

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Anderson County

Honorable R. Scott Sprouse, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL DARREN DUNCAN,

APPELLANT

APPELLATE CASE NO 2017-001252

ANDERS BRIEF OF APPELLANT

RECEIVED

JUL 18 2018

SC Court of Appeals

LANELLE CANTEY DURANT
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TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUE ON APPEAL.....	1
STATEMENT OF THE CASE.....	2
STANDARD OF REVIEW	3
ARGUMENT	
The trial court erred in denying Appellant Duncan’s motion to reconsider the court’s finding that Appellant was not entitled to the suppression of the evidence secured by the search warrant issued October 15, 2015 when the search warrant failed to connect Appellant with the stolen items which were brought to his home during his absence without his knowledge and which failed to demonstrate any connection between the drugs found with the stolen items outside and Appellant’s residence.	4
CONCLUSION.....	10
PETITION TO BE RELIEVED AS COUNSEL	11

TABLE OF AUTHORITIES

Cases

<u>Illinois v. Gates</u> , 462 U.S. 213 (1983)	8
<u>State v. Brockmeyer</u> , 406 S.C. 324, 751 S.E.2d 645 (2013).....	3
<u>State v. Brown</u> , 267 S.C. 311, 227 S.E.2d 674 (1976)	8
<u>State v. Hatcher</u> , 392 S.C. 86, 708 S.E.2d 750 (2011).....	3
<u>State v. Lee</u> , 298 S.C. 362, 380 S.E. 2d 834 (1989)	8
<u>State v. Owen</u> , 275 S.C. 586, 274 S.E.2d 510 (1981).....	8
<u>State v. Pagan</u> , 369 S.C. 201, 631 S.E.2d 262 (2006).....	3
<u>U.S. v. Bethea</u> , 442 F.2d 790 (D.C. Cir. 1971).....	8

Constitutional Provisions

U.S. Const. amend. IV	9
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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in denying Appellant Duncan's motion to reconsider the court's finding that Appellant was not entitled to the suppression of the evidence secured by the search warrant issued October 15, 2015 when the search warrant failed to connect Appellant with the stolen items which were brought to his home during his absence without his knowledge and which failed to demonstrate any connection between the drugs found with the stolen items outside and Appellant's residence?

STATEMENT OF THE CASE

On May 24, 2016, the Anderson County Grand Jury indicted Michael Duncan on the charge of trafficking in methamphetamine twenty-eight to one hundred grams. On April 17 – 19, 2017, Appellant Duncan proceeded to trial before the Honorable Scott Sprouse and a jury. Duncan was represented by Donald Smith, and the state was represented by Lauren Price. R. 1. The jury found Appellant Duncan guilty as indicted. R. 432, ll. 10 – R. 433, ll. 3. The judge sentenced Duncan to twelve years and a fine of \$50,000. R. 437, ll. 3 – 7.

On May 1, 2017, Appellant's trial counsel filed a motion to reconsider the denial of the motion to suppress. The trial judge issued an order on May 8, 2017 denying Appellant Duncan's motion to reconsider the judge's suppression of the evidence. Trial counsel filed a timely notice of appeal wherein he appealed the trial judge's order of May 8, 2017 denying Appellant's motion to reconsider the denial of the motion to suppress. This appeal follows.

STANDARD OF REVIEW

“The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.” State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” Id.; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

ARGUMENT

The trial court erred in denying Appellant Duncan's motion to reconsider the court's finding that Appellant was not entitled to the suppression of the evidence secured by the search warrant issued October 15, 2015 when the search warrant failed to connect Appellant with the stolen items which were brought to his home during his absence without his knowledge and which failed to demonstrate any connection between the drugs found with the stolen items outside and Appellant's residence.

Relevant Facts

On October 15, 2015, Deputy David Stipe responded to a call from dispatch that OnStar was tracking a stolen vehicle from Anderson County that was shown to be in the area of the South Main Street Extension. R. 152, ll. 2 – 25. Deputy Stipe was the first responder and found four people sitting in front of the residence. He identified them as Appellant Duncan, Joseph Surdak, Clinton Macomson, and Amanda Sanders. The vehicle was in the driveway with lights flashing and the horn blowing. R. 153, ll. 2 – 25.

Deputy Stipe handcuffed all four people who all denied any knowledge of the truck. R. 155, ll. 2 – 25. Detective Ronald Wood was a narcotics investigator with the Anderson County Sheriff's Office. However, in 2015, he investigated burglaries and larcenies. He responded to the call on October 15, 2015. R. 208, ll. 8 – R. 209, ll. 24.

When he arrived, Surdak and Macomson were already in the patrol car. Detective Wood was advised to talk to Amanda Sanders who was sitting in front of the building. As he "squatted" down to talk to her, on his right he saw a firearm under an abandoned vehicle.

However, it was in close proximity to the defendants. He called Deputy Stipe who collected the weapon. R. 211, ll. 1 – R. 212, ll. 24.

When Deputy Stipe retrieved the gun, he also saw a clear bag that had crystal-like substance in it which field tested positive for methamphetamine. R. 159, ll. 6 - R. 161, ll. 2. Investigator Heath Davis, who was the lead investigator, arrived and decided to obtain a search warrant for Duncan's residence because some stolen items were still missing, and because the drugs were found on the property. R. 236, ll. 1 – R. 237, ll. 25.; R. 230, ll. 13 – 18.

Once the search warrant was obtained, which meant that the judge found probable cause for the search, Detective Davis and Detective Alan Hendrix took over executing the search warrant. R. 238, ll. 1 – 25. Detective Hendrix oversaw the search for narcotics. He obtained a set of keys from Duncan who had been determined to be the owner of the residence. Detective Hendrix then opened a door inside the residence that was guarded by a chained dog. When he opened the door to that room, he found a black IBM bag which contained 73 grams of crystal substance that field tested positive for methamphetamine. None of the four suspects admitted possession of the methamphetamine. R. 276, ll. 3 – R. 279, ll. 25.

Appellant Duncan was arrested and charged with trafficking methamphetamine. R. 281, ll. 6 – 10. Duncan proceeded to trial on April 17, 2015. R. 1.

Defense counsel told the judge pretrial that he had a motion to suppress. A pretrial hearing was held on the motion to suppress. R. 27, ll. 5 – 19. During the hearing, defense counsel argued that law enforcement had no probable cause to enter Duncan's residence because there was nothing to indicate that anything was in there. Counsel pointed out that he was challenging the sufficiency of the search warrant. Counsel's grounds for this challenge were that there was no evidence that the pipe and methamphetamine found outside underneath a vehicle belonged to

Duncan. He said there was no probable cause to enter Duncan's house because there was nothing that related to the reason the officers were there which was for a stolen truck and not drugs. R. 64, ll. 7 – R. 65, ll. 25.

Counsel informed the court that two other defendants---Sanders and Macomson-- brought the truck and motorcycle, which were reported missing by OnStar, to Duncan's house. There was no allegation that Duncan knew anything about them. Another defendant---Joey Surdak--- reported that Macomson told Sanders to get the truck out of there because Duncan did not know about it. Macomson just showed up with a truck to sell. R. 62, ll. 5 - R. 63, ll. 25.

Detective Davis testified at the pretrial hearing that he was involved in obtaining the search warrant but that Deputy Jason Price typed the affidavit. Detective Davis stated that the stolen items found outside led him to believe the other missing items might be found inside the residence. He told Deputy Price to list in the search warrant the missing items which were: a dirt bike that was in the back of the stolen truck; a set of keys with a red tag; and drugs and drug paraphernalia. R. 120, ll. 1- R. 127, ll. 23. The detective spoke with Duncan at the scene, and Duncan denied any knowledge of the stolen property, Duncan said that Macomson tried to sell the trailer and motorcycle to Duncan. R. 127, ll. 1 – 23.

Detective Hendrix testified pretrial that he oversaw the narcotics portion of the search warrant. He helped obtain the search warrant because he had a "good faith" belief that drugs would be found in the residence because they did not know who the drug found outside belonged to. He said that when drugs were found outside, it was common to find drugs outside and inside the residence. R. 90, ll. 18 – R. 91, ll. 18; R. 103, ll. 2 – 11; R. 111, ll. 1 – 22.

Investigator Jason Price testified that he wrote the search warrant on scene on October 15, 2015. R. 70, ll. 7 – R. 71, ll. 25. In the probable section, he wrote that on October 15, 2015,

a stolen truck, trailer and motorcycle were recovered from a known property. Known items missing were a dirt bike and set of keys with a red tab. Also found outside were a small baggy with a substance that field tested positive for methamphetamine and a glass pipe used for smoking the drug. R. 72, ll. 17 – R. 73, ll. 4.

Investigator Price admitted on cross examination that he did not know what the keys with the red tab went to. He only included them in the affidavit because the other officers told him to include them. Defense counsel asked him if that meant that he had the judge sign something that Price did not even know about in his affidavit. Price replied he did only because the other officers told him to include them. R. 89, ll. 1 – 14.

After the hearing, the trial judge proceeded with the trial. R. 140, ll. 1 – R. 146, ll. 18. During the trial, Meredith Lanford, the forensic chemist with the Anderson Oconee Forensic Laboratory, testified regarding the methamphetamine. R. 309, ll. 10-24. She testified that the total amount of methamphetamine tested was 67.67 grams. R. 319, ll. 1 – 23. State's Exhibit 5, 6, 9, and 35 contained the drugs. These exhibits were admitted into evidence without objection. R. 4; R. 314, ll. 1 – 6; R. 318, ll. 1 – 24.

Joey Surdak testified for the defense during the trial. He admitted that he had been charged because he was at Duncan's house during this incident. He pled guilty to possession of less than a gram of methamphetamine and received probation. R. 341, ll. 1 – 16. He explained that Duncan was not at the residence when Clint Macomson brought the truck to Duncan's residence. He explained that Duncan took Joey's girlfriend, Nicole, to her probation hearing that morning and then returned home. While Duncan was gone, Clint Macomson and Amanda Sanders pulled up with a truck and motorcycle attached to the back. They wanted gas. R. 339, ll.

Discussion

Possession requires more than mere presence; the State must show the defendant had dominion or control over thing allegedly possessed or had right to exercise dominion or control over it. State v. Lee, 298 S.C. 362, 380 S.E. 2d 834 (1989).

To prove constructive possession under statute governing crimes of knowingly selling or dispensing a narcotic drug not in its original stamped package and of knowingly facilitating concealment or sale of a narcotic drug illegally imported into the United States, government must show that defendant had dominion and control, or right to exercise dominion and control, over narcotics; such possession can be established by circumstantial as well as direct evidence, and may be jointly shared. U.S. v. Bethea, 442 F.2d 790 (D.C. Cir. 1971).

A search warrant may issue only upon a finding of probable cause. State v. Owen, 275 S.C. 586, 274 S.E.2d 510 (1981). 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.

In State v. Brown, 267 S.C. 311, 227 S.E.2d 674 (1976), the Defendant was convicted of simple possession of marijuana and possession with intent to distribute marijuana. On appeal, the Supreme Court held that evidence, consisting of fact that defendant was passenger in car on deserted road about 1:00 a.m., that driver had undetermined sum of cash in large roll, that defendant was nervous and had no identification, that there was smell of marijuana in car, and that there was large opaque bag containing eight pounds of marijuana on rear floorboard, and

that driver knew defendant's name and defendant told driver to be quiet when driver started to admit crime, was insufficient to support conviction as it failed to make jury issue of defendant's dominion and control of marijuana, essential element of those crimes. The case was reversed.

The Fourth Amendment protects the right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures. U.S. Const. amend. IV.

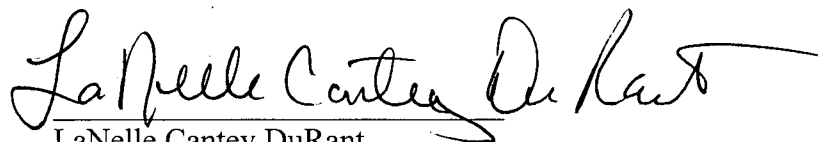
The trial court erred in denying Appellant Duncan's motion to suppress evidence found with the search warrant. There was no connection between the small amount of drugs found on the outside and Duncan's residence. Duncan had nothing to do with the stolen items as he was not at the residence when Macomson brought the items. There was no evidence that Duncan knew about the small amount of drugs found outside underneath a vehicle.

Investigator Price admitted that he did not know about the items listed for the search warrant. He just included them based on the information from the other officers. This meant that he presented information to the magistrate that he could not validate as reliable or true.

The search warrant violated Duncan's constitutional rights under the Fourth Amendment to be free from unreasonable searches.

CONCLUSION

Based on the above, Appellant's conviction should be reversed, and the case remanded for a new trial.

A handwritten signature in black ink, reading "LaNelle Cantey DuRant". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of July, 2018.

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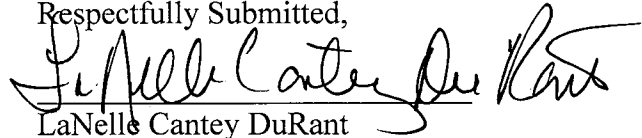
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Michael Darren Duncan states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge R. Scott Sprouse, which was held on April 17 - 21, 2017, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, She asks the Court to relieve her as counsel for Michael Darren Duncan.

Respectfully Submitted,



LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of July, 2018.

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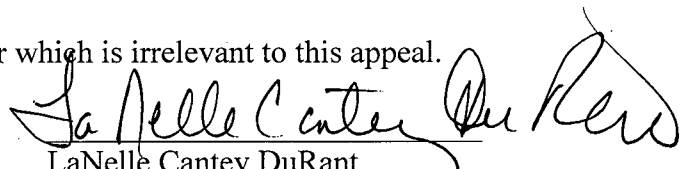
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s):
- (2) Sentencing Sheet
- (3) Trial Transcript April 17, 2017
- (4) Trial Transcript April 18, 2017
- (5) Trial Transcript April 19, 2017
- (6) Motion to Reconsider Denial of Motion to Suppress May 1, 2017
- (7) Order Denying Motion to Reconsider Motion to Suppress May 8, 2017
- (8) State's Exhibit #2 (Search warrant)

I certify that this designation contains no matter which is irrelevant to this appeal.

July 18, 2018


LaNelle Cantey DuRant
Appellate Defender

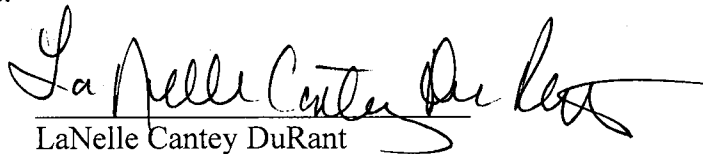
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ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders 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."

July 18, 2018.



LaNelle Cantey DuRant
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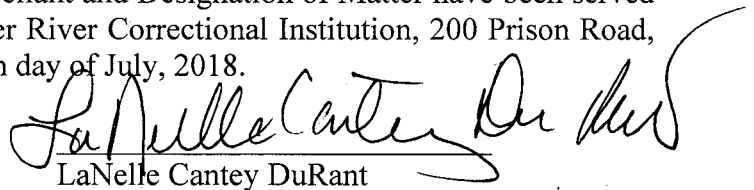
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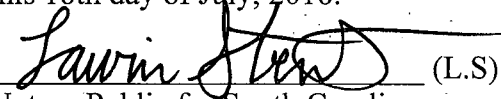
APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Michael Darren Duncan, #123736, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29335-9308, this 18th day of July, 2018.


LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 18th day of July, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.