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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

DeAndrea G. Benjamin, Circuit Court Judge

THE STATE, RESPONDENT,

V.

JOE LEWIS BUSBY, APPELLANT

APPELLATE CASE NO. 2019-001796

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred where it admitted evidence obtained pursuant to a search warrant where the affiant relied on information from another officer, and where the search warrant affidavit and affiant's supplemental testimony were imprecise and conclusory, since the magistrate lacked sufficient information to determine probable cause?

STATEMENT OF THE CASE

On July 16, 2015, a Richland County Grand Jury indicted Appellant for the offense of reckless homicide. R. *(indictment). Appellant was tried before the Honorable DeAndrea G. Benjamin and a jury, from October 14 – 17, 2019. Tr. 1. John Tate and Rhodes Bailey represented Appellant. Tr. 1. Carter Potts and Richard Cathcart represented the State. Tr. 1.

Appellant was convicted as indicted and he was sentenced to eight years' imprisonment. Tr. 604, ll. 13-19; Tr. 616, ll. 1-3.

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. An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling. The appellate court will reverse only when there is clear error.

State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) (citations and internal quotation marks omitted). This deference does not bar appellate courts from conducting their own review of the record to determine whether the trial judge's decision is supported by the evidence. *State v. Tindall*, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010).

On appeals from a motion to suppress based on Fourth Amendment grounds, the appellate court reviews questions of law de novo. *State v. Bash*, 419 S.C. 263, 268, 797 S.E.2d 721, 723–24 (2017). The existence of binding appellate precedent is a pure question of law and is reviewed de novo. *See State v. Brown*, 401 S.C. 82, 93-96, 736 S.E.2d 263, 268-70 (2012).

ARGUMENT

The trial court erred where it admitted evidence obtained pursuant to a search warrant where the affiant relied on information from another officer, and where the search warrant affidavit and affiant's supplemental testimony were imprecise and conclusory, since the magistrate lacked sufficient information to determine probable cause.

In this three-car crash, the affidavit and supplemental testimony for the search warrant seeking data from Appellant's truck alleged insufficient facts to support the magistrate's finding of probable cause. Without specifying that Appellant was suspected of a crime and without specifying that it was his vehicle that crossed the center line, the affidavit and supplemental testimony did not show that it was likely any evidence of a crime would be found in Appellant's truck. Additionally, because the affiant got all of his information second and third-hand, he was required to give the magistrate information upon which the magistrate could determine the veracity and basis of knowledge of the affiant's sources of information in order for the magistrate to find probable cause.

Relevant facts

The wreck

William Carroll (Decedent) died from injuries he sustained in a car wreck about one month after the wreck. Tr. 316, l. 16 – 317, l. 2. On January 24, 2015, Decedent was the passenger in a Chevy Tahoe being driven down Forest Drive by his daughter when the Chevy was hit head-on by Appellant's Ford F-150 truck. Tr. 183, ll. 16-22; 189, ll. 1-6; Tr. 392, ll. 16-18; Defendant's Exhibit #1.

Appellant's Ford was traveling in the opposite direction from the Chevy when the Ford hit George Anderson's Toyota Camry as it was making a left turn out of Trader Joe's. After

hitting Anderson's Toyota, Appellant's Ford struck Decedent's Chevy. Tr. 407, l. 21 – 412, l. 18; Tr. 319, l. 6 – 320, l. 6; Tr. 200, l. 10 – 201, l. 19. Initially, the drivers of two out of the three cars involved were ticketed: Anderson was ticketed for failure to yield and Appellant was ticketed for reckless driving. Tr. 411, l. 22 – 412, l. 18.

The search warrant

However, after Decedent passed away, Russell Shumard of the Forest Acres Police Department contacted the South Carolina Highway Patrol's MAIT team (Multi-Disciplinary Accident Investigation Team) and MAIT recommended Shumard obtain search warrants so that it could retrieve data from the cars. Tr. 51, ll. 5-11; Tr. 53, l. 14 – 54, l. 13. Shumard simultaneously sought and received a search warrant for all three vehicles from a Lexington County magistrate since the cars had been towed to salvage yards in Lexington County. Tr. 54, l. 14 – 55, l. 6. At the time he sought the search warrants, Shumard did not know who was responsible for the accident. Shumard sought the search warrants to investigate rather than to confirm. Tr. 59, l. 4 – 60, l. 11.

After obtaining a search warrant for Appellant's Ford truck, Shumard went to the salvage yard and seized from Appellant's truck an airbag control mechanism (ACM). Tr. 61, ll. 6-10. MAIT inspected the ACM and based on its data, concluded that Appellant was traveling seventy-seven miles an hour a few seconds before the crash. Tr. 465, ll. 11-14. The speed limit was thirty-five miles per hour on that stretch of road. Tr. 145, ll. 19-20.

The search warrant affidavit for Appellant's truck provided as follows.

> On 1/24/2015 at 1518 hours the above described vehicle was involved in a traffic collision on SC-12, within the City of Forest Acres, which involved 3 vehicles. The 2009 Ford Pick-up was traveling East on SC-12 when a 1996 Toyota pulled out into it's [sic] right of way. The Ford struck the above vehicle and subsequently struck a West bound 2001 Chevy Tahoe occupied by

> a William Carroll, W/M DOB: [redacted], who recently succumbed to his injuries sustained in this accident. An inspection of the above listed vehicle and data retrieved from it would assist the South Carolina Highway Patrol — MAIT and the Forest Acres Police department in determining the speed of the vehicles at impact along with the sequence of events of the collision.

R. *(Defendant's Exhibit #2).

Motion to suppress

Defense counsel filed a written suppression motion regarding the seized evidence prior to trial and argued the search warrant's deficient affidavit required suppression of the ACM evidence. R. *(motion to suppress). The court heard the motion pretrial. Defense counsel argued that pursuant to U.S. CONST. amend. IV; S.C. Const. art. I, § 10; and S.C. Code Ann. § 17-13-140, the fruits of the search warrant should be suppressed. Tr. 41, ll. 9-13; Tr. 47, ll. 8-14. A copy of the search warrant as well as documents from the South Carolina Department of Motor Vehicles (which showed Appellant owned the truck) were entered into the record as Defendant's Exhibits #1 and #2. R. *.

Defense counsel first argued that Appellant did have standing to object to the search warrant and that he had a reasonable expectation of privacy in the truck since he still owned the truck when the search warrant was issued. Tr. 42, l. 11 – 43, l. 2.

Defense counsel next argued the search warrant affidavit "fail[ed] as to specificity," because it did not allege a crime was committed, it did not allege Appellant committed a crime, and the affidavit provided the magistrate with no basis of knowledge for or veracity of the affiant's information. Tr. 43, l. 3 – 45, l. 25. Defense counsel noted that, "a magistrate must be able to determine from the affidavit or oral testimony that—where the information came from. Who said what, because part of the judge's job is judging the veracity of the information. Nothing in here is attributed to anyone." Tr. 45, ll. 15-19. Defense counsel cited *State v. Weston*,

State v. Johnson, *State v. Smith*, *State v. Thompson*, and *Illinois v. Gates*[1] in support of his argument.

Defense counsel further argued the deficient search warrant should not be saved by the "good faith exception," since "no reasonable police officer could read this affidavit and believe that it is a sufficient warrant." Tr. 46, l. 1 – 47, l. 2.

The court then heard testimony from Investigator Shumard of the Forest Acres Police Department. Shumard testified he had been with the Forest Acres Police Department for twenty-six years and was friendly with the Lexington County Magistrate. Tr. 49, ll. 19-22; Tr. 55, ll. 20-22. Shumard said he had been to the crime scene on the day of the offense, said he also talked to the responding officer, Officer McKenzie, and said he had read "the reports." Tr. 50, l. 23 – 51, l. 22.

Shumard applied for a search warrant for all three cars involved in the wreck at the same time. Tr. 54, ll. 14-23. Shumard testified that he was sworn and told the magistrate there had been a "major collision" about a month before, and that one vehicle "was reported to be driving recklessly and that another vehicle had pulled out in front of that vehicle and that the driver who was driving reckless swerved and hit and oncoming car, in which—an occupant met their demise. And showed him my three search warrants and he signed off on them." Tr. 55, l. 23 – 56, l. 15. The solicitor asked Shumard if he sought the search warrant to help figure out who did what, and Shumard said that he had. Tr. 60, ll. 7-11. Shumard testified that he had taken photographs of the crash scene but that "any statements" were obtained after he applied for the search warrant rather than before. Tr. 62, l. 24 – 63, l. 18.

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[1] *State v. Weston*, 329 S.C. 287, 494 S.E.2d 801 (1997); *State v. Johnson*, 302 S.C. 243, 395 S.E.2d 167 (1990); *State v. Smith*, 301 S.C. 371, 392 S.E.2d 182 (1990); *State v. Thompson*, 149 S.C. 250, 797 S.E.2d 716 (2017); *Illinois v. Gates*, 462 U.S. 213 (1983).

At the conclusion of the testimony, defense counsel reiterated that the oral testimony to supplement the affidavit only provided the magistrate with "conclusions, not facts," such that the magistrate was unable to make an independent determination of probable cause. Tr. 70, l. 8 – 72, l. 13.

The solicitor argued Appellant did not have standing to challenge the search warrant since he "gave power of attorney" for the truck to State Farm prior to the issuance of the warrant. Tr. 48, ll. 4-14. The solicitor also argued that the caselaw cited by defense counsel about veracity did not apply because Shumard "went there, saw it with his own eyes," and there was "[s]omething he observed himself." Tr. 72, l. 14 – 73, l. 19.

The solicitor also said that Shumard did not go to the magistrate claiming that Appellant "caused anything," but only that the police "were trying to figure out what happened." Tr. 72, ll. 23-25.

The court ruled that Appellant had standing to challenge the search warrant because the title to the car was still in his name. Tr. 69, l. 24 – 70, l. 4. The court also ruled that based on the "totality of the circumstances," including the oral testimony that supplemented the affidavit, "the statements are coming from the officer. In terms of reliability, it's based on personal observation of what he saw. He did not witness the accident, but what he saw when he got there." Tr. 74, l. 19 – 75, l. 3. "Also, I believe he testified there — that witness statements — to — that he — regarding driving, the driving of the vehicle by the defendant." Tr. 75, ll. 3-6. The court found there was a "substantial basis" for the magistrate to find probable cause to issue the search warrant. Tr. 74, ll. 6-10.

However, the matter was not yet settled because Shumard spoke with the solicitor during a break and said he was mistaken in his testimony—he remembered he did not go the scene of

the collision on the day it occurred. Tr. 178, l. 12 – 179, l. 22. According to the solicitor, although Shumard did go to the scene at some point days afterwards, he relied on what he was told by Officer McKenzie when he spoke the magistrate to get the warrants. Tr. 179, ll. 11-17. Therefore, the court reconsidered defense counsel's suppression motion and heard more argument from the parties.

The additional argument took place at pages 225 – 243 of the trial transcript. R. *. Defense counsel argued that without personal knowledge on the part of the affiant, the information provided to the magistrate was insufficient. Tr. 228, l. 11 – 229, l. 15. Defense counsel also noted that interviews with witnesses who claimed they saw Appellant speeding did not take place until after the search warrant was secured, and that Shumard never visited the scene until after he got the search warrant either. Tr. 230, l. 8 – 232, l. 6; Tr. 237, ll. 14-17.

The solicitor responded that prior to seeking the search warrant, Shumard had spoken with Officer McKenzie, the officer who wrote Appellant and Anderson (the driver of the Toyota) tickets for reckless driving and failure to yield. Tr. 233, ll. 9-21.

The court ruled the search warrant was permissible after reconsidering the motion to suppress. Tr. 243, l. 17 – 247, l. 24. The court ruled the magistrate could have determined there was a fair probability that evidence of a crime would be found, and that the veracity of Shumard was a sufficient basis for the magistrate to do so. Tr. 247, ll. 4-24.

Fruits of the search warrant

At trial, several motorists who were traveling on Forest Drive the day of the wreck testified that Appellant traveled at a startling speed just prior to the crash, and there was testimony that Appellant had been "weaving in and out of traffic." Tr. 162, ll. 1-23; Tr. 170, l. 25 – 171, l. 15. One motorist said Appellant's truck was traveling "interstate speed" prior to the

crash. Tr. 151, ll. 11-16. Another estimated the truck's speed at sixty-five or seventy miles an hour. Tr. 156, l. 10. However, testimony about the airbag control monitor seized from Appellant's truck was the only expert testimony about Appellant's speed as well as the only testimony that conclusively established his speed at a firm number.

Shumard and Sergeant Calvin Rikard of the Highway Patrol's MAIT unit testified that they were present when the search warrant was served on Appellant's truck. Tr. 432, ll. 19-20; Tr. 371, ll. 6-19. Sergeant Rikard was qualified as an expert in collision reconstruction and ACM technology and retrieval. Tr. 429, ll. 16-24. Sergeant Rikard was an impressive expert witness who demonstrated extensive knowledge of airbag control module systems and his testimony comprised nearly one hundred pages of the six-hundred-page trial transcript. Tr. 425 – 513. Rikard opined that the type of data upon which he relied in this case, ACM data, was "extremely accurate," "constantly getting validated," was "more than peer reviewed," and was heavily scrutinized. Tr. 453, ll. 4-23.

Rikard testified that he personally examined Appellant's truck and retrieved the data from the truck's airbag control module. Tr. 435, ll. 15-18. Rikard opined that per his examination of the ACM, five seconds prior to crashing into the first vehicle (the Toyota), Appellant's truck was travelling seventy-seven miles per hour. Tr. 465, ll. 11-14. Rikard said that Appellant then began "standing on the brakes" for about one second before crashing into the second vehicle (the Chevy) at forty-four miles per hour. Tr. 469, ll. 17-19; Tr. 472, ll. 5-8; Tr. 473, ll. 8-13.

Rikard concluded that Appellant's speed of seventy-seven miles per hour in a thirty-five mile per hour zone was the cause of the collision. Tr. 481, l. 8 – 488, l. 25. According to Rikard, had Appellant been traveling the speed limit, the Toyota would have had time to pull out and

make its turn, and the truck's resulting collisions with the Toyota and with the Chevy would not have occurred. Tr. 488, ll. 14-25.

Appellant was convicted of reckless homicide and was sentenced to eight years in prison. Tr. 604, ll. 13-19; Tr. 616, ll. 1-4.

Discussion

As seen, defense counsel argued the search and seizure violated both Appellant's constitutional rights and statutory rights. In terms of standing, for constitutional purposes Appellant had standing to challenge the search warrant since he had a reasonable expectation of privacy in his truck. A person may have a reasonable expectation of privacy in his property that is protected by the Fourth Amendment. *Katz v. United States*, 389 U.S. 347, 351 (1967); U.S. CONST. amend. IV. The Fourth Amendment applies to the states via the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643 (1961).

A person generally has a lessened expectation of privacy in an automobile due to the characteristics and use of an automobile but he may nevertheless possess a constitutionally protected privacy interest in one. *New York v. Class*, 475 U.S. 106, 112–13 (1986). Here, Appellant established (and the trial court properly found) that he had a reasonable expectation of privacy in his truck. A person's expectation of privacy, for purposes of Fourth Amendment, is legitimate if it is one that society is prepared to recognize as "reasonable." *Minnesota v. Olson*, 495 U.S. 91, 95-96 (1990) (quoting *Rakas v. Illinois*, 439 U.S. 128, 143 (1978)). Appellant's expectation of privacy here was reasonable since he owned the truck. The search warrant was issued on February 27, 2015 and Appellant did not sell the truck to State Farm until March 24, 2015, and the new title was issued on April 6, 2015. *See* Defendant's Exhibit #1. R. *.

For statutory purposes, however, Appellant had standing to suppress the evidence seized by execution of the search warrant regardless of any reasonable privacy interest simply because the State sought to admit the evidence against him. S.C. Code Ann. § 17-13-140 provides, in part, that

> Any magistrate or recorder or city judge having the powers of magistrates, or any judge of any court of record of the State having jurisdiction over the area where the property sought is located, may issue a search warrant to search for and seize (1) stolen or embezzled property; (2) property, the possession of which is unlawful; (3) property which is being used or has been used in the commission of a criminal offense or is possessed with the intent to be used as the means for committing a criminal offense or is concealed to prevent a criminal offense from being discovered; (4) property constituting evidence of crime or tending to show that a particular person committed a criminal offense; (5) any narcotic drugs, barbiturates, amphetamines or other drugs restricted to sale, possession, or use on prescription only, which are manufactured, possessed, controlled, sold, prescribed, administered, dispensed or compounded in violation of any of the laws of this State or of the United States . . .
>
> The property described in this section, or any part thereof, may be seized from any place where such property may be located, or from the person, possession or control of any person who shall be found to have such property in his possession or under his control.
>
> A warrant issued hereunder shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for the warrant. If the magistrate, municipal judge, or other judicial officer abovementioned is satisfied that the grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched . . .

In *State v. McKnight*, 291 S.C. 110, 115, 352 S.E.2d 471, 473-74 (1987), the South Carolina Supreme Court explained that on the one hand, a defendant must show a legitimate expectation of privacy to suppress evidence on Fourth Amendment grounds but, “[o]n the other hand, the rights afforded by Section 17-13-140 are not dependent upon a showing of an

expectation of privacy in the searched premises." The Supreme Court explained that because the "primary benefit of the statute is to the person arrested or searched . . . one contesting the legality of a search because of a defect under Section 17-13-140 need only show that the State is attempting to introduce the evidence against him." *Id.* (internal quotations omitted). Appellant therefore had standing to challenge the search warrant's issuance under § 17-13-140 because the State sought to admit the fruits of the warrant against him.

Here, the trial court correctly found Appellant had standing to challenge the issuance of the search warrant but incorrectly found there was a substantial basis for the magistrate to determine probable cause. Tr. 74, l. 19 – 75, l. 10; Tr. 243, l. 17 – 247, l. 24.

The search warrant should have been suppressed pursuant to the Fourth Amendment to the United States Constitution; S.C. Const. art. I, § 10; and S.C. Code Ann. § 17-13-140 because the warrant, even when supplemented by Shumard's testimony to the magistrate, failed to establish probable cause for the search. Probable cause is defined as "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, 338 U.S. 160, 175 (1949). Probable cause "mean[s] more than bare suspicion." *Id.*

Probable cause is evaluated under the totality of the circumstances test. *Illinois v. Gates*, 462 U.S. 213, 230-31 (1983). When all the circumstances set forth in the affidavit before the magistrate present a fair probability that evidence of a crime will be found in a particular place, then a search warrant may be issued." *Id.* at 239.

"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." *Id.* "In order to ensure that such an abdication of the magistrate's duty does not occur,

courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued." *Id*. The warrant clause of the Fourth Amendment was designed to prevent "wide-ranging, exploratory searches." *Maryland v. Garrison*, 480 U.S. 79, 84 (1987); *see also United States v. Ross,* 456 U.S. 798, 824 (1982).

Here, the search warrant (and supplemental testimony) at best established bare suspicion, not probable cause. Shumard did not provide the magistrate probable cause to believe Appellant committed a crime—instead, Shumard sought the warrant to try to get probable cause. Tr. 60, ll. 7-11. As seen, the solicitor argued that Shumard did not go to the magistrate claiming that Appellant "caused anything," but only that the police "were trying to figure out what happened." Tr. 72, ll. 23-25. This was an improper wide-ranging, exploratory search.

Since Shumard, the affiant, had gotten all of his information about the case from others, he was additionally required to give the magistrate information upon which the magistrate could determine the veracity and basis of knowledge of Shumard's sources of information. In *Illinois v. Gates*, the United States Supreme Court explained that a magistrate must be able to consider the veracity of the witnesses relied on by police and how those witnesses knew what they claimed to know when determining probable cause.

> 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. And the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed.

Illinois v. Gates, 462 U.S. at 238–39 (internal alterations and quotations omitted) (emphasis added).

The appellate courts of this State have agreed. *See State v. Smith*, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990) (affidavit defective where police relied on an informant but there was no indication that this fact was made known to the magistrate or that the magistrate made any determination of the informant's reliability, because an affidavit must contain sufficient underlying facts not mere conclusory statements); *State v. Johnson*, 302 S.C. 243, 247-49, 395 S.E.2d 167-70 (1990) (if affidavit relied on uncorroborated information from informant and informant's reliability was not set forth in affidavit or provided in supplemental oral testimony, warrant was invalid); *State v. Weston*, 329 S.C. 287, 494 S.E.2d 801 (1997) (search warrant defective where affidavit contained mere conclusory statements and there was nothing on the affidavit from which the ministerial recorder "could have assessed the veracity and basis of knowledge of the informant").

Here, Shumard did not provide any information that would give the magistrate an ability to judge the sources of Shumard's information or their basis for knowledge. Shumard was not at the scene. Shumard did not tell the magistrate that Appellant admitted to speeding or that other motorists said Appellant was speeding. It is unclear from the record whether Shumard even knew of the eyewitnesses who testified at trial that Appellant was speeding. As seen, Shumard agreed that any "statements" taken in the case were done so after he got the search warrant.

The affidavit does not allege Appellant committed a crime. In fact, it does not even allege Appellant was the driver of the truck. The affidavit seems to put the blame for the wreck on the Toyota, not the Ford. It also does not state the Ford committed a traffic violation by crossing the center line, as the solicitor argued, because while the affidavit said the Ford was traveling east and hit a west-bound Chevy, it did not state that the Ford crossed the center line. Given the vague

wording of the affidavit, it could have been the Chevy that crossed the center line. *See* R. *(Defendant's Exhibit #2).

Shumard's supplemental oral testimony to the magistrate was likewise imprecise and conclusory. *See* Tr. 55, l. 20 – 56, l. 7. According to Shumard, he "chatted about the weather" with the magistrate and told him there had been a "major collision," and that "one vehicle" "was reported to be driving recklessly and that another vehicle had pulled out in front of that vehicle and that the driver who was driving reckless swerved and hit an oncoming car, in which — an occupant met their demise . . ." Tr. 55, l. 20 – 56, l. 6.

The magistrate was not presented with sufficient information to find probable cause. "Mere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient. [A magistrate's] action cannot be a mere ratification of the bare conclusions of others." *State v. Smith*, 301 S.C. at 373, 392 S.E.2d 183 (internal quotations omitted) (quoting *Illinois v. Gates*, *supra*).

"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." *State v. Thompson*, 419 S.C. 250, 256–57, 797 S.E.2d 716, 719 (2017) (emphasis omitted). "In South Carolina, the judicial officer asked to issue a search warrant must make a practical, common sense decision concerning whether, under the totality of the circumstances set forth in the affidavit, there is a fair probability that evidence of a crime will be found in the particular place to be searched." *Id*. (emphasis omitted).

Although an affidavit is not required to state whether the target of the search has committed a crime, the affidavit must show there is a fair probability that evidence of a crime

will be found in the particular place to be searched. **Here, where there were three vehicles involved in the crash, without specifying that Appellant was suspected of a crime and without specifying that it was his Ford that had crossed the center line, the affidavit (and supplemental testimony) did not show that it was likely any evidence of a crime would be found in the Ford**. Therefore, the search warrant for Appellant's truck failed to allege facts sufficient to support a finding of probable cause. *Thompson*, 419 S.C. at 256–57, 797 S.E.2d at 719; *Smith*, 301 S.C. at 373, 392 S.E.2d at 183; *Illinois v. Gates*, 462 U.S. at 238–39.

Moreover, the good faith exception does not save this facially invalid warrant, since probable cause was so lacking as to render belief in its existence invalid. The good faith exception does not apply where an affidavit did not provide the magistrate with a substantial basis for determining the existence of probable cause. *United States v. Leon*, 468 U.S. 897, 915 (1984). An officer may not "manifest objective good faith in relying on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Id*. at 923 (internal quotations omitted). In *State v. Johnson*, 302 S.C. at 240-49, 395 S.E.2d at 170, the South Carolina Supreme Court explained that where a search warrant affidavit and supplemental sworn testimony are insufficient to establish probable cause, "the good faith exception may not be employed to validate [the] warrant."

Therefore, the fruits of the search warrant should have been excluded by the trial court. Evidence that is obtained from an unlawful search or seizure is to be excluded as "fruit of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 417 (1963). "[T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Herring v. United States*, 555 U.S. 135, 144 (2009).

"Evidence seized in violation of the Fourth Amendment must be excluded from trial." *State v. Khingratsaiphon*, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002).

Additionally, the affidavit did not detail probable cause per § 17-13-140, since the affidavit did not allege the officer expected the search would turn up any of the types of evidence detailed by the statute. § 17-13-140 imposes stricter requirements than does the Fourth Amendment, and a search warrant that would survive constitutional scrutiny may still be defective under the statute. *State v. Herring*, 387 S.C. 201, 214–15, 692 S.E.2d 490, 497 (2009); *State v. McKnight*, 291 S.C. at 113, 352 S.E.2d at 473.

§ 17-13-140 provides that a search warrant may be issued to search for five categories of evidence but none of them applied here. No stolen property was involved, no contraband was at issue, and no drugs were involved in the case. Due to the dearth of information in the affidavit, the other two categories of evidence approved by § 17-13-140 did not apply because the affidavit did not allege that Appellant committed a crime and thus evidence from his truck would show he committed a crime.

When the State is unable to demonstrate a good faith attempt to comply with § 17-13-140, exclusion is the proper remedy. *State v. McKnight*, 291 S.C. at 113, 352 S.E.2d at 473; *State v. Sachs*, 264 S.C. 541, 559, 216 S.E.2d 501, 510 (1975). Therefore, in addition to suppression being mandated by the Fourth Amendment and S.C. Const. art. I, § 10, application of South Carolina's warrant statute also requires suppression.

The error admitting the evidence was not harmless. Error of even constitutional magnitude may be deemed harmless if, considering the entire record on appeal, the reviewing court finds beyond a reasonable doubt that the error did not contribute to the verdict. *State v. White*, 410 S.C. 56, 59, 762 S.E.2d 726, 728 (Ct. App. 2014); *Chapman v. California,* 386 U.S.

18 (1967). *See also State v. Tench*, 353 S.C. 531, 537, 579 S.E.2d 314, 317 (2003). Here, the evidence obtained from the search warrant allowed the State to present lengthy expert testimony by Sergeant Rikard that established Appellant was travelling seventy-seven miles per hour just before the crash. By analyzing data from Appellant's airbag control mechanism, Rikard was also able to opine that Appellant caused the crash. This expert opinion on the ultimate issue of the case cannot be considered harmless beyond a reasonable doubt. *Cf. State v. Ellis*, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001) ("An officer's improper opinion which goes to the heart of the case is not harmless.")

The search warrant affidavit failed on both constitutional and statutory grounds. The fruits of the search, including the airbag control mechanism evidence from Appellant's truck, should have been suppressed.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

s/ Joanna K. Delany
Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of August, 2020.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
Aug 26 2020
SC Court of Appeals

Appeal from Richland County

DeAndrea G. Benjamin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOE LEWIS BUSBY,

APPELLANT

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Joe Lewis Busby, #381777, at Palmer Pre-Release Center, 2012 Pisgah Road, Florence, SC 29501, this 26th day of August, 2020.

s/ *Joanna K. Delany*
Joanna K. Delany
Appellate Defender
ATTORNEY FOR APPELLANT