THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

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

Appellate Case No. 2020-_____

The State,

Respondent,

v.

Shawn Roseberry Bisnauth,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

Pursuant to Rule 242(d)(1) of the South Carolina Appellate Court Rules, petitioner's counsel certify that a petition for rehearing was made by petitioner and finally ruled on by the Court of Appeals.

QUESTIONS PRESENTED

1. Did the trial court err in denying the motion to disclose the identity of the confidential informant, and did the Court of Appeals err in failing to address this issue?

2. Did the trial court err in denying the motion to sever the trial of the charge of failure to stop for a blue light from the trial of the drug offenses, and did the Court of Appeals err in summarily affirming the trial court's ruling on this issue?

3. Did the trial court err in denying the motion to suppress the evidence seized as the result of an invalid search warrant, and should the Supreme Court address the merits of this issue?

STATEMENT OF THE CASE

Petitioner, 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,

[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.

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.

In an unpublished opinion filed August 12, 2020, a panel of the Court of Appeals summarily affirmed these convictions. App. pp. 1-2. However, the panel's decision addressed only two of the three issues raised by petitioner in the Court of Appeals. App. p. 2. On August 26, 2020, Petitioner timely filed a petition for rehearing with respect to all three issues raised in the appeal. App. pp. 3-17. The Court of Appeals denied rehearing by order filed November 12, 2020. App. p. 18.

CONSIDERATIONS GOVERNING CERTIORARI REVIEW

Rule 242(b) of the South Carolina Appellate Court Rules provides for certiorari review "where there are special and important reasons." The rule lists specific examples of the character of reasons which will be considered in determining whether to grant a writ of certiorari, including where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court and where substantial constitutional issues are directly involved. *See* Rule 242(b) (3), (4), SCACR.

In this case, the Court of Appeals' decision is in conflict with prior decisions of the Supreme Court pertaining to each of the three issues raised. Moreover, the issues raised involve substantial constitutional rights of petitioner, his right to due process and his right to be free of unreasonable searches and seizures. *See* U.S. Const. amend. IV, V, XIV; S.C. Const. art. I, §§ 3, 10.

ARGUMENT AND AUTHORITIES

The three drug charges for which petitioner was on trial arose from a search on October 15, 2015, of a residence at ___ Sandpiper Drive,[2] 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.

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 petitioner and the confidential informant[3]. The warrant affidavit did not identify the

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[2] The street number is redacted from this address and another listed in the warrant affidavit in compliance with this Court's directive concerning personal identifying information, including home addresses of non-parties. *See* In re Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, 407 S.C. 607, 757 S.E.2d 421 (S.C. April 14, 2014).

[3] 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 petitioner using $800 in government funds. No description

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 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.

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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.

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 as to the identity of the confidential informant was critical to the presentation of petitioner's defense to the charges, since the alleged informant was an active participant in the trafficking charges for which petitioner was on trial. Information about the informant was also 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 petitioner's alleged residence. R. pp. 16, 45.

Ervin provided no information about the confidential informant or his reliability. Ervin testified he did not personally deal with the informant or with the individuals who were handling the informant. R. pp. 50-51. 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, and he could not testify as to how reliable the informant was. R. p. 55.

I. THE TRIAL COURT ERRED IN DENYING THE MOTION TO DISCLOSE THE IDENTITY OF THE CONFIDENTIAL INFORMANT, AND THE COURT OF APPEALS ERRED IN FAILING TO ADDRESS THIS ISSUE.

At trial, the defense sought to have the state reveal the identity of the confidential informant. R. pp. 28, 30-31, 40, 60-62. The trial court denied this motion, stating it was

not going to require disclosure. R. p. 62. In his brief in the Court of Appeals, petitioner 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 petitioner's claim that the trial court erred in refusing to require the state to disclose the identity of the confidential informant. Petitioner sought rehearing and asked the Court of Appeals to specifically address the ruling that denied disclosure of the informant's identity. App. pp. 4-8. The Court of Appeals denied rehearing without addressing the issue. App. p. 18. The Court of Appeals' failure to review and rule upon this claim of error denied petitioner appellate review of an important issue in the case. This Court should grant a writ of certiorari, address the merits of this issue, and reverse.

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). Issues of fairness implicate the accused's right to due process. *See* U.S. Const. amend. V, XIV; S.C. Const. art. I, § 3.

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* U.S. Const. amend. IV; S.C. Const. art. I, § 10; *Burns*, 294 S.C. at 340-41, 364 S.E.2d at 467.

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 petitioner with $800 of government funds. R. p. 16. According to the state's only witness at the pre-trial hearing, he was alone in the car with petitioner, 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 petitioner 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 in the Court of Appeals, 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 or 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 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 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 of Appeals ignore the clear statement of this 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. But even apart from *Burns*, the state's argument against disclosure of the identity of the informant 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. Moreover, he was an active participant in petitioner's charged drug offenses.

The state posited 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. If the Court accepts this premise, that situation is established by the circumstances 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 petitioner's alleged drug trafficking. 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 was that petitioner 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. Under this theory, the informant was an active participant in both the controlled buy and in the charged offenses, 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 the Court of Appeals' failure even to address the issue was also reversible error. This Court should grant certiorari, address the issue, and reverse.

II. 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, AND THE COURT OF APPEALS ERRED IN SUMMARILY AFFIRMING THE TRIAL COURT'S RULING ON THIS ISSUE.

Petitioner 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 the alleged offenses to be closely related. R. p. 63.

Petitioner challenged this ruling in Issue 3 and Argument III of his briefs in the Court of Appeals. 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* that is 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. App. p. 2. 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 petitioner and another person leave that house in separate vehicles and travel to a nearby service station, where petitioner stopped and pumped gas. R. pp. 94-95. There is no evidence that petitioner'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 petitioner was fleeing that location. Indeed, any inference to that effect is negated by petitioner'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. Petitioner'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. Petitioner 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 petitioner lived at the residence. R. pp.

136, 159. The evidence with respect to petitioner'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 petitioner gave that address as his address, and the magistrate 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 petitioner 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 petitioner 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 for joinder, 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 petitioner fled blue lights after police appeared by his house to set up surveillance, implying that petitioner 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 petitioner 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, petitioner 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 petitioner 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. App. p. 2. If this citation was included because the Court of Appeals was adopting the state's argument premised on alleged flight, its conclusion is unsound. There was no evidence that suggested petitioner 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 of Appeals appears to have embraced is the very reason the fourth prong of the joinder test is not satisfied. Petitioner'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 petitioner 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 of Appeals' summary affirmance of this issue was contrary to the evidence applicable to all four factors of the joinder test. It was also contrary to this Court's precedent requiring that all four factors be met before joinder is proper. 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: This Court should grant certiorari, analyze the evidence related to each factor, and find the trial court committed reversible error in allowing the drug charges and the failure-to-stop charge to be tried together.

III. THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS THE EVIDENCE SEIZED AS THE RESULT OF AN INVALID SEARCH WARRANT, AND THE SUPREME COURT SHOULD ADDRESS THE MERITS OF THIS ISSUE.

Petitioner 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. In this case, the warrant affidavit failed to provide any information with respect to the reliability of the informant, and it failed to establish the required connection to the location to be searched. Accordingly, it did not establish probable cause for the search of the Sandpiper Drive residence.

The Court of Appeals held this issue was not preserved and did not address it. This Court should grant a petition for writ of certiorari and decide the suppression issue on the merits, even if it agrees with the Court of Appeals as to preservation. All three issues raised in this appeal are meritorious. Upon a grant of certiorari as to the other issues raised, this

Court should also address the suppression issue, in the interests of judicial economy, notwithstanding any perceived preservation issue.

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 Dill*, 423 S.C. at 542-43, 816 S.E.2d at 562; *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 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 detailed above, *supra* pp. 3-5. This witness affirmed he could not testify as to the informant's reliability. R. p. 55. Notwithstanding the 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 *State v. 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 *State v. Philpot* and *State v. Gentile*, which 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 that 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 Court of Appeals 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. It found the informant's information was vague and unverified, and it 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. It held the warrant was invalid under the totality of the circumstances. *See id.*, 373 S.C. at 516, 646 S.E.2d at 176. Like the information in both *Philpot* and *Gentile*, the information presented to the magistrate in this case was not sufficient to warrant a finding of probable cause.

In this case, 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. *See State v. Thompson*, 419 S.C. 250, 253-54, 258, 797 S.E.2d 716, 717-18, 720 (2017). 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 petitioner at that location was the assertion that he went there after the alleged transaction in Charlotte was completed.

In *Thompson*, 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 this Court found the 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 connection 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 petitioner'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 (Ct.App. 1991). 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.

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 affidavit characterized Sandpiper Drive

location as petitioner's residence, but that characterization is contrary to other information recited in the affidavit. R. p. 16. Records of the South Carolina Department of Motor Vehicles reflected petitioner's address to be at a ***different*** location, on Tributary Drive, Fort Mill, South Carolina. The power bill for the Sandpiper address was in the name of petitioner's mother, not petitioner. The only additional evidence as to petitioner'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, the Sandpiper Drive residence. The trial court erred in finding the warrant valid. This Court should grant a writ of certiorari and find the evidence seized at the Sandpiper Drive address should be suppressed.

CONCLUSION

For all the reasons set out above, the Supreme Court should grant a writ of certiorari, reverse petitioner's convictions, and remand for new, separate trials of the drug offenses and the failure-to-stop offense.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

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SC Court of Appeals

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

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

Appellate Case No. 2020-_____

The State,

Respondent,

v.

Shawn Roseberry Bisnauth,

Petitioner.

PROOF OF SERVICE

I hereby certify that I have served copies of the Petition for Writ of Certiorari upon respondent, by mail to its counsel of record, David A. Spencer, Senior Assistant Attorney General, Office of the Attorney General, PO Box 11549, Columbia, South Carolina 29211-1549, and The Honorable Jenny Abbott Kitchings, Clerk, South Carolina Court of Appeals, PO Box 11629, Columbia, South Carolina 29211 on December 14, 2020.

Kellie S. Reaves
Paralegal to Jack B. Swerling

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December 14, 2020

VIA HAND-DELIVERY
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201

RE: The State v. Shawn Roseberry Bisnauth

Dear Mr. Shearouse:

Enclosed for filing are the original and six copies of the Petition for Writ of Certiorari, an original and one copy of the Appendix, and Proof of Service in the above referenced matter. It would be greatly appreciated if the additional copy would be clocked and returned to me in the enclosed envelope.

By copy of this letter, I am serving David A. Spencer, Senior Assistant Attorney General, with a copy of the Petition for Writ of Certiorari.

If you have any questions, do not hesitate to contact me.

Very truly yours,

Jack B. Swerling

JBS/ksr
Enclosures

cc: Clerk, South Carolina Court of Appeals
David A. Spencer, Senior Assistant Attorney General
Katherine Carruth Goode, Esquire
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