THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant, Shawn Roseberry Bisnauth, was indicted in York County on charges of possession with intent to distribute cocaine,[1] third or subsequent offense; trafficking in heroin; trafficking in methamphetamine; and failure to stop for a blue light. R. pp. 1-8. He was tried by a jury November 14-16, 2017, in York County General Sessions Court, with Judge Thomas L. Hughston, Jr., presiding. The jury found him guilty of the four charges. R. p. 391. Judge Hughston sentenced him to concurrent terms of imprisonment of 10 years, 25 years, 25 years, and three years, respectively, and fines of $50,000 and $200,000 on the heroin and methamphetamine charges. R. pp. 9-12, 392-93.

ARGUMENT

The three drug charges arose from a search on October 15, 2015, of a residence at ____ Sandpiper Drive, Rock Hill, South Carolina, pursuant to a search warrant issued by a York County magistrate. R. pp. 13-17. The blue light charge stemmed from events that occurred on Interstate 77, hours prior to the search of the house.

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[1] One indictment initially charged possession with intent to distribute crack cocaine but was amended at trial to charge possession with intent to distribute cocaine. R. pp. 24-27.

In a pre-trial hearing, the defense moved for disclosure of the identity of the confidential informant, who was also referred to in the warrant affidavit as the "cooperating source" and in the pre-trial testimony as the "confidential source." The defense also moved to suppress the evidence found in the search on multiple grounds, including the lack of the identity of the confidential informant and the lack of any information to establish the reliability of the confidential informant. R. pp. 28-43. After hearing testimony, the court found the warrant valid and denied the motion to suppress. R. pp. 59-60. The defense renewed the motion to disclose the identity of the confidential informant, which the court denied. R. pp. 60-62.

The basis for the search warrant was information provided by the Charlotte Mecklenburg Police and an alleged "controlled buy" conducted in Charlotte between appellant and the confidential informant.[2] The warrant affidavit did not identify the confidential informant and did not provide any information with respect to the reliability of the informant. The affidavit stated, in relevant part,

> On October 9, 2015 Investigators received information from Charlotte Mecklenburg Police Department that a subject known as "Bis" was making deliveries of heroin from Rock Hill, SC to Charlotte, NC. Officers from CMPD and YCMDEU followed and observed "Bis" make what they believe to were [sic] four drug transactions. Officers from CMPD recovered heroin from two of the four transactions that were trafficking amounts of heroin. "Bis" completed one of the transactions in the amount of $800.00 dollars [sic] which was a controlled buy utilizing

[2] Although the search warrant affidavit stated it was believed there were four drug transactions, the affidavit provided information about only one – a purported controlled buy between the informant and appellant using $800 in government funds. No description was provided in the affidavit as to the other purported transactions, which were not controlled buys. R. p. 54. The testimony of the state's only witness at the pre-trial hearing was so vague as to negate any legitimate conclusion that the other encounters were in fact drug transactions. The witness merely testified he saw individuals in the car together. He did not know if it was just a conversation or if anything was exchanged. R. p. 56.

> government funds. Officers from CMPD and YCMDEU followed "Bis" after completing the transaction, maintaining visual sight of him until he arrived back at his residence at ____ Sandpiper Drive, Rock Hill, County of York, South Carolina. "Bis" was operating a 2007 Grey Toyota Camery [sic] displaying SC KJC-905.
>
> Officers from CMPD and YCMDEU were able to identify him, Investigator Jenkins from the YCMDEU was able to indentify [sic] "Bis" as begin Shawn Roseberry Bisnauth. Investigators completed a record's [sic] check through SCDMV and observed that Bisnauth' [sic] address returns to ___ Tributary Drive, Fort Mill, SC. Bisnauth is believed to be living at ____ Sandpiper Drive, Rock Hill, SC due to the power currently being in his mother's name. The cooperating source stated that Bisnauth lives in the area of Planet Fitness on Cherry Road and Ebinport Road, Rock Hill, SC. Bisnauth's residence is within a mile of Planet Fitness on Ebinport Road. Officers know Sheryl Mills-Browne to be his mother from records check to include booking information that he provided stating that his mother was Sheryl. Records check further indicates that Sheryl Mills-Browne resides currently at ___ Tributary Drive which is listed as her property according to property records.

R. p. 16.

Marvin Brown, the affiant for the warrant affidavit, did not testify. There is no evidence that Brown provided any information to the magistrate to supplement the deficiencies in the information supplied by the affidavit.

The only witness in the pre-trial suppression hearing was Rayford Lewis Ervin, an officer with the York County Drug Enforcement Unit. Ervin testified he was present in Charlotte when the alleged controlled buy occurred, watching from approximately 200 yards away. R. pp. 49, 51, 55, 59. He did not know if audio or video surveillance was conducted. R. p. 51.

Information about the confidential informant was critical to a determination of the validity of the search warrant in two important particulars: (1) the informant was the individual who allegedly made the controlled purchase in Charlotte that is recited in the warrant affidavit, and (2) the informant supplied the information in the affidavit

concerning the location of appellant's alleged residence. R. pp. 16, 45. However, in his testimony, Ervin provided no information about the confidential informant or his reliability. 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.

I. THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS THE EVIDENCE SEIZED AS THE RESULT OF AN INVALID SEARCH WARRANT.

The federal and state constitutions guarantee the right to be free from unreasonable searches and seizures. *See* U.S. Const. amend. IV; S.C. Const. art. I, § 10; *State v. Gentile*, 373 S.C. 506, 512, 646 S.E.2d 171, 174 (Ct.App. 2007). Evidence seized in violation of this constitutional protection is inadmissible. *See Gentile*, 373 S.C. at 512, 626 S.E.2d at 174.

A search is deemed reasonable if it is authorized by a warrant supported by probable cause. *See State v. Dill*, 423 S.C. 534, 542, 816 S.E.2d 557, 562 (2018); *State v. Kinloch*, 410 S.C. 612, 616, 767 S.E.2d 153, 155 (2014). In making the probable cause determination, the official asked to issue the warrant must make a practical, common sense decision concerning whether, under the totality of the circumstances set forth in the warrant affidavit, there is a fair probability that evidence of a crime will be found in the particular place to be searched. *See Illinois v. Gates*, 462 U.S. 213, 238 (1983); *State v. Thompson*, 419 S.C. 250, 256-57, 797 S.E.2d 716, 719 (2017); *State v. Philpot*, 317 S.C.

458, 461, 454 S.E.2d 905, 907 (Ct.App. 1995); *State v. Clifton*, 302 S.C. 431, 433, 396 S.E.2d 831, 832 (Ct.App. 1990), *overruled on other grounds*, *Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999). This determination includes an evaluation of the veracity of the person supplying the information and the basis of his or her knowledge. *Gates*, 462 U.S. at 238; *State v. Robinson*, 415 S.C. 600, 605, 785 S.E.2d 355, 357 (2016); *Gentile*, 373 S.C. at 512-13, 646 S.E.2d at 174; *Philpot*, 317 S.C. at 461, 454 S.E.2d at 907; *Clifton*, 302 S.C. at 433, 396 S.E.2d at 832.

Where no supplemental oral testimony is given to the issuing officer, the probable cause determination is limited to the four corners of the affidavit. *See Thompson*, 419 S.C. at 257, 797 S.E.2d at 719; *Kinloch*, 410 S.C. at 616, 767 S.E.2d at 155. It is the duty of the reviewing court to ensure the official who issued the warrant had a substantial basis upon which to conclude that probable cause existed. *See Thompson*, 419 S.C. at 257, 797 S.E.2d at 719; *Kinloch*, 410 S.C. at 616, 767 S.E.2d at 155; *Gentile*, 373 S.C. at 512-13, 646 S.E.2d at 174; *State v. Baccus*, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006).

In this case, there was no information provided 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.

In its suppression argument, the defense noted the absence of any information in the warrant affidavit to establish the reliability of the informant. The court agreed and indicated it 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 detailed above, *supra* pp. 3-4. The state's 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.

This case is unlike *Clifton*, in which the Court of Appeals deemed a warrant valid. There, the affidavit recited the informant had seen drugs at the targeted location within the last 10 days and had received verbal confirmation within the last 72 hours that the drugs were being stored there. The affidavit further recited the informant was reliable, having furnished information on five occasions which led to one arrest. *See Clifton*, 302 S.C. at 432-34, 396 S.E.2d at 832-33. No such information concerning the informant's past history with law enforcement officials or other indicia of reliability was supplied to the magistrate in this case.

Rather, the affidavit in this case is akin to those in *Philpot* and *Gentile*, that were deemed invalid. In *Philpot*, the magistrate had before him an affidavit and a written statement of the informant. However, neither document included any showing as to the reliability of the informant. The Court of Appeals held there was no substantial basis for the magistrate to conclude probable cause existed. *See Philpot*, 317 S.C. at 460-61, 454 S.E.2d at 906-07.

In *Gentile*, the affidavit recited information had been received about narcotics activity at the targeted residence. It stated that during surveillance of the location, a black male was observed entering and leaving the residence, and that person was later stopped and found in possession of four grams of marijuana, after having made no stops since leaving the residence. *See Gentile*, 373 S.C. at 510, 646 S.E.2d at 173. The affidavit was orally supplemented by the officer seeking the warrant, who informed the magistrate there were citizen tips as to heavy foot traffic in and out of the residence late in the afternoon and into the wee morning hours. In surveillance, officers observed several black males entering and leaving after being there less than five minutes. One of those who left was followed and stopped for a traffic violation, then searched and found in possession of two bags of marijuana. There was also a citizen's tip of having smelled marijuana in the vicinity of the residence. *See id.*, 373 S.C. at 510-11, 646 S.E.2d at 173. The Supreme Court analyzed all the components of the information presented to the magistrate and found the information insufficient to establish probable cause. *See id.*, 373 S.C. at 514-16, 646 S.E.2d at 174-76. The Court found the informant's information was vague and unverified, and the Court found there was no indication the citizen was knowledgeable as to the smell of marijuana. *See id.*, 373 S.C. at 509, 646 S.E.2d at 173. The Court held the warrant was invalid under the totality of the circumstances. *See id.*, 373 S.C. at 516, 646 S.E.2d at 176.

The Supreme Court's 2017 decision in *Thompson* emphasizes that the information provided in the affidavit must establish a basis for a reasonable belief that drugs will be found ***in the particular location to be searched***. *See Thompson*, 419 S.C. at 256-58, 797 S.E.2d at 719-20. In this case, the affidavit is woefully deficient on this point. The

alleged activity observed on October 9, 2015, recited in the affidavit and quoted above, *supra* pp. 2-3, occurred elsewhere, in a vehicle, in Charlotte, North Carolina. None of the alleged drug activity had any connection to the residence to be searched, ____ Sandpiper Drive, Rock Hill, South Carolina. The only allegation placing appellant at that location was the assertion that he went there ***after*** the alleged transaction in Charlotte was completed. In *Thompson*, only two pieces of information pertained to the residence to be searched – 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 Supreme Court found this information did not indicate the drugs were being accessed at that address at the time the warrant was sought. *See Thompson*, 419 S.C. at 253-54, 258, 797 S.E.2d at 717-18, 720. Here, the affidavit contains even less of a link to the location to be searched than the affidavit in *Thompson*. Unlike *Thompson*, there is ***no*** allegation that any drug activity occurred at ____ Sandpiper Drive, and the ***only*** allegation of appellant's presence there was ***after*** the alleged transaction in Charlotte was complete.

This circumstance is unlike that discussed in *Thompson*, in which the Court cited prior decisions that upheld warrants where the affidavit provided a timely and direct nexus between the contraband sought and the place to be searched, by providing details of surveillance of the suspect conducting a drug transaction immediately upon ***leaving*** the residence. *See Thompson*, 419 S.C. at 257, 797 S.E.2d at 719-20, *citing Kinloch*, 410 S.C. at 618, 767 S.E.2d at 156; *State v. Gore*, 408 S.C. 237, 248, 758 S.E.2d 717, 722-23 (Ct.App. 2014); and *State v. Scott*, 303 S.C. 360, 362-63, 400 S.E.2d 784, 785-86. Unlike those cases, in this case the affidavit did not describe a nexus with the residence to

be searched through surveillance of the suspect immediately prior to the alleged drug transactions. His going to that location ***after*** the alleged Charlotte transaction does not provide any link between that residence and purported drug activity.

The affidavit characterized ____ Sandpiper Drive as appellant's residence, but that characterization is contrary to other information recited in the affidavit. Records of the South Carolina Department of Motor Vehicles reflected appellant's address to be at a ***different*** location, ___ Tributary Drive, Fort Mill, South Carolina. The power bill for the Sandpiper address was in the name of appellant's mother, not appellant. The only additional evidence as to appellant's residence was supplied by the cooperating source, without any information to establish his source of knowledge, veracity, or reliability.

As in *Thompson*, *Gentile*, and *Philpot*, the information provided to the magistrate in this case is insufficient to establish a substantial basis for a determination that drugs would be found at the location to be searched, ____ Sandpiper Drive. The trial court erred in finding the warrant valid. This Court should reverse and find the evidence seized at ____ Sandpiper Drive must be suppressed.

II. THE TRIAL COURT ERRED IN DENYING THE MOTION TO DISCLOSE THE IDENTITY OF THE CONFIDENTIAL INFORMANT.

The defense moved to require the state to reveal the identity of the confidential informant, which the trial court denied. This ruling was also reversible 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 confidential informant was an active participant in the controlled buy that served as the basis for the warrant. 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. As recited in the affidavit, he participated in the alleged controlled buy from appellant with $800 of government funds. R. p. 16. As

testified to by the state's only witness at the pre-trial hearing, he 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.

III. THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION TO SEVER THE TRIAL OF THE CHARGE OF FAILURE TO STOP FOR A BLUE LIGHT FROM THE TRIAL OF THE DRUG OFFENSES.

The defense moved to sever the charge of failure to stop for a blue light from the trial of the drug offenses. The court denied the motion, upon a finding that the failure to stop charge was closely related to the offenses arising from the search of the house. R. p. 63. This ruling was also erroneous.

Unrelated criminal charges generally should not be joined for trial. 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); *State v. Tucker*, 324 S.C. 155, 164, 478 S.E.2d 260, 265 (1996); *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, and the trial court abused its discretion in denying the motion to sever the failure to stop charge from the drug offenses.

The testimony established that the failure to stop charge arose on Interstate 77 northbound, separately and apart from the drug charges that resulted from the search of the residence at ____ Sandpiper Drive. Officers had not yet attempted to execute the search warrant at that address. They observed appellant and another individual leave that location 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 there to the service station and then to Interstate 77 had anything to do with the search warrant that would be executed at the residence some hours later. There certainly is no testimony that he was fleeing that location; indeed, any inference to that effect is negated by his 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 appellant's 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 set of circumstances. They were separate and distinct, occurring at difference times and in different locations. The charges were not provable by the same evidence. In fact, the only witness with respect to the failure to stop charge was Ervin, and he was not a witness with respect to the drugs found in the search of the residence. The failure to stop charge and the drug charges were completely different in nature, having no overlapping elements and no overlapping proof. The first three criteria of the joinder test are not met.

Nor is the fourth criteria met. Real rights of the defendant 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. The defendant had the right to a fair trial and an adjudication of his guilt or innocence free of improper influences. Those rights were compromised by the trial of the drug offenses in conjunction with the unrelated charge of failure to stop.

The state's evidence was weak in linking appellant to the Sandpiper address. The belongings of a woman were found in the closet and in proximity to the drugs that were seized, establishing that someone other than appellant lived at the residence. R. pp. 136, 159. The evidence the officers had as to appellant's address was contradictory, as established by the warrant itself and by the testimony. R. pp. 16, 155-56, 164, 172. A magistrate called to testify as to the address appearing on certain paperwork could not state that appellant gave the Sandpiper 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 during the execution of the search warrant, and it was possible they all 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 the failure to stop 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).

Because none of the joinder criteria are met, the denial of the motion to sever was an abuse of discretion. Appellant is entitled to a new trial on all the charges, with the drug offenses tried separately from the charge of failure to stop for a blue light.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's convictions and remand for new, separate trials of the drug offenses and the charge of failure to stop for a blue light.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Counsel hereby certifies that the final brief and final reply brief of appellant comply with Rule 211(b) of the South Carolina Appellate Court Rules. Counsel further certifies that the final brief and final reply brief of appellant comply with the Order of the Supreme Court of South Carolina, *Re Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings* (April 15, 2014).

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