 S.E.2d 437, 441 (Ct. App. 2003). Applying the same standard as the magistrate, the court should base its determination on the totality of circumstances. State v. Keith, 356 S.C. 219, 223, 588 S.E.2d 145, 147 (Ct. App. 2003). The magistrate's probable cause determination should be afforded great deference on appeal. State v. Rutledge, 373 S.C. 312, 316, 644 S.E.2d 789, 791 (Ct. App. 2007).

Substantial basis to find probable cause

In order for a magistrate to issue a search warrant, the affiant must present a sworn affidavit establishing the grounds for the warrant. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). A search warrant affidavit must contain sufficient underlying facts upon which a magistrate can base a probable cause determination. State v. Smith, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990). A search warrant may only be issued upon a finding of probable cause. Bellamy, 336 S.C. at 143, 519 S.E.2d at 348. In State v. Williams, 262 S.C. 186, 189, 203 S.E.2d 436, 437-438 (1974), the South Carolina Supreme Court explained probable cause as it relates to the issuance of a search warrant:

> In order to justify the issuance of a search warrant, probable cause must be shown, but the term 'probable cause' does not import absolute certainty. In determining whether there is sufficient evidence to sustain a finding of probable cause, each case stands on its own facts. The evidence need not be sufficient to support a conviction, or a verdict of guilty, or to establish guilt beyond a reasonable doubt; nor need the proof be positive, it being enough if it is such as to induce in the mind of the issuing officer an honest belief that the facts set forth exist, or as would lead a man of prudence to believe that the offense has been committed.

(citing State v. Bennett, 256 S.C. 234, 182 S.E.2d 291 (1971)).

In deciding whether to issue a search warrant, the magistrate must "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." Illinois v. Gates, 462 U.S. 213, 238 (1983). In determining the validity of the warrant, a reviewing court may consider only information brought to the magistrate's attention. State v. Gentile, 373 S.C. 506, 513-14, 646 S.E.2d 171, 174 (Ct. App. 2007). Critically, in making a probable cause determination,

"magistrates are concerned with probabilities and not certainties." State v. Sullivan, 267 S.C. 610, 617, 230 S.E.2d 621, 624 (1976); see Bennett, 256 S.C. at 240-241, 182 S.E.2d at 294 ("Obviously, neither the affiant nor his informer could state with absolute certainty that the weapon used to kill Green was at Bennett's house, and such was not required.").

Because search warrant affidavits are typically prepared by non-lawyers in the haste of criminal investigations, they must be viewed in a common sense and realistic fashion. State v. Arnold, 319 S.C. 256, 260, 460 S.E.2d 403, 405 (Ct. App. 1995). "Searches based on warrants will be given judicial deference to the extent that an otherwise marginal search may be justified if it meets a realistic standard of probable cause." Id. "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.'" State v. Weston, 329 S.C. 287, 293, 494 S.E.2d 801, 804 (1997) (quoting United States v. Leon, 468 U.S. 897, 923 (1984)).

Probable cause was not premised on an anonymous tip. Instead, Sergeant Ervin was advised **by Officer Lackey** that Bisnauth, referred to by the informant as "Bizzy," would meet at a predetermined location in order to conduct a drug transaction. Sergeant Ervin was at the predetermined location in Charlotte, North Carolina, and observed Bisnauth arrive and the informant enter Bisnauth's vehicle, and quickly leave. Sergeant Ervin observed three more transactions which in his experience appeared to be drug transactions. See United States v. Lender, 985 F.2d 151, 154 (4th Cir. 1993) ("Courts are not remiss in crediting the practical experience of officers who observe on a daily basis what transpires on the street."). He then maintained contact with Bisnauth as Bisnauth drove to the interstate and left Charlotte, until Bisnauth exited the interstate in Rock Hill, at which point Commander Brown continued to monitor Bisnauth until Bisnauth returned to the residence which was ultimately searched.

In the instant case, probable cause is not based on an unsubstantiated tip, but on information supplied by a police officer from another jurisdiction that is corroborated by Sergeant Ervin's own observations. Even after the controlled buy, Sergeant Ervin continued surveillance and saw, independent of the informant, three more transactions that based on his professional experience he believed were drug transactions.

This Court previously noted that in Illinois v. Gates, 462 U.S. 213 (1983), the United States Supreme Court "rejected the application of a rigid two-pronged test in which an informant's veracity and basis of knowledge were considered as separate and independent requirements to finding probable cause." State v. Dupree, 354 S.C. 676, 684-85, 583 S.E.2d 437, 442 (Ct. App. 2003). Instead, the proper test is the totality of circumstances test "where veracity and basis of knowledge were relevant to, but not inflexible requirements of, a determination of probable cause." Id. at 685, 583 S.E.2d at 442 (citation and internal quotation marks omitted). "A deficiency in one of the elements of veracity and reliability may be compensated for, in determining the overall reliability of the tip, by a strong showing as to the other, or by some other indicia of reliability." Id. at 685, 583 S.E.2d at 442. Reliability may be "established by independent verification of the information prior to the search." State v. Viard, 276 S.C. 147, 150-51, 276 S.E.2d 531, 532 (1981) *quoted by* Dupree, 354 S.C. at 686, 583 S.E.2d at 442.

"Where the affidavit is based in part on information provided by an informant of unknown reliability, police corroboration of details provided in the tip may establish probable cause." Dupree, 354 S.C. at 690, 583 S.E.2d at 444 (citing Gates). In the instant case, Sergeant Ervin corroborated that Bisnauth met the informant at the predetermined location, even if he did not personally observe money or drugs change hands. Bisnauth's involvement in narcotics was further verified during the continued surveillance in which three further highly suspicious interactions with three other

individuals gave a clear indication Bisnauth was involved in drug transactions, thus further corroborating what Sergeant Ervin saw and was told about the controlled purchase. Accordingly, under the totality of circumstances, the magistrate did not err in issuing a search warrant.

Sufficient nexus to the residence

Further, a sufficient nexus between the observed conduct and the house was shown sufficient for the search warrant to be issued. In determining whether a search warrant is supported by probable cause, the crucial element is not whether the target of the search is suspected of a crime, but whether it is reasonable to believe that the items to be seized will be found in the place to be searched. See Zurcher v. Stanford Daily, 436 U.S. 547, 555-556 (1978). "[T]he nexus between the place to be searched and the items to be seized may be established by the nature of the item and the normal inferences of where one would likely keep such evidence." United States v. Anderson, 851 F.2d 727, 729 (4th Cir. 1988); see also, United States v. Grossman, 400 F.3d 212, 217-18 (4th Cir. 2005); United States v. Servance, 394 F.3d 222, 230 (4th Cir. 2005) *vacated on other grounds*, 544 U.S. 1047 (2005); United States v. Williams, 974 F.2d 480, 481-82 (4th Cir. 1992).

The Fourth Circuit Court of Appeals held "a sufficient nexus may be present even if the affidavit contains no factual assertions directly linking the items sought to the defendant's residence." See Anderson, 851 F.2d at 729 (upholding search warrant for residence after defendant attempted to sell a firearm even though affidavit did not link the firearm to residence); Williams, 974 F.2d at 481-82 (upholding search warrant for motel room of known drug dealer where motel receipt was sole connection to defendant). As the Fourth Circuit noted:

> [W]e have upheld warrants to search suspects' residences and even temporary abodes on the basis of (1) evidence of the suspects' involvement in drug trafficking combined with (2) the reasonable suspicion (whether explicitly articulated by the applying officer or

> implicitly arrived at by the magistrate judge) that drug traffickers store drug-related evidence in their homes.

United States v. Williams, 548 F.3d 311, 319 (4th Cir. 2008). The Fifth Circuit explained the reasoning for allowing a search of a residence when looking for contraband or the fruits or instrumentalities of a crime:

> The justification for allowing a search of a person's residence when that person is suspected of criminal activity is the common-sense realization that one tends to conceal fruits and instrumentalities of a crime in a place to which easy access may be had and in which privacy is nevertheless maintained. In normal situations, few places are more convenient than one's residence for use in planning criminal activities and hiding fruits of a crime.

United States v. Green, 634 F.2d 222, 226 (5th Cir. 1981).

This Court also discussed the required evidentiary standard to establish a nexus between drugs and the residence of a person suspected of dealing or possessing drugs. In State v. Keith, this Court articulated the existence of probable cause to search a residence is a common-sense determination based on a totality of the circumstances. Keith, 356 S.C. 219, 225, 588 S.E.2d 145, 148 (Ct. App. 2003). In that case, Commander Brown, after conducting surveillance on a house on Ebinport Road, pulled over Keith's vehicle as it drove away from the house with an expired tag. A search of the car revealed a marijuana bud and a pipe with marijuana residue. Commander Brown obtained a search warrant for the house. This Court found as follows:

> Similarly, we find the information contained in Brown's affidavit relating the stop and seizure of illegal drugs from Keith's car provided a sufficient basis for the determination of probable cause under the totality of circumstances, and it is not necessary to consider Keith's argument concerning the lack of informant reliability. The affidavit outlined the investigative surveillance of Keith's home, the officers' observation of Keith's vehicle as it left the residence, the lawful stop, and the discovery of marijuana. It also appears from a reading of the affidavit that, as in Scott, the officers maintained visual contact with Keith from the time he left his residence until he was

stopped.

Id.; see State v. Scott, 303 S.C. 360, 362, 400 S.E.2d 784, 786 (Ct. App. 1991) ("In the case of drug dealers, evidence is likely to be found where the dealers live.") (quoting United States v. Angulo-Lopez, 791 F.2d 1394, 1399 (9th Cir. 1986)).

In the instant case, Bisnauth was tracked to Sandpiper Drive. The informant advised officers Bisnauth lived near a Planet Fitness on Cherry Road and Ebinport Road. This proved accurate as the searched residence was within a mile of the Planet Fitness on Ebinport Road. Further, the affidavit states a utility bill for the targeted residence was in Bisnauth's mother's name. (Warrant, R. p. ___).

Because probable cause is supported by information from CPMD and Sergeant Ervin's observations, and because Bisnauth returned to Sandpiper Drive after making what appeared to be four drug transactions, the magistrate had a substantial basis to issue a search warrant for the residence. Therefore, the trial court did not err in denying the suppression motion.

II.

The trial court did not err in declining to require the State to reveal the identity of the informant used by North Carolina police because the informant was not a participant in the South Carolina crimes and the York County law enforcement officer relied primarily on his own observations and information provided by a North Carolina police officer to establish probable cause for the search warrant.

Bisnauth complains the trial court erred in declining to require the State to reveal the identity of the informant to whom Bisnauth sold drugs to in Charlotte, North Carolina. Bisnauth fails to show how the identity of the informant would have aided his defense. Further, disclosure was not required because the informant was not a participant in any of the crimes for which he was on trial: the possession of various narcotics in Bisnauth's house in York County or Bisnauth's failure to stop for a blue light while he sped away on the interstate.

Standard of review

"[T]he trial court has considerable discretion as to ordering, or refusing to require, disclosure and that in the event of refusal, the burden is upon the accused to show prejudice resulting therefrom." State v. Batson, 261 S.C. 128, 134-35, 198 S.E.2d 517, 520 (1973).

Discussion

The general rule concerning the disclosure of an informant is described by the Court of Appeals as follows:

> At common law the prosecution in a criminal case is ordinarily privileged to withhold from an accused disclosure of the identity of persons who furnished information relative to violations of the law to officers charged with the enforcement thereof. Such privilege is founded upon public policy to protect effective law enforcement, but is not absolute and is subject to certain limitations and exceptions.

State v. Wright, 322 S.C. 484, 487, 472 S.E.2d 642, 644 (Ct. App. 1996).

> The disclosure of the identity of one who is merely an informer and not a participant nor a material witness is not generally required. Where, however, the informer is also a participant and/or a material witness **on the issue of guilt or innocence**, disclosure may or may not be required depending on various factors and circumstances.

Id. at 488, 472 S.E.2d at 645 (emphasis added).

"The purpose of the privilege [against disclosure of confidential informants] is the furtherance and protection of the public interest in effective law enforcement." Roviaro v. United States, 353 U.S. 53, 59 (1957). "The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform their obligation." Id. However, the privilege against disclosure is limited to the extent necessary to ensure fundamental fairness for all parties to a case. Id. at 60. "Where the disclosure of an informant's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." Id. at 60-61. Significantly though, there is "no fixed rule with respect to disclosure[.]" Id. at 62. Instead, the public's interest in perpetuating the flow of vital information to law enforcement officials must be balanced against the criminal defendant's right to prepare his defense. State v. Bultron, 318 S.C. 323, 330, 457 S.E.2d 616, 620 (Ct. App. 1995). Therefore, whether disclosure is required necessarily depends on the particular circumstances of each individual case. Roviaro, 353 U.S. at 62.

"A criminal defendant's interest in access to certain evidence must be weighed against the State's interest in protecting the identity and safety of the informant." Hyman v. State, 397 S.C. 35, 47, 723 S.E.2d 375, 381 (2012); see also United States v. Mehciz, 437 F.2d 145, 149 (9th Cir. 1971) ("The reasons for refusing to disclose the identity of an informant are well known, as is the existence of the tremendous traffic in narcotics and dangerous drugs which require federal and state officers to

rely heavily on informants."). "[T]he onus is on the defendant to 'come forward with something more than speculation as to the usefulness of such disclosure.'" United States v. Blevins, 960 F.2d 1252, 1259 (4th Cir. 1992) (citations omitted). Because Bisnauth offers nothing beyond mere speculation that the informant's identity would be useful, the trial court did not abuse its discretion in failing to require the State to disclose the confidential informant. Blevins, State v. Batson, 261 S.C. 128, 134-35, 198 S.E.2d 517, 520 (1973) (noting the trial judge has "considerable discretion" in the judge's decision whether to require disclosure of the informant's identity).

Additionally, disclosure is not required where the informant merely provides information supplying probable cause. "[T]he identity of an informant who has supplied probable cause for the issuance of a search warrant need not be disclosed where such disclosure is sought merely to aid in attacking probable cause." People v. Hobbs, 873 P.2d 1246, 1251 (Cal. 1994) (emphasis removed); see also United States v. Gray, 47 F.3d 1359, 1365 (4th Cir. 1995) (concluding "Gray's request for disclosure is controlled by the well settled principle that the government is permitted to withhold the identity of a confidential informant when 'the informant was used only for the limited purpose of obtaining a search warrant.'" (citations omitted)).

The Supreme Court noted when determining if disclosure of an informant's identity is essential to the defense, the trial court must consider the status of the informant, whether the informant is (1) merely a tipster with peripheral knowledge of the crime; (2) an active participant in the criminal act; or (3) a material witness on the issue of guilt or innocence. State v. Bultron, 318 S.C. 323, 330, 457 S.E.2d 616, 620 (1995) (citations omitted). This Court further explained, "Even if the informant is an active participant in the criminal act and/or a material witness, the court may still sustain an invocation of the nondisclosure privilege if other factors and circumstances warrant doing so." Id. (citation omitted). "In short, the trial court must balance the public's interest in

perpetuating the flow of vital information to law enforcement officials against the right of an individual to prepare his defense." Id.

In the instant case, Bisnauth argues disclosure was required because of the informant's participation in a controlled purchase that provided Ervin with the information to obtain a search warrant. However, the informant was not a participant or involved for the crime that Bisnauth was prosecuted for, which is the trafficking levels of possession of heroin and methamphetamine, and possession of distribution levels of cocaine, all in South Carolina.

Bisnauth relies on State v. Burns, 294 S.C. 338, 340-41, 364 S.E.2d 465, 467 (1988). However, in that case, the trial court in its discretion required the State to reveal the identity of the informant, but would not grant the defendant's motion for a continuance so the defendant could locate the informant. The Supreme Court reversed the trial court's denial of the motion for continuance because the defendant was denied a reasonable opportunity to locate the informant. Therefore, the issue of whether disclosure of the identity was required was not an issue in Burns. In the present case, the trial court properly exercised its discretion to deny the motion for the State to reveal the identity of the informant.

In McCray v. Illinois, 386 U.S. 300 (1967), the United States Supreme Court responded to the appellant's argument as follows: "Yet we are now asked to hold that the Constitution somehow compels Illinois to abolish the informer's privilege from its law of evidence, and to require disclosure of the informer's identity in every such preliminary hearing where it appears that the officers made the arrest or search in reliance upon facts supplied by an informer they had reason to trust." Id. at 312. Unsurprisingly, the Court rejected that argument, quoting favorably State v. Burnett, 201 A.2d 39 (N.J. 1964):

> If a defendant may insist upon disclosure of the informant in order to

> test the truth of the officer's statement that there is an informant or as to what the informant related or as to the informant's reliability, we can be sure that every defendant will demand disclosure. He has nothing to lose and the prize may be suppression of damaging evidence if the State cannot afford to reveal its source, as is so often the case. . . . [W]e accept the premise that the informer is a vital part of society's defensive arsenal. The basic rule protecting his identity rests upon that belief.

McCray, at 306-07 (quoting Burnett at 43-44) (quotation marks omitted).

The United States Supreme Court also cited Professor Wigmore: "Law enforcement officers often depend upon professional informers to furnish them with a flow of information about criminal activities. Revelation of the dual role played by such persons ends their usefulness to the government and discourages others from entering into a like relationship." McCray, at 308-09 (quoting 8 Wigmore, Evidence § 2374 (McNaugton rev. 1961) (quotation marks omitted)).

In the instant case, Sergeant Ervin was relayed information about a pending controlled sale by a CPMD officer that perhaps relied in part on information supplied by the informant. The question is not whether the information might conceivably be false, but whether Sergeant Ervin reasonably relied on the information in conjunction with his own observations. The Ninth Circuit rejected an argument that disclosure of an informant was required to determine if the informant's information was false, holding "Their argument is that the informant gave false information, not that the officer did not have reason to believe that what he was told was true. Such an attack is not permitted in a hearing to determine probable cause, and the informant's identity would therefore not have been relevant." United States v. King, 478 F.2d 494, 508 (9th Cir. 1973).

In United States v. Pelley, 572 F.2d 264 (10th Cir. 1978), the Tenth Circuit Court of Appeals rejected an argument the government should have disclosed the identity of an informant providing a tip. The Officer testified about the reliability of the informant, and importantly, verified observable

facts provided by the informant. The Tenth Circuit held, "The information obtained gave reasonable ground for the routine investigatory stop but was related in no way to the charged for which the defendant was convicted. Disclosure of identity was not required." Id. at 266; see also United States v. Kim, 577 F.2d 473, 479 (9th Cir. 1978) (Finding no error in denying motion to produce informants, finding documents in support of motion "merely established, at most, that either the [informants for the wiretap order] intentionally mislead [the police officers] or that the latter mislead [F.B.I.] Agent Tanaka. Neither case would be sufficient to destroy the original probable cause upon which the [wiretap order] was based . . . or justify a ruling on appeal that the lower court clearly abused its discretion in denying Kim's request for either the production of informants or an in camera hearing." (citations omitted)).

Like Kim, even if the informant misled Officer Lackey, or Officer Lackey misled Sergeant Ervin, neither event changes Sergeant Ervin's reasonable reliance on the information Officer Lackey provided in conjunction with what Sergeant Ervin personally observed.

In the instant case, the informant's actions in North Carolina were in no way related to the charges for which Bisnauth was convicted. He was not a participant to Bisnauth's possession of narcotics in his Rock Hill home. Instead, Sergeant Ervin established probable cause to attain the search warrants based on information provided to him by a CPMD officer, his observations of what appeared to be a drug transaction with the informant in North Carolina, and his observations during continued surveillance of Bisnauth when Sergeant Ervin observed three different men visit Bisnauth's car and leave after only about a minute. The informant did not provide any information directly to Ervin and was not a participant in the charged crimes. See United States v. Reardon, 787 F.2d 512, 517 (10th Cir. 1986) ("Disclosure of an informant is not required, however, where the information sought from the informer would be merely cumulative . . . **or where the informant did**

not participate in the transaction in question.") (citations omitted).

Further, no evidence in the record indicates York County DEU knew the identity of the informant utilized by North Carolina law enforcement officials. Therefore, as a practical matter, no evidence indicates the State of South Carolina was able to reveal the identity of the informant working for the Charlotte Mecklenburg Police Department, which is outside this state's jurisdiction.

In the instant case, Bisnauth failed to show he was prejudiced by the failure to disclose the identity of the informant. As discussed above, disclosure of an informant is not required so that a defendant may attempt to attack a finding of probable cause. Further, because probable cause was based on what a North Carolina police officer told Ervin and what Ervin observed in North Carolina, disclosure was not warranted in Bisnauth's trial for his possession of drugs found in his Rock Hill home. See State v. Shupper, 263 S.C. 53, 57, 207 S.E.2d 799, 800 (1974) (finding no error in the refusal to require disclosure of the confidential informant's identity where "the defendant made no showing whatever that his lot may have been improved by the informer's testimony").

III.

The trial court did not err in denying the motion for severance of the failure to stop for a blue light charge as the witness in support of the blue light charge was also a witness for the drug charges, and all the offenses arose out of the same set of circumstances.

The charges for the drug offenses and the charge for failure to stop for a blue light arose from DEU's attempt to set up surveillance at Bisnauth's home. He drove away, they pursued, and he sped up to as much as 100 m.p.h. to escape to North Carolina while McMoore attempted to impede DEU's ability to pursue Bisnauth. At trial, the defense attempted to blame McMoore for the drugs and assert a claim Bisnauth did not live at the home. Accordingly, the facts supporting the blue light charge were highly relevant to the prosecution for the drug charges premised on constructive possession because the facts supporting the blue light charge explain why Bisnauth was not present at the house when the search warrant was executed and show that Bisnauth and McMoore were acting in concert to allow Bisnauth to flee the state.

Standard of Review

A motion for severance is addressed to the sound discretion of the trial court. State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996); McCrary v. State, 249 S.C. 14, 152 S.E.2d 235 (1967); State v. Anderson, 318 S.C. 395, 458 S.E.2d 56 (Ct. App. 1995). The court's ruling will not be disturbed on appeal absent an abuse of that discretion. Tucker, 324 S.C. at 164, 478 S.E.2d at 265; State v. Prince, 316 S.C. 57, 447 S.E.2d 177 (1993); State v. Deal, 319 S.C. 49, 459 S.E.2d 93 (Ct. App. 1995); see also State v. Harris, 351 S.C. 643, 572 S.E.2d 267 (2002) (stating a motion for severance is addressed to the trial court and should not be disturbed unless abuse of discretion is shown). An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. State v. Walker, 366 S.C. 643, 623 S.E.2d 122 (Ct. App. 2005).

Discussion

Criminal charges may be tried together where they (1) arise out of a single chain of circumstances, (2) are proved by the same evidence, (3) are of the same general nature, and (4) no real right of the defendant has been prejudiced. State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996). Where the offenses charged in separate indictments are of the same general nature involving connected transactions closely related in kind, place and character, the trial judge has the discretionary power to order the indictments tried together if the defendant's substantive rights would not be prejudiced. State v. Cutro, 365 S.C. 366, 618 S.E.2d 890 (2005); State v. Sullivan, 277 S.C. 35, 43-44, 282 S.E.2d 838, 843 (1981) (where offenses charged in separate indictments are of same general nature, involving connected transactions closely related in kind, place and character, the trial judge has authority, in his discretion, to order indictments tried together over the objection of the defendant absent a showing that the defendant's substantive rights were violated); McCrary v. State, 249 S.C. 14, 36, 152 S.E.2d 235, 246 (1967) (stating "[t]he two offenses were of the same general nature, involving connected transactions closely related in time, place and character; and the trial judge had power, in his discretion, to order them tried together over objection by the defendant in the absence of a showing that the latter's substantive rights would have been thereby prejudiced."). The requirement that the charges be of the same general nature is flexible: the Supreme Court rejected a "restrictive reading of the phrase 'a single chain of circumstances.'" State v. Beekman, 415 S.C. 632, 637, 785 S.E.2d 202, 205 (2016) (citing City of Greenville v. Chapman, 210 S.C. 157, 161-62, 41 S.E.2d 865, 867 (1947) (explaining courts should avoid the "inflexible application" of the rule that charges must arise out of the same set of circumstances to allow joinder and if "it does not appear that any real right of the defendant has been jeopardized, it would be a refinement not demanded by the law or by justice to require in all instances a separate trial")).

In State v. Tucker, 324 S.C. 155, 164, 478 S.E.2d 260, 265 (1996), the Supreme Court found the charges of murder and burglary were interconnected because the reason Tucker burglarized a church was to avoid capture for the murder charge. The Court found severance was not warranted because the crimes arose out of a single chain of circumstances, evidence of the break-ins were admissible as evidence of flight and identity for the murder, and the crimes were of the same general nature.

Recently, this Court found joinder of charges for first-degree burglary and possession with intent to distribute methamphetamine proper because the burglar's vehicle was parked on the burglarized property and during an inventory search of the vehicle, officers found methamphetamine in the vehicle and the burglar in the house. State v. Davis, 422 S.C. 472, 482, 812 S.E.2d 423, 429 (Ct. App. 2018). This Court noted the offenses originated from the same chain of events and required the same witnesses. Id.

In the instant case, both charges arose out of the same set of circumstances. Sergeant Ervin was attempting to set up surveillance at Bisnauth's residence and serve a search warrant when Bisnauth left the residence in his vehicle. Sergeant Ervin was the only witness presented for the failure to stop for a blue light charge. The reason Sergeant Ervin attempted to stop Bisnauth's vehicle was to serve the search warrant that was utilized to search Bisnauth's residence. When Sergeant Ervin and Sergeant Jenkins lost contact with Bisnauth, Sergeant Ervin returned to the house to assist in setting up surveillance of the house and he assisted in executing the search warrant of the residence. Therefore, he was a witness for both charges.

Because Bisnauth fled blue lights after police appeared by his house to set up surveillance, the blue light charge is relevant as to consciousness of guilt for the drug charges. "As a general rule, any guilty act, conduct, or statements on the part of the accused are admissible as some evidence of

consciousness of guilt." State v. McDowell, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976); State v. Crawford, 362 S.C. 627, 635-36, 608 S.E.2d 886, 890-91 (Ct. App. 2005) (In South Carolina, flight from prosecution constitutes evidence of guilt). A reasonable juror could find he was attempting to flee upon noticing police surveillance. This is supported by testimony Bisnauth's counsel elicited on cross-examination. Defense counsel asked Sergeant Ervin why he did not pull Bisnauth over before Bisnauth reached the interstate and Sergeant Ervin answered, "Because the information that we had received about Mr. Bisnauth is that he goes to Charlotte, North Carolina . . . to sell his drugs. We were going to be making sure that he was headed that way." R. p. 112, lines 7-15. Of course, later Bisnauth possessed $500 cash later forfeited as drug proceeds when he turned himself in.

Further, during the police chase, McMoore acted in concert with Bisnauth, which was evidence relevant to the issue of constructive possession of the contraband found inside the residence. State v. Halyard, 274 S.C. 397, 400, 264 S.E.2d 841, 842 (1980) (noting multiple individuals can be in constructive possession of the same item simultaneously).

Severance was not necessary since both charges arose out of the same set of circumstances and involved overlapping evidence. Further, no real right of Bisnauth was violated by trying all the charges together. The jury was capable of determining guilt based on the evidence supporting each charge individually. Accordingly, the trial court did not err in trying the cases together.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

KEVIN SCOTT BRACKET
Solicitor, Sixteenth Judicial Circuit

Moss Justice Center
1675-1A York Highway
York, SC 29745
(803) 628-3025

BY: _____
DAVID SPENCER

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

February 14, 2019

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County
Thomas L. Hughston, Circuit Court Judge

THE STATE,

Respondent,

vs.

SHAWN ROSEBERRY BISNAUTH,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

KEVIN SCOTT BRACKET
Solicitor, Sixteenth Judicial Circuit

By: _____
DAVID SPENCER

Office of Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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