THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
General Sessions Court
Thomas L. Hughston, Jr., Circuit Court Judge

Unpublished Opinion No. 2020-UP-236
(S.C. Ct. App. filed August 12, 2020)

The State,

Respondent,

v.

Shawn Roseberry Bisnauth,

Petitioner.

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Shawn Roseberry Bisnauth, Appellant.

Appellate Case No. 2017-002445

Appeal From York County
Thomas L. Hughston, Jr., Circuit Court Judge

Unpublished Opinion No. 2020-UP-236
Submitted June 1, 2020 – Filed August 12, 2020

AFFIRMED

Katherine Carruth Goode, of Winnsboro; and Jack B. Swerling, of Columbia, both for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Attorney General David A. Spencer, both of Columbia; and Solicitor Kevin Scott Brackett, of York, all for Respondent.

PER CURIAM: Shawn Roseberry Bisnauth appeals his convictions for possession with intent to distribute cocaine, third or subsequent offense; trafficking in heroin;

trafficking in methamphetamine; and failure to stop for a blue light. He contends the circuit court erred in admitting evidence discovered based on a search warrant issued as the result of an insufficient affidavit. He also appeals the circuit court's denial of his motion to sever the failure to stop charge from trial of the drug offenses. We affirm pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Wood*, 362 S.C. 520, 526, 608 S.E.2d 435, 438 (Ct. App. 2004) ("In most cases, making a motion *in limine* to exclude evidence at the beginning of trial does not preserve an issue for review because a motion *in limine* is not a final determination."); *id.* ("Thus, the moving party must make a contemporaneous objection when the evidence is introduced."); *State v. Tucker*, 324 S.C. 155, 164, 478 S.E.2d 260, 265 (1996) ("A motion for severance is addressed to the trial court and should not be disturbed unless an abuse of discretion is shown."); *id.* ("Charges can be joined in the same indictment and tried together whe[n] they (1) arise out of a single chain of circumstances, (2) are proved by the same evidence, (3) are of the same general nature, and (4) no real right of the defendant has been prejudiced."); *id.* at 164-65, 478 S.E.2d at 265 (affirming the circuit court's denial of a motion to sever because the charges were interconnected and one served as evidence of flight and identity for the other).

AFFIRMED.[1]

WILLIAMS, KONDUROS, and HILL, JJ., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
General Sessions Court
Thomas L. Houston, Jr., Circuit Court Judge

Case No. 2016-GS-46-00756
Case No. 2016-GS-46-00757
Case No. 2016-GS-46-00758
Case No. 2017-GS-46-04770

Appellate Case No. 2017-002445

The State,

Respondent,

v.

Shawn Roseberry Bisnauth,

Appellant.

PETITION FOR REHEARING

Pursuant to Rule 221 of the South Carolina Appellate Court Rules, Appellant, Shawn Roseberry Bisnauth, respectfully petitions for rehearing of his appeal, decided August 12, 2020 (Unpublished Opinion No. 2020-UP-236), and in support of his petition states as follows:

I. Trial Court's Denial of Motion to Disclose Identity of Confidential Informant.

At trial, Appellant sought to have the state reveal the identity of a confidential informant, also referred to in documents and testimony as a "cooperating source" and

"confidential source." R. pp. 28, 30-31, 40-41, 60-62. The trial court denied this motion, stating it was not going to require disclosure. R. p. 62. Appellant's brief raised a claim of error with respect to this ruling, set out as Issue 2 and addressed in Argument II of both the Final Brief and Final Reply Brief of Appellant. The Court of Appeals' decision failed to mention this issue or address Appellant's claim that the trial court erred in refusing to require the state to disclose the identity of the confidential informant. The Court should grant rehearing and address the arguments and authorities cited by Appellant in support of this claim of error.

Although at common law the prosecution was privileged to withhold from disclosure the identity of persons who furnished information related to criminal activity, more recent case law dictates that in certain circumstances the state must disclose the identity of a confidential informant. *See Roviaro v. United States*, 353 U.S. 53, 59-65 (1957); *State v. Diamond*, 280 S.C. 296, 298-99, 312 S.E.2d 550, 550-51 (1984); *State v. Blyther*, 287 S.C. 31, 33-34, 336 S.E.2d 151, 152-53 (Ct.App. 1985). The state's privilege of non-disclosure must give way to the rights of the accused where the informant's identity is relevant and helpful to the defense or is essential for a fair determination of the case against the accused. *See Roviaro*, 353 U.S. at 60-61; *State v. Humphries*, 354 S.C. 87, 90, 579 S.E.2d 613, 615 (2003); *State v. Wright*, 322 S.C. 484, 487, 472 S.E.2d 642, 644 (Ct.App. 1996).

Whether disclosure is required depends on the extent of the informant's involvement. If he has only peripheral knowledge or is a mere "tipster," disclosure is not mandated. *See Humphries*, 354 S.C. at 90, 579 S.E.2d at 615; *Wright*, 322 S.C. at 488, 472 S.E.2d at 645. However, if he is an active participant or a material witness as to guilt

or innocence, disclosure may be required. *See Diamond*, 280 S.C. at 297-98, 312 S.E.2d at 551; *Blyther*, 287 S.C. at 33, 336 S.E.2d at 152-53.

The right to learn an informant's identity also encompasses the right to a reasonable opportunity to search for the informant. *See State v. Burns*, 294 S.C. 338, 340-41, 364 S.E.2d 465, 467 (1988). Moreover, it pertains not only to the informant's testimony about the offense itself, but also to ***preliminary matters such as search and seizure*** or other constitutional matters. *See id.*

In this case, the three drug charges for which Appellant was on trial were based on drugs found in a residence on Sandpiper Drive in Rock Hill, which officers claimed was Appellant's residence. The search was conducted pursuant to a warrant, and the primary basis for that warrant was an alleged controlled buy between Appellant and the confidential informant on October 9, 2015. The confidential informant was an active participant in this alleged drug transaction. He was not a mere tipster. *Cf. Humphries*, 354 S.C. at 90, 579 S.E.2d at 615. His role was not merely peripheral. *Cf. Wright*, 322 S.C. at 488-89, 472 S.E.2d at 645. Rather, he was an integral, active participant in the events that led to the warrant application. The warrant affidavit recited the informant participated in the alleged controlled buy from Appellant with $800 of government funds. R. p. 16. The state's only witness at the pre-trial hearing testified the informant was alone in the car with Appellant, with officers observing from some 200 yards away. R. pp. 51-52, 55. No audio or video surveillance was produced. The informant was the sole witness as to the events that transpired between him and Appellant inside the car on October 9. As such, he was critical to the defense in its efforts to challenge the validity of the warrant and the legality of the search, and his identity was relevant and helpful and

essential for a fair determination of those issues. As in *Roviaro*, *Diamond*, and *Blyther*, the trial court's refusal to require the state to disclose his identity was reversible error.

In its brief, the state cited decisions from other jurisdictions for the proposition that such disclosure is not required where the informant "merely provided information supplying probable cause." However, the authorities on which the state relied addressed factual situations in which the informant's role was nothing more than providing information. *See, e.g., People v. Hobbs*, 873 P.2d 1246 (Cal. 1994); *United States v. Gray*, 47 F.3d 1359 (4th Cir. 1995). One of the state's authorities addressed an informant who was identified and whose only role was introducing the defendant to a government agent. *See United States v. Reardon*, 787 F.2d 512 (10th Cir. 1986). The state did not cite ***any*** decision that addressed the factual situation presented here – a warrant based on a controlled buy involving the active participation of the unidentified informant.

The state's authorities concerning informants who merely supply information do not support the court's refusal to require disclosure in this case. In *McCray v. Illinois*, 386 U.S. 300 (1967), cited by the state, the United States Supreme Court declined to require disclosure of the informant, but the decision turned in large part on the fact that the officers had been acquainted with the informant for years and the informant had supplied information to the officers in excess of 20 times, information that had proved to be accurate and had resulted in convictions. The non-disclosure of the informant's identity was upheld in the context of evidence of the underlying circumstances from which it could be determined that the informant was credible and his information reliable. *See McCray*, 386 U.S. at 303-05. Here, no similar evidence was presented to the magistrate, or even the trial judge, about the informant's history with law enforcement

officials and their knowledge of his reliability. The warrant affidavit contained no information about prior dealings or the informant's reliability. *See* R. p. 16. The only witness at the pre-trial hearing also supplied no such evidence. He testified he did not personally deal with the informant. R. pp. 50-51. He did not deal with the individuals who were handling the informant. R. p. 51. He had no contact with the informant. R. p. 57. He did not meet with the informant and did not talk to the informant. R. pp. 52-53. He did not know how long the Charlotte Mecklenburg police actually knew the informant. R. p. 55. He specifically stated he could not testify as to how reliable the informant was. R. p. 55. The cases relied upon by the state simply do not apply to the facts of this case.

The state's brief sought to have the Court ignore the clear statement of the South Carolina Supreme Court that the right to learn the identity of an informant pertains not only to the informant's testimony about the offense itself, but also to ***preliminary matters such as search and seizure.*** *See Burns*, 294 S.C. at 340-41, 364 S.E.2d at 467. Even apart from *Burns*, the state's argument against disclosure of the identity of the information must fail because of the factual difference in this case and all the authorities on which the state relied. In this case, the informant's involvement was far greater than merely providing information supplying probable cause. In this case, the informant was an active participant in the alleged criminal activity – the alleged controlled buy – and a material witness to the circumstances that led the officers to seek the search warrant.

If this Court accepts the state's premise that disclosure is not required where the informant actively participated in the criminal activity leading to a search warrant, but is required only where he participated in the actual charged offense, that situation is

established by the facts of this case. Based on the totality of the state's allegations, the informant was a participant in the on-going chain of events that constituted the alleged trafficking offense. The officer testified that part of the informant's payment during the controlled buy was for a "previous ounce that he had fronted him." R. p. 45. The state's theory of the case was that Appellant was operating out of what the state alleged was his residence in Rock Hill, keeping drugs there, but making deliveries in Charlotte, including at least two to the confidential informant. Upon this theory of the case, the informant was clearly an active participant in both the controlled buy and in the trafficking offense, such that his identity had to be disclosed when requested by the defense. The trial court's refusal to require disclosure was reversible error, and this Court should grant rehearing, address this issue, and reverse.

II. Trial Court's Denial of Motion to Sever.

Appellant was being tried for three drug charges that arose from a search on October 15, 2015, of the Sandpiper Drive residence, pursuant to a search warrant. R. pp. 13-17. He was also being tried on a charge of failure to stop for a blue light, which stemmed from events that occurred on Interstate 77, hours ***prior to*** the search of the house. The defense sought to have the trial of that charge severed from the trial of the drug charges, but the trial judge denied that motion, deeming them to be closely related. R. p. 63.

Appellant challenged this ruling in his Issue 3 and Argument III. The Court of Appeals' decision summarily rejected this claim of error, without discussing the facts and evidence that pertain to the four-prong analysis of the issue. The Court of Appeals' decision cited *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996), and the test for

joinder set forth in *Tucker* and still followed by the courts of this state. However, the Court's decision failed to conduct an analysis of the evidence related to the four factors that must be met if charges are to be joined for trial. Those factors required that the trial court sever the trial of the failure-to-stop offense from the trial of the drug offenses, and the denial of the motion to sever constituted an abuse of discretion.

Joinder and trial together of criminal charges is allowed where the charges (1) arise out of a single chain of circumstances, (2) are proved by the same evidence, and (3) are of the same general nature, and where (4) no real right of the defendant has been prejudiced. *See State v. Beekman*, 415 S.C. 632, 636, 785 S.E.2d 202, 204 (2016); *Tucker*, 324 S.C. at 164, 478 S.E.2d at 265; *State v. McGaha*, 404 S.C. 289, 293-94, 744 S.E.2d 602, 604 (Ct.App. 2013); *State v. Rice*, 368 S.C. 610, 615, 629 S.E.2d 393, 395 (Ct.App. 2006); *State v. Tate*, 286 S.C. 462, 464, 334 S.E.2d 289, 290 (Ct.App. 1985). In this case, none of these criteria are met.

The failure-to-stop charge arose on Interstate 77 northbound, separated in both time and distance from the search of the residence on Sandpiper Drive. Officers had not yet attempted to execute the search warrant at that address. They observed Appellant and another person leave that house in separate vehicles and travel to a nearby service station, where Appellant stopped and pumped gas. R. pp. 94-95. There is no evidence that Appellant's departure from the residence or his travel from it to the service station and then to Interstate 77 had anything to do with the search warrant that would be executed at the residence hours later. There certainly is no testimony that he was fleeing that location. Indeed, any inference to that effect is negated by Appellant's stopping at the

service station nearby. The officers did not attempt a stop of his vehicle until after passage of some period of time and his travel to and on Interstate 77. R. pp. 95, 115-16.

The failure-to-stop charge and the drug charges did not arise out of a single chain of circumstances, the first factor required for joinder. They were separate and distinct, occurring at different times and in different locations. The charges were not provable by the same evidence, the second joinder factor. The only witness with respect to the failure-to-stop charge was Rayford Ervin, and he was not a witness with respect to the drugs found in the search of the residence. R. pp. 93-126. The failure to stop charge and the drug charges were not of the same general nature, the third factor. Rather, they were completely different in nature, having no overlapping elements and no overlapping proof. Under these circumstances, the first three factors of the joinder test are not met.

The fourth factor also is not met. Appellant's real rights were implicated, with resulting prejudice. A component of the constitutional right to due process is fundamental fairness. *See* U.S. Const. amend. V, XIV; S.C. Const. art. I, § 3. Appellant had the right to a fair trial and an adjudication of his guilt or innocence free of improper influences. Those rights were infringed by the trial of the drug offenses with the unrelated charge of failure to stop for a blue light. Moreover, resulting prejudice is demonstrated by the evidence at trial and the weakness of the state's case. In the search of the Sandpiper location, the belongings of a woman were found in the closet and in proximity to the drugs found there, establishing that someone other than Appellant lived at the residence. R. pp. 136, 159. The evidence with respect to Appellant's actual residence address was contradictory, as established by the warrant itself and by the testimony. R. pp. 16, 155-56, 164, 172. A magistrate who testified concerning the

Sandpiper address appearing on some paperwork could not state that Appellant gave that address as his address and could not verify the address did not come from other paperwork he had before him. R. pp. 297, 299-300. Three other individuals were present at the residence when it was searched, and it was possible any or all of them resided there. R. pp. 120-23, 125, 131-32. Against this backdrop of uncertainty as to a link between Appellant and the drugs found in the search, a real likelihood exists that the jury was influenced by evidence of failure to stop for a blue light in its conclusion that Appellant was guilty of the drug offenses, or by the drug offenses in its conclusion that he was guilty of failure to stop, drawing an improper inference of guilt due to criminal disposition. *See Tate*, 286 S.C. at 464, 334 S.E.2d at 290; *State v. Lyle*, 125 S.C. 406, __, 118 S.E. 803, 807 (1923).

In its brief, the state acknowledged the four-part test, but it focused on only one prong of the test – that the charges arose out of the same circumstances. While the state claimed there was "overlapping evidence" between the drug charges and the charge of failure to stop for a blue light, it did not contend or establish that the charges are proved by the same evidence, another prong of the test. The state made no claim whatsoever that the charges are of the same general character, and they are not. Drug charges and a charge of failure to stop for a blue light are of entirely different character and nature, and they are not proved by the same evidence.

The state asserted that Appellant fled blue lights after police appeared by his house to set up surveillance, implying that Appellant saw the police at the house they claimed was his residence and that he fled upon seeing them. This implication is contrary to the evidence. There is no evidence whatsoever that Appellant saw the officers at the

surveillance location. Instead, the evidence established that he did ***not*** act in any manner consistent with fleeing until some time later, at a point far removed from the surveillance location, when officers' blue lights were activated on Interstate 77. There is no testimony that, upon leaving the surveillance location, Appellant drove at a high rate of speed. In fact, the evidence is that he actually stopped at a service station before proceeding toward the interstate. There is no evidence from which it can be inferred that Appellant was fleeing due to the surveillance activity and with guilty knowledge, as the state contended.

In the last citation of its decision, the Court of Appeals included a parenthetical reference to a situation in which one charge served as evidence of flight and identity for the other. If this citation was included because the Court was adopting the state's argument premised on alleged flight, the Court misapprehended its applicability. There was no evidence that suggested Appellant knew of the presence of the officers and an impending search, and thus no evidentiary support for an inference of flight.

The unwarranted inference that the state argued and the Court appears to have embraced is the very reason the fourth prong of the joinder test is not satisfied. Appellant's right of due process and fundamental fairness mandated that his conviction be premised on the jury's belief that he was guilty of the crime charged. *See* U.S. Const. amend. V, XIV; S.C. Const. art. I, § 3. He was entitled to have his guilt on the drug charges determined by the evidence related thereto, and not on the basis of an improper inference that was not supported by the evidence – that he was fleeing the surveillance location because he saw the officers there. The evidence does not support that inference, and trying the charges together resulted in the likelihood that the jury was influenced by that unwarranted inference in convicting Appellant of all the charges.

Because none of the joinder criteria are met, the trial court abused its discretion in denying the motion to sever. The Court's summary affirmance of this issue overlooked the evidence applicable to all four factors of the joinder test. It also misapprehended that joinder may be appropriate even if all the factors are not met. A finding with respect to a single factor of the test is not enough. Rather, all four factors must be established before the charges may be joined for trial. The Court should grant rehearing, analyze the evidence related to each factor, and find the trial court committed reversible error in allowing the drug charge and the failure-to-stop charge to be tried together.

III. Insufficiency of Warrant Affidavit to Establish Probable Cause.

Appellant challenged the trial court's denial of his motion to suppress the evidence seized pursuant to the search warrant, because the warrant affidavit lacked sufficient information to establish probable cause. The Court of Appeals held this issue was not preserved and did not address it. The Court should grant rehearing and decide the suppression issue on the merits. Because the warrant affidavit failed to provide any information with respect to the reliability of the informant and because it failed to establish the required connection to the location to be searched, it did not establish probable cause for the search of the Sandpiper Drive residence.

The warrant affidavit provided no information as to the reliability of the confidential informant, his veracity, or his basis of knowledge, for the reviewing magistrate to evaluate in making the probable cause determination. The information before the magistrate was limited to the four corners of the warrant affidavit. The informant was not identified by name. Nor was any information provided to establish how the individual was known to the officers; whether he had past dealings with any of

the officers and, if so, the circumstances of those dealings; and, most importantly, whether past experience had shown him to be reliable. R. p. 16.

In its suppression argument, the defense noted the absence of any information in the warrant affidavit to establish the reliability of the informant. The trial judge agreed and indicated he was bothered by this lack of information. R. p. 42. The state then presented its only witness, who supplied no information concerning the informant or his reliability, as set out above. That witness affirmed he could not testify as to the informant's reliability. R. p. 55. Notwithstanding this complete lack of evidence as to the reliability, veracity, and source of knowledge of the informant, the court summarily ruled the affidavit and search warrant were valid and denied the motion to suppress. R. p. 59. This ruling was erroneous under the authorities cited in Appellant's briefs in the Court of Appeals, incorporated herein by reference. As set out in greater detail in the Final Brief of Appellant, pages 6-7, the holdings and rationales of *State v. Philpot*, 317 S.C. 458, 460-61, 454 S.E.2d 905, 906-07 (Ct.App. 1995), and *State v. Gentile*, 373 S.C. 506, 514-16, 646 S.E.2d 171, 174-76 (Ct.App. 2007), dictate a finding that this warrant did not provide a sufficient basis for a finding of probable cause.

The warrant affidavit was also deficient in failing to establish a reasonable belief that drugs would be found in the particular location to be searched. The alleged activity observed on October 9, 2015, recited in the affidavit, occurred elsewhere, in a vehicle, in Charlotte, North Carolina. R. p. 16. None of the alleged drug activity had any connection to the Sandpiper Drive residence to be searched. The only allegation placing Appellant at that location was the assertion that he went there after the alleged transaction in Charlotte was completed. In a decision of the South Carolina Supreme Court in 2017,

only two pieces of information pertained to a residence to be searched pursuant to a warrant – a statement from over a year earlier that cocaine was delivered there on several occasions, and a statement that in the preceeding six months the subject had been to that address just before making cocaine deliveries – and the Court found this information did not indicate the drugs were being accessed at that address at the time the warrant was sought. *See State v. Thompson*, 419 S.C. 250, 253-54, 258, 797 S.E.2d 716, 717-18, 720 (2017). Here, the affidavit contained even less of a link to the location to be searched than the affidavit in *Thompson*. Unlike *Thompson*, there was no allegation that any drug activity occurred at the Sandpiper Drive location, and the only allegation of Appellant's presence there was after the alleged transaction in Charlotte was complete. Under the rationale of *Thompson*, this warrant was inadequate to provide probable cause of the search of the Sandpiper Drive residence, and the trial court erred in denying the motion to suppress. This Court should rehear its decision and reverse.

IV. Conclusion.

For all the reasons outlined above, and based on all the authorities cited in the Final Brief and Final Reply Brief of Appellant, the Court should rehear this appeal, find reversible error, and remand for a new trial.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM YORK COUNTY
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Appellate Case No. 2017-002445

The State,

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PROOF OF SERVICE

I certify that I have served appellant's petition for rehearing upon respondent, by mailing a copy, postage prepaid, to counsel of record, David A. Spencer, Senior Assistant Attorney General, Office of the Attorney General, Post Office Box 11549, Columbia, South Carolina 29211, on August 26, 2020.

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The South Carolina Court of Appeals

The State, Respondent,

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Shawn Roseberry Bisnauth, Appellant.

Appellate Case No. 2017-002445

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

cc:
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FILED
November 12, 2020