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ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Roger L. Couch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DERRICK JERMAINE ANCRUM,

APPELLANT

APPELLATE CASE NO. 2018-000586

FINAL BRIEF OF APPELLANT

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LARA M. CAUDY  
Appellate Defender

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

ATTORNEY FOR APPELLANT

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**STATEMENT OF ISSUE ON APPEAL**

Did the trial judge err by denying Appellant's motion to suppress the drug evidence seized during the execution of a search warrant at his mother's residence where the affidavit in support of the search warrant failed to provide the magistrate with a substantial basis upon which to conclude that probable cause existed?

## STATEMENT OF THE CASE

A Charleston County grand jury indicted Appellant on February 8, 2016 for trafficking cocaine, two hundred grams or more; trafficking crack cocaine, ten grams or more; and manufacturing crack cocaine. R. 326-327. A pretrial hearing was held on October 10, 2017 and October 11, 2017 before the Honorable R. Markley Dennis. R. 1. Appellant's case was called to trial on October 16, 2017 before the Honorable Roger L. Couch, and a jury. R. 3. Assistant Solicitors Lauren Frierson and Stephanie Linder represented the state, and Grant Smaldone and Ryan Schwartz represented Appellant. R. 3.

On October 18, 2017, the jury found Appellant guilty as indicted. R. 300, ll. 3-16. He was sentenced to twenty-five years for trafficking cocaine, two hundred grams or more, second offense; twenty-five years for trafficking crack cocaine, ten grams or more, second offense; and twenty-five years for manufacturing crack cocaine, second offense. All sentences were ordered to be served concurrently. R. 301, ll. 17-25.

This appeal follows.

### STANDARD OF REVIEW

“In criminal cases, the appellate court sits to review errors of law only.” State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) (citing State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001)). “This Court is bound by the trial court’s factual findings unless they are clearly erroneous.” Id. (citing State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000)). “The trial judge’s factual findings on whether evidence should be suppressed due to a Fourth Amendment violation are reviewed for clear error.” Id. at 48-49, 625 S.E.2d at 220 (citing State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 665-666 (2000)). This deference does not bar this Court from conducting its 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) (citing State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 459 (2002)).

## STATEMENT OF THE FACTS

On August 18, 2015, Detective Jason Scurry with the Charleston Police Department obtained a search warrant to search the residence located at 805 Tripe Street in Charleston. In his affidavit supporting the search warrant, Detective Scurry averred:

Within the past 72 hours, the CPD Special Investigations Unit conducted a controlled purchase of illegal narcotics from the area of Tripe St./Sycamore Ave., utilizing an undercover officer (UC) working under the direction and control of Det. Scurry. The UC was equipped with an audio/video recording device and the entire transaction was recorded. During the transaction, the UC made contact with the black male SUBJECT. The UC asked the male subject if he had any cocaine base. After a brief conversation the male subject advised the UC that he had to go get the narcotics. The UC observed the male subject travel from Sycamore Ave. to Tripe St. While traveling on Tripe St. Det. Scurry and Gill observed the male subject go to the residence of 850 Tripe St. and make contact with another black male subject standing within the door frame of the residence. Det. Gill and Scurry then observed the black male subject travel directly back to the UC and give the UC a quantity of Cocaine Base, in exchange for a sum of pre-recorded US currency taken from the Official CPD Narcotics Fund. Det. Scurry then met back with the UC and subsequently recovered the Cocaine Base from the UC. The Cocaine Base field tested presumptive as cocaine base. The substance was submitted into CPD evidence and will be sent to the CPD Forensic Lab for further analysis.

The transaction listed above involved the sale to an undercover officer and was conducted under controlled conditions monitored by the Charleston Police Special Investigative Unit. The (UC) used pre-recorded currency to make the purchases and were monitored through visual and audio surveillance during the transaction. All of the purchased substances were entered into evidence and subsequently tested by the Charleston Police Forensic Services Division.

Furthermore, based on the affiant's training, experience, and participation in other narcotic and financial investigations involving drugs, your affiant further knows that drug distributors or traffickers use their residence(s) to store the following items:

- a) Large amounts of U.S. currency in order to maintain and finance their ongoing drug business.
- b) Currency, jewelry and other items of value that are proceeds of drug transactions.
- c) Items related to their business such as scales, baggies, packaging material, and drug paraphernalia.
- d) Records of trips to obtain illegal drugs as well as other information pertaining to the names and locations of such sources.

- e) Records from financial institutions which hold and/or show the proceeds of their illegal activities.
- f) Records of illegal cash proceeds obtained as a result of their drug transactions by purchasing money orders to pay bills.

I am an Officer of the City of Charleston Police Department (CPD) and have been so for over 9 years. I have been a Detective in the Central Investigations Division, Special Investigations Unit (Narcotics) and have been so nearly 2 years. During my tenure as a Narcotics Detective, I have written search warrants and frequently utilized the services of cooperating sources, and other confidential sources of information. I have written and submitted to the Court numerous affidavits in support of seizures and arrest warrants. I have also been involved in investigations whereby ETDs were placed on vehicles and monitored. As a result of my training and experience, I am familiar with how various drugs are used and the typical distribution and trafficking methods used by drug dealers and traffickers. In addition, I am also familiar with the typical methods used by traffickers to "courier" and clandestinely transport controlled substances. I have received training, both formal and informal, in the investigation of illegal drug trafficking. I have participated in the investigation, arrest, and prosecution of numerous narcotic related offenses. Your affiant has a Bachelor's degree in Criminal Justice from Cameron University and has attended several narcotics related training classes and seminars over the course of his career taught by the South Carolina Criminal Justice Academy and Regional Counter Drug Training Academy. Prior to your affiant's assignment with CPD Narcotics Unit, Detective Scurry served for over 2 years with Team 4 Power-shift, a proactive patrol unit tasked with enforcing municipal, state and federal narcotic/weapon law violations in crime plagued neighborhoods. During that time, Detective Scurry has served as lead case agent and assisted other investigations in narcotics investigations, which has led to the arrest of numerous individuals for illegal drug offenses. Furthermore, your affiant has conducted surveillance on suspected drug dealers, testified in federal and state court, managed informants, and interviewed numerous suspects and witnesses for drug related crimes.

Based on Detective Scurry training, experience, documentation obtain during this investigation, and the above facts, there is probable cause to believe that narcotics and/or the proceeds of narcotics are being stored inside of the residence of 850 Tripe St. Charleston SC 29407.

R. 315-316.

*Nine days later*, on August 27, 2015, officers executed the search warrant at 805 Tripe Street. The SWAT team entered the residence first and, once it was secured, Detective Scurry and other narcotic officers began searching the home. R. 106, ll. 19-22. Scurry claimed

Appellant was detained on the front porch. He told Appellant who they were and why they were there, and then read him his Miranda<sup>1</sup> rights. R. 106, l. 22 – 189, l. 20; R. 108, ll. 11-12. According to Scurry, Appellant immediately made a statement. He claimed Appellant “bowed his head, looked down, and [said] I don’t want anybody else to get in any trouble . . . I have a couple ounces in the bedroom.” R. 108, ll. 4-15. Scurry later clarified that Appellant said he had a couple ounces of cocaine in the bedroom and pointed at the bedroom located near the front of the residence. R. 108, l. 16 – 109, l. 22.

Officers searched this bedroom and found a large amount of currency, cocaine, crack cocaine, a digital scale, and Appellant’s South Carolina identification card in a dresser. R. 146, ll. 3-21. Some of the cocaine was packaged in small bags. There was also a larger bag containing compressed or compacted cocaine. R. 151, ll. 2-11. Inside the closet in the bedroom, officers also found items “associated with cooking crack cocaine,” including inositol powder, which is a cutting agent, tiny zip-lock bags commonly used in distribution, another digital scale, an electric grinder, measuring cups and spoons, strainers, and sponges. R. 153, l. 1 – 156, l. 6. In total, law enforcement seized approximately 16.5 grams of crack cocaine, 267 grams of cocaine, and twenty-eight hundred dollars in cash. R. 156, l. 7 – 157, l. 12; R. 205, l. 21 – 211, l. 18; R. 303.

Appellant vehemently denied the drugs belonged to him. R. 224, ll. 17-18. He testified that 805 Tripe Street was his mother’s residence. His mother would allow family and friends to stay at the house whenever they were struggling to pay their bills or had no where else to live. R. 215, ll. 1-6. On any given week, approximately twelve to fifteen people stayed at the house. R. 217, ll. 10-16. Appellant explained that in August 2015, he, his wife, and their three daughters

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<sup>1</sup> Miranda v. Arizona, 384 U.S. 436 (1966).

often stayed at his mother's house. The daycare center he owned was doing poorly and he could not keep up with all the bills at both his house and the daycare so he and his wife decided to move out of their home on Savannah Highway and use all their money to keep the daycare center operating. R. 215, l. 19 – 216, l. 10. In addition to his mother's house on Tripe Street, Appellant and his family also stayed with his sister-in-law on occasion or with friends. R. 216, l. 22 – 217, l. 1.

Appellant explained that “the house was so crowded, nobody had an official place to stay.” The occupants would “bounce” from room to room and sleep on air mattresses. The front bedroom where the drugs were found was “an all purpose room” where most people went to watch television and collect their mail. R. 216, ll. 9-21. Numerous people also stored their clothing in this room, including Appellant, his cousin, Markie Rivers, and his nephews, Brian Ancrum and Deshawn Ancrum. R. 218, l. 3 – 219, l. 11.

Appellant disputed the circumstances surrounding his statement and the content of that statement. He testified that he was detained inside the home after the SWAT team made entry and that officers immediately began searching the residence. After they found the drugs, Lieutenant Jenkins began demanding, “Whose stuff is this? . . . Somebody's got to go down for this stuff. Somebody's got to claim it.” Jenkins then threatened to call the Department of Social Services (DSS) and have DSS take his nephew's six month old baby who was present in the home if no one claimed the drugs. R. 222, ll. 3-18. Because of these threats, Appellant told Jenkins that he slept in the room where the drugs were found. However, he never said anything about two ounces as the officers claimed. R. 222, ll. 19-25. After he gave this statement, Appellant was moved outside to the porch where Detective Scurry read him his Miranda rights and placed him in handcuffs. R. 223, ll. 3-21.

After law enforcement completed its search of the residence, Appellant was arrested and charged with trafficking cocaine, trafficking crack cocaine, and manufacturing crack cocaine.

On October 2, 2017, Appellant filed a motion to suppress the evidence found during the execution of the search warrant at 850 Tripe Street on August 27, 2015 pursuant to the Fourth Amendment, Article 1, § 10 of the South Carolina Constitution, and S.C. Code Ann. § 17-13-140. R. 312. A pretrial hearing was held on Appellant's motion on October 16, 2017 before Judge Couch.

Defense counsel argued the affidavit in support of the search warrant failed to provide the magistrate with a substantial basis upon which to determine whether probable cause existed. Counsel also asserted there was no information in the affidavit concerning the reliability of the unidentified black male subject who ultimately sold crack cocaine to the undercover officer. R. 5, l. 23 – 6, l. 12. Comparing the facts of this case to the facts in State v. Gentile, 373 S.C. 506, 646 S.E.2d 171 (Ct. App. 2007) and State v. Kinloch, 410 S.C. 612, 767 S.E.2d 153 (2014), counsel concluded the affidavit did not establish probable cause and any evidence seized as a result of the warrant should be suppressed. R. 7, l. 18 – 13, l. 15.

As a result of Appellant's motion, the state proffered several witnesses who were involved in the undercover operation that led to the search warrant. When the solicitor called her first witness, Detective Leon Forrest, an officer with the Charleston Police Department, defense counsel objected on grounds that Forrest did not relay any information to the magistrate. R. 15, ll. 6-10. The judge overruled the objection. R. 15, ll. 11-15.

Forrest then testified about the undercover operation that occurred on August 15, 2015, in which he acted as an undercover officer. He explained that law enforcement received a couple of complaints from citizens who lived in the neighborhood near Tripe Street, presumably

concerning drug activity although Forrest never specified. Consequently, officers with the Special Investigations Unit decided to conduct several undercover buys in the neighborhood to further their investigation. R. 16, ll. 3-15. Forrest explained that he rode a bicycle through the neighborhood and, after he did not see many people outside, he rode to a nearby gas station. Eventually, a black male arrived, who was also riding a bicycle, and Forrest engaged in conversation with him. Forrest asked the male "if he knew anybody in the neighborhood that was selling any turkeys," which was a slang term used for crack cocaine. R. 17, l. 19 – 18, l. 19. The man said he had to make a phone call. Forrest testified, "So he made a phone call to an unknown party on the other end, and I think he said something to the effect of, Do you have any candy? Which is also another word for crack cocaine. And he put the call on speaker phone so I could hear the other party saying, yeah, and I think he said, Well, I'll come into your home." R. 19, ll. 2-9.

According to Forrest, the black male told him he was going to ride his bicycle down the street and would return. The man gave Forrest his cell phone so Forrest knew the man was coming back and Forrest gave him the money for the drugs. Forrest claimed he watched the man ride his bike down Sycamore Street and turn onto Tripe Street. R. 19, l. 13 – 20, l. 10. As soon as the man left, Forrest shared the man's location, direction of travel, physical description, and what street he turned down to Detectives Gill and Scurry who were conducting surveillance in an undercover vehicle. Forrest claimed he watched the man until he turned down Tripe Street and did not see him make contact with anyone else. A few minutes later, the man returned and gave Forrest a rock-like substance resembling crack cocaine and Forrest gave him his phone back. R. 20, l. 11 – 21, l. 16.

Forrest conceded that he did not search the black male before he left or when he returned and had never met the man before that day. R. 24, ll. 18-23. He also admitted he did not speak with the magistrate who issued the search warrant for 805 Tripe Street nor did he assist in drafting the affidavit in support of the warrant. R. 27, ll. 3-7. When questioned by the trial judge, Forrest further admitted that the affidavit contained no information about the alleged complaints law enforcement received concerning the neighborhood. Forrest maintained this information "was left out on purpose." R. 29, ll. 4-16.

The state then called Detective Patrick Gill to testify *in camera*. Gill explained:

Detective Forrest advised us over the wire that he was giving the money to the black male on the bicycle. He then told us that he [watched] the black male [travel] on the bicycle up Tripe Street. At that same time, myself and Detective Scurry were turning the corner down Tripe Street, and I witnessed the black male get off his bicycle in the front yard of 850 Tripe Street, walked to the front door.

Another black male, dark skinned, heavy build, kind of tall, little shorter than I was - - I'm over six foot - - was standing in the doorway, opened the screen door. That black male handed the guy on the bicycle something, and the black male on the bicycle handed him something. I couldn't tell you exactly what it was. The black male on the bicycle turned around, keeping his hands cupped, and then rode his bicycle back toward Detective Forrest.

R. 33, ll. 5-21.

Detective Gill claimed the black male on the bicycle did not make contact with anyone else while he was in his sight and did not rummage through his pockets or clothing. R. 34, ll. 2-12; R. 35, ll. 8-12.

Gill admitted he was not the affiant on the search warrant and he did not communicate any information to the magistrate who issued the warrant. R. 36, ll. 12-21; R. 47, ll. 2-4. During his testimony, defense counsel again objected because Gill did not convey any information to the magistrate so his testimony was irrelevant as to whether the magistrate had a sufficient basis

upon which to determine whether probable cause existed. R. 45, l. 23 – 46, l. 1. The trial judge overruled his objection. R. 46, ll. 3-8.

Lastly, Detective Jason Scurry, who was the affiant, testified. During his direct examination by the solicitor, the following exchange took place:

Q: And the information in your affidavit, does that include items from your investigation that you yourself witnessed or other individuals in your unit?

A: Yes, ma'am. We all supplement it.

Q: When you presented her [the magistrate] the search warrant, did you just stand quietly or did you kind of talk her through what happened?

A: No, ma'am. We always talk her through it, and she also asked questions as well.

Q: And you did that in this case?

A: Yes, ma'am.

R. 50, ll. 8-21.

Detective Scurry further claimed that officers purposefully do not include all the details in a search warrant affidavit because they did not want to compromise their investigation. He testified, "We have to leave a copy of that search warrant at the residence and stuff like that, so that's the primary reason why we don't put everything in this." R. 50, l. 25 – 51, l. 4. As far as the unknown black male from whom Detective Forrest purchased crack cocaine, Scurry admitted he had never dealt with this man before, did not know who he was, and had no information as to his reliability. R. 57, ll. 10-17.

After the conclusion of the testimony, defense counsel continued to argue there was insufficient evidence presented to the magistrate from which she could have concluded there was probable cause to search the residence at 805 Tripe Street. In support of his argument, counsel again discussed Gentile and Kinloch and how they differed from this case. Counsel stressed this

was a single isolated event, the officers did not see a hand to hand transaction, there was no information as to the reliability of the unidentified black male from whom Detective Forrest purchased crack cocaine or whether he had drugs on him before he rode his bicycle to 805 Tripe Street, and no additional surveillance was conducted on the residence. R. 66, l. 2 – 70, l. 5. Lastly, he argued there was an insufficient nexus between the undercover transaction that day and the house at 805 Tripe Street. R. 70, ll. 6-16. Consequently, counsel concluded the evidence seized pursuant to the search warrant should be suppressed. R. 70, ll. 17-20.

In response, the assistant solicitor based her argument that there was a substantial basis upon which the magistrate could conclude probable cause existed based on the specific details of the undercover transaction that occurred on August 15, 2015 as testified to by Detectives Forrest, Gill, and Scurry. R. 70, l. 22 – 75, l. 10. The trial judge interrupted the solicitor and asked what information the magistrate was specifically told. The solicitor gave a conclusory response maintaining the magistrate was told all the details of the transaction as testified to by the detectives. R. 72, l. 9 – 73, l. 6.

At the conclusion of her argument, defense counsel asserted, “[T]he Court’s concern should be what was presented to the magistrate. We have an affidavit and we have someone saying they supplemented the affidavit. We never heard, [w]e can play it back. We never heard exactly what the magistrate heard, so my concern is the State is now supplementing their supplement at the circuit court level, which . . . it’s not for Your Honor to consider . . . So I do have some concerns they are trying to correct an affidavit . . . All that matters, Your Honor, is what the magistrate was informed of.” R. 75, l. 19 – 76, l. 5.

The trial judge ultimately denied the motion to suppress, although he recognized it was a “close case.” The judge found, based on the totality of the circumstances, that the magistrate

was provided with a substantial basis upon which to conclude there was a fair probability that the residence at 805 Tripe Street was involved in illegal activity. R. 89, ll. 22 – 90, l. 15. In reaching this conclusion, the judge found, based on Detective Scurry's vague testimony, that "the magistrate was informed of the stories of the people involved in the investigation." However, he noted it would have been helpful to have heard testimony as to specifically what the magistrate was told. R. 86, l. 2 – 88, l. 6.

Appellant contemporaneously renewed his objection when the evidence seized from the residence at 805 Tripe Street was admitted into evidence. R. 92, l. 7 – 93, l. 18.

## ARGUMENT

The trial judge erred by denying Appellant's motion to suppress the drug evidence seized during the execution of a search warrant at his mother's residence where the affidavit in support of the search warrant failed to provide the magistrate with a substantial basis upon which to conclude that probable cause existed.

“The Fourth Amendment to the United States Constitution guarantees the right of the people to be free from unreasonable searches and seizures and provides that no warrants shall be issued except upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.” McHam v. State, 404 S.C. 465, 476, 746 S.E.2d 41, 47 (2013) (citing U.S. Const. amend. IV).

“A search warrant may issue only upon a finding of probable cause.” State v. Baccus, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006) (citing State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999)). “The duty of the reviewing court is to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed.” Id. (citing State v. Adams, 291 S.C. 132, 352 S.E.2d 483 (1987)). In Illinois v. Gates, 462 U.S. 213, 238 (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 South Carolina, the General Assembly has imposed stricter requirements than federal law for issuing a search warrant. Search warrants may be issued “only upon affidavit sworn to before the magistrate . . . establishing the grounds for the warrant.” S.C. Code Ann. § 17-13-

140; See State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987). “The affidavit must set forth particular facts and circumstances underlying the existence of probable cause to allow the magistrate to make an independent evaluation of the matter.” Baccus, 367 S.C. at 50-51, 625 S.E.2d at 221 (citing Franks v. Delaware, 438 U.S. 154 (1978)). If no supplemental testimony is taken, a magistrate’s probable cause determination is limited to the four corners of the search warrant affidavit. State v. Kinloch, 410 S.C. 612, 617, 767 S.E.2d 153, 155 (2014) (citing State v. Herring, 387 S.C. 201, 214, 692 S.E.2d 490, 497 (2009)).

In this case, it is unclear from the record what specific details of the undercover transaction Detective Scurry informed the magistrate of when he obtained the search warrant. Scurry made a vague and general statement during his *in camera* testimony that he “always” talks the magistrate through what happened and that he did so in this case. See R. 50, ll. 15-21. The trial judge relied on this blanket statement in making his ruling.

Although the search warrant affidavit states this was a controlled purchase, none of the ordinary safeguards employed during a controlled buy were used in this case. The unidentified black male who sold the drugs to Detective Forrest, the undercover officer, was not searched before he went to the residence on Tripe Street nor when he returned. He was not arrested immediately after the purchase and never relayed any information to the officers regarding the circumstances of the drug transaction prior to the drawing of the affidavit. He was not wearing audio and video surveillance equipment, and the officers have no way of knowing whether the unidentified black male had the drugs on his person before he sold them to the undercover officer.

Although the affidavit states the purchase was made with marked bills, there is no reference in the affidavit to a recovery of the marked bills from Appellant or any person at the

residence. Because none of the marked bills were recovered, this fact does not contribute to any probable cause determination.

Moreover, there were no prior controlled buys at the residence on Tripe Street. There was no controlled purchase of drugs at the home on August 15, 2015 that is described in the warrant affidavit. The undercover officer made a controlled purchase from an unidentified black male. The affidavit alleges the unidentified black male purchased a quantity of drugs from another unidentified black male standing “in the doorframe” of the house, which was some distance away from the undercover officer and the location of the controlled buy.

The undercover officer was not present in the home and did not witness the alleged drug transaction. There was no audio or video surveillance of the alleged drug transaction at the home. According to the affidavit, Detectives Scurry and Gill were also not present at the home and did not witness the drug transaction. They were driving by in a vehicle. The affidavit states only that the detectives saw the unidentified black male go to the residence and “make contact with another black male subject standing within the door frame of the residence.” The person that the first black male made contact with at the home is also unidentified in the warrant and during the *in camera* testimony.

In State v. Gentile, 373 S.C. 506, 514-516, 646 S.E.2d 171, 175-176 (Ct. App. 2007), this Court held the search warrant affidavit was insufficient to establish probable cause where (1) there were numerous citizen complaints about a high volume of traffic at the residence; (2) a citizen told police that she smelled marijuana coming from the residence; and (3) officers pulled over a visitor as he left the residence and found marijuana in his possession.

Here, the search warrant affidavit does not allege any additional complaints such as high volume of traffic or an odor of marijuana. It relies solely on Scurry’s statement that he and

Detective Gill witnessed an unidentified black male “make contact” with another unidentified black male at the residence on Tripe Street, and the first black male’s later sale of drugs to an undercover officer.

The officers had no knowledge whether the unidentified black male obtained drugs from the male at the residence on Tripe Street. The unidentified black male was not searched prior to going to the home or when he returned to the undercover officer. Although Detectives Scurry and Gill watched the black male from their vehicle as they drove down the street, there is no confirmation that the unidentified black male obtained the drugs from the residence. Detective Scurry did not state in the affidavit that they saw drugs or money exchanged nor did he or Detective Gill testify they saw such an exchange during their *in camera* testimony.

Moreover, the affidavit in support of the search warrant along with the detectives’ testimony during the *in camera* hearing failed to set forth any information as to the reliability of the unidentified black male. The unidentified black male was essentially an unknowing, unsearched, and unrecorded informant for law enforcement. The affidavit does not name this person and, at the time the warrant was issued, law enforcement did not know the identity of this individual. Consequently, law enforcement did not and could not have known anything concerning his reliability.

In State v. Philpot, 317 S.C. 458, 454 S.E.2d 905 (Ct. App. 1995), the Court of Appeals held the search warrant affidavit was insufficient to establish probable cause for a search of the defendant’s residence. In Philpot, an officer with the Pickens County Sheriff’s Department signed an affidavit in support of a search warrant for the defendant’s residence to search for marijuana and marijuana paraphernalia. Id. at 460, 454 S.E.2d at 906. The affidavit contained the following statement:

Within the past 72 hours, a confidential informant has seen a quantity of marijuana in the residence to be searched. Also in the past, agents with the Special Operations Div. of the Pickens County Sheriff's Office have received information the [sic] one of the persons who lives at the residence, Jim Philpot, is involved in illicit activity.

Id.

Based on this affidavit, the magistrate issued the search warrant. Officers executed the search warrant and seized evidence of marijuana manufacturing and possession. Id.

Philpot moved to suppress the evidence seized during the search because the name of the confidential informant had not been disclosed and the affidavit for the search warrant was devoid of any information as to the informant's reliability. The trial court denied the motion. During cross-examination, the defense counsel asked the officer presenting the affidavit whether he told the magistrate why this informant was dependable and reliable. The officer replied that he had presented the magistrate with a statement from the informant. Defense counsel moved for a production of the statement. After reviewing the statement, the trial court ruled there was nothing in it which would assist the defense and denied the motion to produce. Id. at 460, 454 S.E.2d at 906-907.

On appeal, Philpot asserted that the evidence seized during the execution of the search warrant should have been suppressed because the warrant was not supported by probable cause. More specifically, Philpot attacked the failure of the affidavit to address the veracity of the confidential informant. The Court of Appeals agreed. Id. at 460, 454 S.E.2d at 907.

This Court concluded "the search warrant should not have been issued." Id. The record indicated that the magistrate only had the officer's affidavit and the written statement of the confidential informant before him. Id. The court found that the affidavit and written statement contained "absolutely no showing of the confidential informant's reliability." Id. Consequently, the

court held there was no substantial basis for the magistrate to conclude that probable cause for the search existed and, therefore, the evidence obtained as a result of the search warrant was inadmissible. Id.

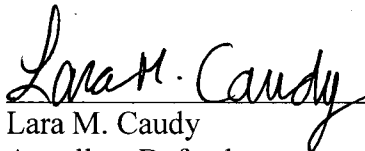
Like in Philpot, this Court should hold there was not a substantial basis from which the magistrate could conclude probable cause existed where the reliability of the unidentified black male was unknown.

Because there was insufficient evidence from which the magistrate could have concluded probable cause existed to search the residence at 805 Tripe Street, this Court should hold the trial judge erred by denying the motion to suppress, reverse Appellant's convictions and sentence, and remand for a new trial.

**CONCLUSION**

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

Respectfully Submitted,



Lara M. Caudy  
Appellate Defender

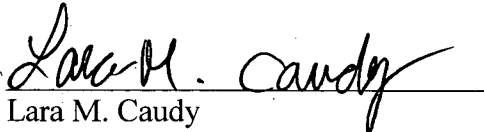
ATTORNEY FOR APPELLANT

This 26th day of June, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

June 26, 2019

  
Lara M. Caudy  
Appellate Defender

S.C. Commission on Indigent Defense  
Division of Appellate Defense  
1330 Lady Street, Suite 401  
Post Office Box 11589  
Columbia, South Carolina 29211-1589

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