ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
The Honorable Roger L. Couch, Circuit Court Judge

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Appellate Case No. 2018-000586

THE STATE,

RESPONDENT,

V.

DERRICK JERMAINE ANCRUM,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial judge properly denied Appellant's motion to suppress the drug evidence seized during the execution of a search warrant at his residence where the affidavit and supplemental testimony in support of the search warrant provided a sufficient basis for the magistrate judge to find, based on the totality of the circumstances, probable cause supporting the warrant.

STATEMENT OF THE CASE

A Charleston County Grand Jury indicted Derrick Jermaine Ancrum, (Appellant), for trafficking cocaine, two hundred grams or more; trafficking crack cocaine, ten grams or more; and manufacturing crack cocaine on February 8, 2016. Appellant appeared before the Honorable R. Markley Dennis on October 10, 2017 and October 11, 2017 for a pretrial hearing. On October 16, 2017, Appellant appeared before the Honorable Roger L. Couch, and a jury for trial. Assistant Solicitors Lauren Frierson and Stephanie Linder represented the State of South Carolina, and Grant Smaldone and Ryan Schwartz represented Appellant.

On October 18, 2017, the jury found Appellant guilty as indicted. Appellant was sentenced to twenty-five years for trafficking cocaine, two hundred grams or more, second offense; twenty-five years for trafficking cocaine, ten grams or more, second offense; and twenty-five years for manufacturing crack cocaine, second offense. All sentences were ordered to run concurrent.

Appellant timely filed a notice of appeal and an initial brief. This brief of Respondent now follows.

STATEMENT OF FACTS

The Search Warrant

On August 18, 2015, Detective Jason Scurry of the Charleston Police Department (CPD), obtained a search warrant from Appellant's residence located at 850 Tripe Street in Charleston, South Carolina. Scurry provided the following in an affidavit supporting the search warrant:

> 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 affiants' assignment with CPD Narcotics Unit, Detective Scurry served for over 2 years with Team 4 Power-shift, a proactive patrol united 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.pp.313–18).

Law enforcement executed the search warrant at 850 Tripe Street on August 27, 2015. A SWAT team entered and secured the residence. Scurry and several other narcotic officers searched the residence. Scurry testified that Appellant was detained on the front porch. Scurry told Appellant who they were and why they were there. Scurry then read Appellant his Miranda[1] rights. Appellant immediately uttered a statement according to Scurry. Appellant "bowed his head, looked up, and he's like, I don't want anybody else to get in any trouble, and he said, I have a couple ounces in the bedroom." Appellant pointed out which bedroom had cocaine in it to Scurry. (R.pp.40–50).

Officers searched the bedroom and found a large amount of currency, cocaine, crack cocaine, a digital scale, and Appellant's South Carolina identification card in a dresser. Some of the cocaine was packaged in small bags. Compressed cocaine was also found in a bank bag. Inside the closet of the bedroom, law enforcement found items "associated with cooking crack cocaine"; including very small Zip-Lock bags commonly used for distribution, inositol powder, which is a cutting agent, another digital scale, an electric grinder, spoons, sponges, strainers, and measuring cups. Collectively, law enforcement recovered over 280 grams of cocaine, about 16 grams of crack cocaine, and twenty-eight hundred dollars in cash. (R.pp.146–59; 205–11; 302–03).

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

Motion to Suppress

On October 2, 2017, Appellant filed a motion to suppress the drug evidence recovered during the execution of the search warrant at 850 Tripe Street on August 27, 2015 pursuant to the

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966).

Fourth Amendment, Article 1, Section 10 of the South Carolina Constitution and S.C. Code Ann. §17-13-140. A pretrial hearing was held concerning Appellant's motion on October 16, 2017. (R.pp.305–12).

Trial counsel claimed the affidavit and supplemental testimony in support of the search warrant failed to provide the magistrate with a sufficient basis to determine whether probable cause existed. Trial counsel proclaimed there was insufficient information in the affidavit concerning the reliability of the unidentified black male subject (later identified as Bernard Barnwell) who ultimately sold crack cocaine to an undercover officer. Defense counsel maintained that the seized drug evidence from the search warrant should be suppressed because the affidavit was insufficient to establish probable cause for a search warrant by comparing the facts of this case to Gentile[2] and Kinloch.[3] (R.pp.4–13).

In response, the State proffered several witnesses who were involved with the undercover investigation that provided substantial information to obtain the search warrant of Appellant's residence. Detective Leon Forrest, Charleston Police Department, testified that he acted as the undercover officer during the drug investigation on August 15, 2015. He testified that law enforcement received multiple complaints from individuals that lived in the neighborhood near 850 Tripe Street. As a result, the Special Investigations Unit decided to conduct several undercover drug buys in the neighborhood to further their investigation. Detective Forrest testified that he rode a bicycle through the neighborhood and after not seeing many people outside, he rode to a gas station. (R.pp.13–18).

Soon after, a black male arrived, Barnwell, who was also riding a bicycle engaged in conversation with Forrest. Forrest asked Barnwell, "if he knew anybody in the neighborhood

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[2] State v. Gentile, 373 S.C. 506, 646 S.E.2d 171 (Ct. App. 2007).
[3] State v. Kinloch, 410 S.C. 612, 767 S.E.2d 153 (2014).

that was selling any [crack-cocaine]." Barnwell made a phone call to an unknown man. Forest testified that Barnwell "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 speakerphone so I could hear the other party saying, yeah, and I think he said, Well, I'll come into your home." (R.pp.18–19).

Forrest explained that Barnwell told him that he was going to ride his bicycle down the street and would return. Barnwell explained to Forrest that he was trustworthy. Forrest gave Barnwell forty dollars of marked currency and Barnwell gave Forrest his cellphone in return. Barnwell left the gas station and went down the street toward 850 Tripe Street. As soon as Barnwell left the gas station, Forrest shared Barnwell's location, direction of travel, physical description, and what street he turned down with Detectives Patrick Gill and Scurry. Gill and Scurry were conducting surveillance in an undercover vehicle. Forrest watched Barnwell until he turned down Tripe Street and did not see him make contact with any other persons. Minutes later, Barnwell returned and gave Forrest a rock-like substance resembling crack cocaine and Forrest gave Barnwell his phone back. Forrest noted Barnwell acted as a "runner," for the drug operation, and was himself charged with distribution. (R.pp.19–22).

During cross-examination, Forrest explained he did not search Barnwell before he left or when he returned. He also testified that he never met Barnwell before that day. Forrest also explained he did not speak with the magistrate judge who found probable cause to issue a search warrant for 850 Tripe Street. Forrest affirmed defense counsel's question that that he did not assist with the drafting of the affidavit in support of the search warrant. When questioned by the trial judge, Forrest further explained why the affidavit purposefully did not contain information about the neighborhood complaints received by law enforcement. (R.pp.22–29).

Gill testified he and Scurry operated as "mobile surveillance" while Forrest performed the controlled buy. They observed Forrest, and his interaction with Barnwell, from their vehicle. Further, they listened to the audio surveillance relayed by Forrest's devices while monitoring the area. Gill recalled:

> Detective Forrest advised us over the wire that he was giving the money to [Barnwell] on the bicycle. He then told us that he [watched Barnwell travel] on the bicycle up Triple Street. At that same time, myself and Detective Scurry were turning the corner down Tripe Street, and I witnessed [Barnwell] 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 short that I was – I'm over six foot – was standing in the doorway, opened the screen door, That black man handed the guy on the bicycle something, and [Barnwell] handed him something. I couldn't tell you exactly what it was. [Barnwell] turned around, keeping his hands cupped, and then rode his bicycle back toward Detective Forrest.

(R.pp.30–33).

Gill testified that Barnwell did not make contact with anyone besides the black male that stood in the doorway of 850 Tripe Street. Gill mentioned, Barnwell did not make any movements on his person, into his pockets, or shirt. Gill believed the hand-to-hand transaction as involving Barnwell handing the man in the doorway the money to get the crack cocaine that Forrest requested. He later reviewed the video recorded by Forrest and confirmed the man with whom Forrest interacted was the same man he saw engage in the hand-to-hand transaction. (R.pp.33–36).

During cross-examination, defense counsel questioned Forrest about the affidavit submitted to the magistrate judge. Forrest responded, "I was not the affiant of the search warrant." Defense counsel objected to the relevancy of Forrest testimony. The trial judge overruled his objection. (R.pp.36–47).

Scurry, the affiant who generated the affidavit which led to the search warrant for 850 Tripe Street, also testified. During his direct examination by the assistant solicitor, the following exchange to 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 search warrant, did you just stand silently or did you kind of talk [the magistrate] through what happened?
> A: No, ma'am. We always talk to [the magistrate] through it, and [the magistrate] also asked questions as well.
> Q: And you did that in this case?
> A: Yes, ma'am.
> Q: And then [the magistrate] signed the search warrant based on the affidavit and your supplement?
> A: Yes, ma'am.
> Q: Why is every single detail not in the affidavit?
> A: Essentially, you don't want to compromise our investigation. We have to leave a copy of that search warrant at the residence.

(R.pp.50–51).

During cross-examination, Scurry testified that he did not know Barnwell. Scurry explained that he never dealt with Barnwell before and he was not provided information about Barnwell's reliability. Scurry testified that he went to the magistrate judge to obtain a search warrant for the particular location and that he swore an oath to the magistrate before informing him of the supplemental information not included in the affidavit. He also clarified to the court the Barnwell was not a confidential informant employed by the Charleston Police Department. (R.pp.51–65).

Following the officers' testimonies, trial counsel moved to suppress the drug evidence seized pursuant to the search warrant. Trial counsel claimed there was insufficient evidence presented to the magistrate judge to find the probable cause standard was satisfied to search Appellant's residence. Defense counsel comprehensively relied on Gentile and Kinlock. Trial

counsel emphasized this was a single event, and alleged the officers did not see a hand-to-hand transaction. Defense counsel claimed no evidence was presented about Barnwell's reliability or whether Barnwell had cocaine on his person before he rode his bicycle to the Appellant's residence. Defense counsel also stressed to the court that subsequent surveillance was not conducted on 850 Tripe Street after the completion of the undercover drug investigation. (R.pp.66–70).

In response, the State argued the instant case was distinguishable from Gentile and Kinlock because it involved a controlled purchase using an undercover officer. The assistant solicitor explained that the involved law enforcement officers used a cold buy technique by having Forrest wear a live wire and camera during a cocaine investigation. Further, the State noted the magistrate judge was informed of the chronological sequence of events that took place during the drug investigation. By clarifying that law enforcement saw Barnwell "[got] off his bike, go directly up to 850 Tripe Street, -- to the doorway where a man from inside the residence came to the door frame, opened the screen door, and had a hand-to-hand transaction." The State confirmed this information was supplied to the magistrate judge in order to establish a sufficient nexus to the controlled drug purchase and 850 Tripe Street. It reiterated that some information was purposefully left out of Scurry's affidavit because "it could potentially damage their investigation, and it could make it an unsafe condition for the undercover officers or even [Barnwell], ... who ultimately pled guilty to [these] facts." The State concluded by noting that, based under the totality of the circumstances, "there was a fair probability that drugs would be found at 850 Tripe Street based on the investigation by the Charleston County detectives." (R.pp.72–75).

The trial judge denied Appellant's motion to suppress the drug evidence. The trial judge noted each case would involve different facts, any number of which could lead to probable cause when considering the totality of the circumstances. The trial judge found that the totality of the information presented to the magistrate provided a substantial basis upon which to grant the search warrant. In reaching this conclusion, the trial judge explained that the search warrant was issued based on both the affidavit and the testimony provided by Scurry. (R.pp.86-90).

STANDARD OF REVIEW

"In criminal cases, an appellate court reviews errors of law only and is bound by the factual findings of the trial court unless clearly erroneous." State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). "The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion. Id. "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." Id.

ARGUMENT

The trial judge properly denied Appellant's motion to suppress the drug evidence seized during the execution of a search warrant at his residence where the affidavit and supplemental testimony in support of the search warrant provided a sufficient basis for the magistrate judge to find, based on the totality of the circumstances, probable cause supporting the warrant.

Appellant contends the trial judge erred in denying his motion to suppress the drug evidence seized during the execution of a search warrant at 850 Tripe Street because the search warrant was not supported by sufficient evidence to give rise to probable cause. The State disagrees with this allegation of error. The suppression motion was properly denied not only because the affidavit itself provided sufficient information which, based on the totality of the circumstances, justified issuance of the warrant, but the affidavit was also supplemented by Officer Scurry's statements to the magistrate judge which provided additional information further justifying the search warrant.

"An appellate court reviewing the decision to issue a search warrant 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). "The appellate court should give great deference to a magistrate's determination of probable cause." Id. "Probable cause . . . is not a high bar: [i]t requires only the 'kind of "fair probability" on which "reasonable and prudent [people,] not legal technicians, act."'" Kaley v. U.S., 571 U.S. 320, 338 (2014) (quoting Florida v. Harris, 568 U.S. 237, 244 (2013)). "[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." Illinois v. Gates, 462 U.S. 213, 232 (1983).

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Likewise, the South Carolina Constitution similarly protects our citizens from "unreasonable searches and seizures and unreasonable invasions of privacy[.]" S.C. Const. art. I, § 10. Significantly, based on the plain language of the state and federal constitutional provisions regarding searches and seizures, the touchstone of those provisions is reasonableness. See Florida v. Jimeno, 500 U.S. 248, 250 (1991) ("The touchstone of the Fourth Amendment is reasonableness."). As a result, **only** unreasonable searches and seizures are constitutionally prohibited, and law enforcement officers are not required to be perfect or mistake-free in order to be in compliance with the constitutional requirements regarding searches and seizures. State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977); see Maryland v. Buie, 494 U.S. 325, 331 (1990) ("It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures[.]"); see also Heien v. North Carolina, 574 U.S. 54 (2014) ("To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them 'fair leeway for enforcing the law in the community's protection.' " (citation omitted)).

In South Carolina, an affiant seeking to obtain a search warrant must present a sworn affidavit to a judge presenting grounds sufficient to establish probable cause in order to justify the issuance of the warrant. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348-349 (1999); see S.C. Code Ann. § 17-13-140 ("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."); see also Illinois v. Gates, 462 U.S. 213, 238 (1983) (identifying probable cause as "a fair probability that contraband or evidence of a crime will be

found"). In State v. Williams, 262 S.C. 186, 189, 203 S.E.2d 436, 437-438 (1974), this 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.

(citation omitted).

In deciding whether to issue a search warrant, the issuing judge 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." Gates, 462 U.S. at 238. In making the probable cause determination, "[issuing judges] are concerned with probabilities and not certainties." State v. Sullivan, 267 S.C. 610, 617, 230 S.E.2d 621, 624 (1976). Importantly, the issuing judge must view the search warrant affidavit in a common-sense and realistic fashion and give consideration to the fact such affidavits are typically prepared by non-lawyers in the haste of criminal investigations. State v. Arnold, 319 S.C. 256, 260, 460 S.E.2d 403, 405 (Ct. App. 1995). Moreover, "[a] search warrant affidavit which itself is insufficient to establish probable cause may be supplemented before the magistrate by sworn oral testimony." State v. McKnight, 291 S.C. 110, 113, 352 S.E.2d 471, 472–73 (1987).

When reviewing a decision to issue a search warrant, the reviewing court should decide whether the issuing judge 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 issuing judge, the court should base its determination on the **totality of the circumstances**. State v. Keith, 356 S.C. 219, 223, 588 S.E.2d 145, 147 (Ct. App. 2003) (emphasis added); see United States v. Woosley, 361 F.3d 924, 926 (6th Cir. 2004) ("The affidavit should be reviewed in a commonsense—rather than a hypertechnical—manner, and the court should consider whether the totality of the circumstances supports a finding of probable cause, **rather than engaging in line-by-line scrutiny**." (emphasis added)); Henson v. State, 440 S.W.3d 732, 740 (Tex. App. 2013) ("[I]t is impermissible to employ a 'divide-and-conquer' or 'piecemeal' approach to analyzing the information upon which the magistrate found probable cause to exist."). The issuing judge'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). Significantly, "[s]earches 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) (citation omitted).

In the case sub judice, the search warrant affidavit presented to the magistrate judge contained substantial information supporting a finding of probable cause for the search of 850 Tripe St. The affidavit: (1) explained an undercover officer (Forrest) engaged in a controlled purchase of cocaine base; (2) the male subject (Barnwell) informed Forrest he would obtain the drugs from him; (3) Scurry and Gill observed Barnwell exchange in a hand-to-hand exchange with an individual at 850 Tripe St.; (4) Barnwell immediately returned to Forrest and gave him the drugs; (5) officers filed tested the drugs, which tested positive as a cocaine base; (6) the drugs were turned into the agency's forensics lab for further testing; (7) Forrest's interactions with

Barnwell were recorded and monitored by the officers; (8) the training and expertise of both Forrest and Scurry, upon which they determined Barnwell acted as a "courier" for a drug operation based out of 850 Tripe St.

Appellant's argument that the information contained information not directly observed by Scurry, the affiant, is incorrect. Scurry noted he listened to the live audio feed of the controlled purchase from a distance and watched Barnwell make the exchange with an individual at 850 Tripe St. Scurry also reviewed the audio and video recordings before generating his affidavit. Moreover, Scurry was not required to base the affidavit solely on his personal knowledge; even hearsay evidence may justify the issuance of a search warrant. See Draper v. United States, 358 U.S. 307, 311 (1959) (recognizing probable cause can be established by evidence – including hearsay evidence – that would not be admissible during trial or sufficient to prove guilt during trial); see also State v. Dunbar, 361 S.C. 240, 249, 603 S.E.2d 615, 620 (Ct. App. 2004) ("Certainly, magistrates can issue search warrants based upon hearsay information that is not a result of direct personal observations of the affiant.") Significantly, because the three individuals who witnessed the events of the controlled purchase were all Charleston police officers, they were inherently reliable. See State v. Driggers, 322 S.C. 506, 511, 473 S.E.2d 57, 60 (Ct. App. 1996) ("[A] non-confidential informant should be given a higher level of credibility because he exposes himself to public view and to possible criminal and civil liability should the information he supplied prove to be false."). Further, the audio and video recordings of the transaction confirmed Forrest's assertions that Barnwell participated in the controlled purchase; namely that he told Forrest he would fetch the cocaine, his disappearance, then reemergence with the drugs.

Probable cause is ultimately a matter of common sense, and here common sense indicated that contraband was likely to be located within 850 Tripe Street. see also United States v.

Williams, 974 F.2d 480, 481-482 (4th Cir. 1992) ("The affidavit submitted to the magistrate clearly establishes that Williams was a drug dealer. The affidavit also contains evidence that Williams was currently residing in the Statesman Motor Lodge. With this evidence before him, the magistrate must consider, in the light of all of the surrounding circumstances, the likelihood that drug paraphernalia would be found in the motel room of a known drug dealer. The magistrate concluded that there was a fair probability that drug paraphernalia would be found in Williams' motel room and issued the search warrant. The affidavit submitted to the magistrate fully supports this conclusion.").

Under the circumstances of the instant case, in which Forrest attempted to buy drugs from Barnwell, Barnwell left to retrieve drugs and went to 850 Tripe Street, and Barnwell returned to Forrest with the drugs, the information in the search warrant affidavit provided the issuing judge with a probable cause basis to believe cocaine or other incriminating evidence connected to the controlled purchase would be found at the Tripe Street residence. See State v. Adams, 291 S.C. 132, 134, 352 S.E.2d 483, 485 (1987) ("[T]he evidence of a contemporaneous drug deal cited in the warrant's supporting affidavit was a sufficient basis for the determination of probable cause under the totality of the circumstances."); see also United States v. Cortez, 449 U.S. 411, 418 (1981) ("[A] trained officer draws inferences and makes deductions – inferences and deductions that might well elude an untrained person."); cf.

Supplemental Testimony

In State v. Crane, 296 S.C. 336, 372 S.E.2d 587 (1988), the trial court denied the defendant's motion to suppress evidence after finding the affidavit underlying the search warrant was itself insufficient to establish probable cause, but the supplemented, sworn oral testimony

presented to the magistrate judge in conjunction with the affidavit established probable cause and justified the warrant. Id. at 338–39, 372 S.E.2d at 588–89.

Here, in addition to the substantial information included in the search warrant affidavit, Scurry testified he presented additional information to the magistrate: (1) Barnwell was arrested and charged with distribution due to his participation in the controlled purchase; (2) Forrest was the officer who participated in the controlled purchase; (3) a shooting had occurred "recently" at the home; (4) Gill, based on his training, experience, and observations, believed he saw a "hand-to-hand transaction" in which Barnwell handed the individual at 850 Tripe Street the money he received from Forrest; (5) 850 Tripe Street had numerous exterior surveillance cameras; and (6) the officers began investigating the neighborhood which included 850 Stripe Street because several citizens complained of drug activities in the area. This additional information further supported the magistrate's determination of probable cause. See Crane, 296 S.C. at 338–39, 372 S.E.2d at 588–89.

Good Faith Exception

Both the United States Constitution and the South Carolina Constitution prohibit unreasonable searches and seizures. U.S. Const. amend. IV; S.C. Const. art. I, § 10. When an unreasonable search or seizure occurs, any evidence seized as the result of that unconstitutional action generally must be excluded from trial pursuant to the exclusionary rule, a judicially-created remedy designed to serve as a deterrent sanction against unconstitutional conduct. State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007); see State v. Brown, 401 S.C. 82, 88, 736 S.E.2d 263, 266 (2012) ("The Fourth Amendment itself provides no remedy for a violation of the warrant requirement. However, the United States Supreme Court has fashioned a judicially-created remedy, the exclusionary rule, which is a deterrent sanction by which the

prosecution is barred from introducing evidence obtained in violation of the Fourth Amendment." (citation omitted)). Importantly though, the exclusion of evidence following an unconstitutional search "is 'not a personal constitutional right,' nor is it designed to redress the injury occasioned by an unconstitutional search." Davis v. United States, 564 U.S. 229, 236 (2011) (citations omitted). Due to the heavy costs exacted by the exclusion of evidence on both the judicial system and society as a whole, application of the exclusionary rule is only appropriate where the deterrent benefits of the rule outweigh the heavy costs its application would exact. Brown, 401 S.C. at 88, 736 S.E.2d at 266. As a result, judicially-created exceptions to the exclusionary rule have been established, including the good faith exception first recognized by the United States Supreme Court in its decision in United States v. Leon, 468 U.S. 897 (1984). Brown, 401 S.C. at 88-89, 736 S.E.2d at 266; see also State v. McKnight, 291 S.C. 110, 113, 352 S.E.2d 471, 473 (1987) ("Exclusion of evidence is not the only means available to insure that warrants are properly issued.").

In Leon, officers received information from an informant of **unknown** reliability about drug activity occurring at a particular residence and initiated a narcotics investigation as a result. Id., 468 U.S. at 901. During their investigation, they observed cars registered to individuals with criminal records come to and leave from the residence and saw individuals enter the residence and leave a short time later with small paper sacks. Id. They also located a small quantity of marijuana at an airport in the belongings of two individuals connected to the targeted residence when those individuals returned from a trip to Miami. Id. at 902. Thereafter, a narcotics investigator prepared a search warrant affidavit recounting those details, obtained a search warrant, searched a variety of locations connected to Leon and his accomplices, and discovered large quantities of cocaine and other evidence. Id. Subsequently, during trial, Leon and his

accomplices sought the suppression of the evidence discovered during the searches, and the district court judge granted the suppression motion after finding the search warrant affidavit contained insufficient information to establish probable cause. Id. at 903. Following that ruling, the State appealed, and the Ninth Circuit Court of Appeals affirmed the district court judge's decision. Id. at 904-905. The State then filed a petition for a writ of certiorari in the Supreme Court, and the Supreme Court granted that petition to address the issue of whether the exclusionary rule should be applied to evidence "obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." Id. at 900.

After considering the issue, the Supreme Court determined the exclusionary rule should only "rarely" be applied to cases where officers reasonably relied upon subsequently-invalidated search warrants. Id. at 926. Specifically, the Supreme Court concluded suppression of the evidence based on a subsequently-invalidated search warrant was only appropriate in four limited situations: (1) where the affiant misled the issuing judge by including false or misleading information in the search warrant affidavit; (2) where the issuing judge wholly abandoned his neutral and detached judicial role; (3) where the search warrant affidavit was " 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable[;]' " and (4) when a search warrant was so facially deficient in some technical respect the officer executing that warrant could not reasonably have presumed it to be valid. Id. at 923 (citation omitted). Thereafter, the Supreme Court reversed the district court judge's decision despite the fact the search warrant affidavit had been found to contain insufficient information to establish probable cause after concluding "the officers' reliance on the magistrate's determination of probable cause was objectively reasonable" under the circumstances. Id. at 926.

Just as in Leon, even assuming the search warrant affidavit was insufficient to establish a substantial basis for a finding of probable cause in Appellant's case, the good faith exception would have nonetheless been applicable under the circumstances because the search warrant affidavit was not " 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable' " and the officers' reliance on the judicially-issued search warrant was objectively reasonable. Id. at 924; cf. United States v. Bynum, 293 F.3d 192, 195 (4th Cir. 2002) ("[I]f Agent Peterson's affidavit does not provide a substantial basis for determining the existence of probable cause, . . . it is not 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' " (citations omitted)). Specifically, the information in Scurry's lengthy and detailed search warrant affidavit was not "bare bones." Instead, that multi-page affidavit contained statements establishing a comprehensive controlled purchase of cocaine base, viewed by multiple officers of the Charleston Police Department, and contained specific information linking their investigation directly to 850 Tripe Street. Cf. Leon, 468 U.S. at 926 (finding an officer's reliance on a search warrant was not objectively unreasonable despite the fact the search warrant affidavit did not contain sufficient information to establish probable cause where the warrant was supported by more than a "bare bones" affidavit). Moreover, before conducting any search, Scurry acted in an objectively-reasonable manner by obtaining a search warrant from the issuing judge, and the search warrant affidavit used to obtain that search warrant was subsequently found to be sufficient upon review by the trial judge. See Messerschmidt v. Millender, 565 U.S. 535 (2012) ("Where the alleged Fourth Amendment violation involves a search or seizure pursuant to a warrant, the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner or, as we have sometimes put it, in 'objective

good faith.' " (citation omitted)); see also United States v. Martin, 833 F.2d 752, 756 (8th Cir. 1987) ("When judges can look at the same affidavit and come to differing conclusions, a police officer's reliance on that affidavit must, therefore, be reasonable."). Under those circumstances, Scurry's and the other officers' reliance on the search warrant was not objectively unreasonable, the officers acted in good faith in executing the search warrant, and the trial judge properly declined to suppress the evidence discovered during the search of the River Street residence. Cf. Leon, 468 U.S. at 927 ("Officer Rombach's application for a warrant clearly was supported by much more than a 'bare bones' affidavit. The affidavit related the results of an extensive investigation and, as the opinions of the divided panel of the Court of Appeals make clear, provided evidence sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause. Under these circumstances, the officers' reliance on the magistrate's determination of probable cause was objectively reasonable, and application of the extreme sanction of exclusion is inappropriate.").

As a result, even assuming that both magistrate court judge who issued the search warrant and the trial judge erred in concluding the search warrant affidavit provided a substantial basis for a finding of probable cause, Appellant's suppression motion was nonetheless properly denied and the incriminating evidence discovered during the search of the Tripe Street residence was properly admitted during trial. See Leon, 468 U.S. at 918-921 ("[S]uppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule. . . . Penalizing the officer for the [issuing judge]'s error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations."); cf. United States v. Lalor, 996 F.2d 1578, 1583 (4th Cir.1993) ("[T]he warrant application is deficient because it fails to

establish a nexus between the drug activity and the location that was searched. Nevertheless, the warrant is not so lacking in probable cause that the officers' reliance upon it was objectively unreasonable. Indeed, two judicial officers have determined that the affidavit provided probable cause to search."); United States v. Corral-Corral, 899 F.2d 927, 939 (10th Cir. 1990) ("Just as reviewing courts give 'great deference' to the decisions of judicial officers who make probable-cause determinations, police officers should be entitled to rely upon the probable-cause determination of a neutral magistrate when defending an attack on their good faith for either seeking or executing a warrant. This is particularly true, where, as here, with the benefit of hindsight and thoughtful reflection, reviewing judges still cannot agree on the sufficiency of the affidavit."); United States v. Anderson, 851 F.2d 727, 729-730 (4th Cir. 1988) (finding the good-faith exception applied even though the search warrant affidavit did not contain **any** information regarding the date of the crime or the date of Anderson's offer to sell a weapon to the informants).

Accordingly, Appellant's conviction should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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June 14, 2019

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
The Honorable Roger L. Couch, Circuit Court Judge

Appellate Case No. 2018-000586

THE STATE,

RESPONDENT,

V.

DERRICK JERMAINE ANCRUM,

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."

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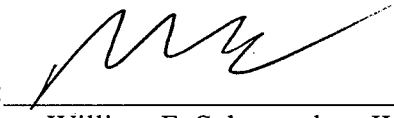
BY: 

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