

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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**SC Court of Appeals**

Appeal from Richland County  
Honorable DeAndrea G. Benjamin, Circuit Court Judge

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THE STATE,

Respondent,

vs.

JOE LEWIS BUSBY,

Appellant.

Appellate Case No. 2019-001796

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**INITIAL BRIEF OF RESPONDENT**

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### **APPELLANT'S STATEMENT OF ISSUE ON APPEAL**

The trial court erred where it admitted evidence obtained pursuant to a search warrant where the affiant relied on information from another officer, and where the search warrant affidavit and affiant's supplemental testimony were imprecise and conclusory, since the magistrate lacked sufficient information to determine probable cause.

### **RESPONDENT'S STATEMENT OF ISSUE ON APPEAL**

Police officers are allowed to rely on information provided from fellow police officers to support probable cause. The affidavit in support of the search warrant and supporting sworn testimony from the affiant established appellant's vehicle was involved in a collision resulting in death after two traffic violations occurred among the three vehicles involved in the accident, including a vehicle crossing into oncoming traffic. Therefore, a substantial basis existed for the magistrate to believe there was a fair probability evidence of a crime would be found in the seized vehicle and the other vehicles involved in the accident. Further, Appellant lacked a reasonable expectation of privacy in the vehicle because physical possession was relinquished to an auto salvage yard and Appellant granted the power to dispose of the vehicle and its title to the insurance company.

## **STATEMENT OF THE CASE**

The Richland County grand jury indicted Appellant for Reckless Vehicular Homicide (S.C. Code §56-5-2910) on July 16, 2015. Appellant was convicted by a jury of the same charge following trial on October 14-17, 2019. The Honorable DeAndrea G. Benjamin, who presided over the trial, sentenced Appellant to eight years' imprisonment.

## STATEMENT OF FACTS

Caroline Scoggins was riding to work with a friend on Forest Drive when their car was passed by a Ford F-150. Scoggins estimated their car was travelling at approximately 45 m.p.h., but the F-150 drove much faster – she estimated it travelled at 60 m.p.h. in a 35 m.p.h. zone. On cross-examination, she explained it was going at an interstate speed. She told her friend, “They’re going so fast they’re going to get into an accident . . . .” The prediction came true seconds later. The F-150 hit a small green car, and then went across traffic and hit a Chevy Tahoe head on. Tr. pp. 144-48 (direct quote p. 145, lines 14-15); p. 151. Scroggins and her friend stopped to see if they could assist, the fire department and police arrived, and they spoke with police officers before they left the accident scene. Tr. pp. 148-49.

Madison Peyton was driving herself and Scoggins to work. She saw the F-150 driving erratically and swerving. She testified the F-150 “almost hit us.” It swerved right and left, passing cars before hitting something – she thought a curb. The F-150 over-corrected and swerved into oncoming traffic, hitting another car. Peyton estimated the F-150 was driving about 65-70 m.p.h. She described the F-150’s movements as erratic and recalled Scroggins telling her it was going to hit someone. Tr. pp. 153-57.

Steve Benson was driving down Forest Drive with his granddaughter in the car when the truck passed him by as if his own vehicle was “standing still.” Tr. pp. 160-61. Benson commented, “I can’t think why he was going that fast.” Tr. p. 161, lines 1-3. Benson lost sight of the truck when he stopped at a traffic light, then drove down the road further to discover the accident. Tr. pp. 162-64. The passenger in one of the vehicles needed to be cut out of the vehicle with the jaws-of-life.

Tr. p. 165. Benson spoke with police and gave him his name. Tr. p. 165, lines 9-15.

Joanna Snead was driving down Forest Drive when suddenly a truck that was driving fast and passing people came into her lane. The truck was driving “very fast” and weaved in and out of traffic. She deaccelerated even before the F-150 came in her lane because watching the truck was “very scary.” She slammed on the breaks to avoid hitting the vehicle in front of her – the victims’ vehicle. She described the traffic in the area as busy and crowded. Tr. pp. 168-71.

Kimberly Hoffman was driving with her father, William Carroll, as a passenger. She heard a noise and saw a big truck coming right at her. After the wreck, Carroll was unconscious. Carroll would never leave the hospital, dying about a month later. Hoffman suffered a broken ankle. Tr. pp. 184-94.

George Anderson was in the small car – a Toyota – that was struck by Appellant’s vehicle first. However, Anderson never saw what happened. He was making a left turn and looked left, believing the traffic was clear before looking right as he pulled into the median in the center of the road. Tr. pp. 201-03. Anderson noted there is a lot of traffic on that part of Forest Drive and described the area as “a pretty busy place.” Tr. p 198, lines 1-6. Although he left the exit from Trader Joe’s that was closest to a curve on Forest Drive, he noted “you can see things as they come around the curve there, and that’s pretty far away, but it’s still a curve. Tr. p. 198, lines 16-22.

Walter McKenzie, a police officer at the time of the accident, responded to the accident. The fire department and EMS were already on the scene. Tr. p. 392-93. He saw the SUV and the F-150 facing each other in the westbound lane. He determined, “They had collided head on.” Tr. p. 393, lines 16-24. Officer McKenzie took photographs at the accident scene. Tr. pp. 396-97. Reviewing

the photographs he took at the accident scene, McKenzie recounted the train of skid marks and scuff marks on the road extending one hundred and twenty-six feet. He was able to follow the trail of liquids and skidmarks which depict the F-150's trail after the impact with the Toyota, leading from the site of first impact to the site of the F-150's impact in the west bound lane with the Tahoe. He used crayons to mark the path on the pavement. Tr. pp. 398-403; pp. 420-21. Appellant identified himself as the driver. Tr. p. 403. McKenzie completed the accident report, including gathering the names of drivers and occupants of the vehicles. Tr. pp. 404-05.

McKenzie described the traffic on that section of Forest Drive as busy. He described the curve to the left of the Trader Joe's and noted the visibility is not good. Tr. pp. 408-09. McKenzie issued a citation to Appellant for reckless driving. Appellant told him he was going about 45 m.p.h. Tr. pp. 412-13. In assessing the reasons for the ticket, McKenzie testified that the primary factor was Appellant was driving too fast for conditions and secondary to that, he was exceeding the speed limit. Tr. pp. 414-15. McKenzie testified he issued the citation for reckless driving based on the entirety of his investigation and the facts he was able to gather. Tr. p 413. McKenzie discussed the accident with the investigator after the investigator informed him the victim had died. Tr. p. 415-16.

Russell Shumard was the investigator, and he testified he obtained a search warrant for the three cars involved in the accident. The cars were all at scrapyards. He testified the F-150 belonged to Appellant. At the scrapyard, he removed the Airbag Control Module (ACM) from the F-150 and handed it to the MAIT team, so it could extract the data. Tr. pp. 370-72.

Sergeant Calvin Rikard was admitted as an expert in Airbag Control Modules and collision reconstruction. Tr. pp. 427-29. The Toyota did not have an ACM. The Tahoe and F-150, however,

did have an ACM, and Sergeant Rickard extracted the data from these two vehicles. Tr. pp. 434-35.

Analyzing the Tahoe, Sergeant Rickard noted it was going 27 m.p.h. at the time of collision, and knocked backwards at a speed of 7 m.p.h. during the collision, a loss of energy of negative 34 m.p.h. Tr. pp. 451-52. He noted the F-150 was going 77 m.p.h. five seconds before the accident, slowing down to 76 m.p.h. at two and half seconds before the airbag deploys, and 75.2 m.p.h. when the airbag did deploy when the F-150 struck the Toyota. Tr. p. 465. Appellant hit the Tahoe head on at 44 m.p.h. Tr. p. 472-73. If driving the speed limit, the F-150 would have been seven seconds away from the Toyota at the time of impact and there would not have been an accident. He determined the driver of the Toyota would have been unable to see the F-150 at the speed it was travelling. Tr. pp. 488-91.

Dr. Arthur Cooler testified that when Carroll came into the emergency room, he had a laceration in his scalp, broken ribs, broken pelvis, and a fractured vertebrae. Dr. Cooler observed deformities on Carroll's limbs also. Carroll's health would continue to decline until he finally died. Tr. pp. 316-17.

Dr. Darren Monroe, the forensic pathologist, testified the cause of death was acute pneumonia due to complications from the full body blunt force trauma that Carroll suffered. He would not have suffered from the fatal pneumonia but for the injuries he suffered in the car wreck. Tr. pp. 336-38.

## STANDARD OR REVIEW

Appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216 (2006). Our Supreme Court has explained that our appellate courts “are bound by the trial court’s factual findings unless they are clearly erroneous.” Id. Regarding search and seizure issues, the appellate court reviews the trial court’s determination under the clear error standard and will affirm the trial court’s findings if supported by evidence. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004); see State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000) (“[W]e will review the trial court’s ruling like any other factual finding and reverse if there is clear error. We will affirm if there is any evidence to support the ruling.”); State v. Morris, 411 S.C. 571, 578, 769 S.E.2d 854, 858 (2015) (“When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling.”) (citation and internal quotation marks omitted). “A deferential standard of review applies in a Fourth Amendment challenge to a trial court’s fact-driven affirmation of probable cause.” State v. Thompson, 363 S.C. 192, 199, 609 S.E.2d 556, 560 (Ct. App. 2005).

## ARGUMENT

**Police officers are allowed to rely on information provided from fellow police officers to support probable cause. The affidavit in support of the search warrant and supporting sworn testimony from the affiant established appellant's vehicle was involved in a collision resulting in death after two traffic violations occurred among the three vehicles involved in the accident, including a vehicle crossing into oncoming traffic. Therefore, a substantial basis existed for the magistrate to believe there was a fair probability evidence of a crime would be found in the seized vehicle and the other vehicles involved in the accident. Further, Appellant lacked a reasonable expectation of privacy in the vehicle because physical possession was relinquished to an auto salvage yard and Appellant granted the power to dispose of the vehicle and its title to the insurance company.**

Appellant claims the magistrate lacked a substantial basis to find a fair probability that evidence of a crime would be found in the F-150 Appellant drove when the fatal collision occurred. However, the affidavit alleged the victim died as a result of an accident in which two traffic violations occurred, including a vehicle crossing into oncoming traffic. Therefore, that information alone supplies a fair probability that evidence of a crime would be found in the F150, one of the two vehicles involved in the head-on collision. Further, Appellant did not have an expectation of privacy in the F-150 because it was in physical possession of an auto salvage yard and Appellant assigned the right to dispose of the vehicle and its title to the insurance company. Finally, the evidence obtained from the search of the vehicle was cumulative to testimony provided by eyewitnesses and other evidence of guilt was overwhelming. For instance, three eyewitnesses to the crime observed Appellant's F-150 driving recklessly and at an unconscionable speed as it fatally collided with the victims' vehicle.

### **How the issue arose at trial**

During the motion to suppress, defense counsel argued Appellant retained an expectation of privacy in the F-150, even though the vehicle was at a salvage yard, because title was not yet transferred from Appellant's name. Defense counsel averred that title was not transferred to the insurance company until after the search. The salvage title was not issued until August 25, 2015. Tr. pp. 42-43.

Defense counsel further alleged that the affidavit was insufficient to allege a crime had occurred. Defense counsel argued there was no nexus with Appellant's F-150 except that it stated the F-150 was involved in a traffic accident. Tr. p. 45. Defense counsel further complained the magistrate would be unable to know the source of information in the affidavit. Tr. p. 45.

In response, the prosecution noted that on February 19, 2015, prior to the search warrant being issued, Appellant assigned power of attorney for the vehicle over to the insurance company and endorsed the insurance company to transfer title and control the disposition of the vehicle. Accordingly, the prosecution believed that Appellant did not retain an expectation of privacy in the vehicle. Tr. p. 48.

Investigator Shumard from the City of Forest Acres Police Department was called as the sole witness during the suppression hearing. He originally testified he went to the scene of the accident the day of the accident and saw some of the damage, but he would later inform the prosecutor that this recollection was incorrect and the prosecutor informed the trial court of the mistake. Tr. p. 51; pp. 178-79. Subsequently, a passenger in the struck vehicle passed away, and the case became an investigation of a reckless homicide. Tr. p. 51. Citations were issued to the driver of the Toyota for

failure to yield and to Appellant for reckless driving. Tr. pp. 51-52. Investigator Shumard conferred with a member of MAIT, who recommended seeking search warrants for all three vehicles for the data stored in the vehicle modules. Tr. pp. 53-54. After reviewing reports of the accident and speaking with Officer McKenzie – the officer on the scene of the accident – Investigator Shumard obtained search warrants for all three vehicles at the same time from the magistrate in Lexington County, where the vehicles were all located. Investigator Shumard presented the affidavit for the search warrant and provided additional information to the magistrate. Tr. pp. 55-56. He later agreed with the prosecutor that he told the magistrate he was looking for the control module in the F-150. Tr. p. 61.

Investigator Shumard noted that failure to yield is a crime, and that crossing the center line of a road is a crime. Tr. p. 58. Investigator Shumard also testified that speed appeared to be a factor in the collision. Tr. p. 59. Investigator Shumard testified the basis of the information in the affidavit was his investigation and Officer McKenzie’s investigation. Tr. p. 61.

The trial court found there was standing for Appellant because “the car was not transferred, still in his name, title was still in his name. It was not transferred to State Farm at the time of the search warrant – at the time the search warrant was issued.” Tr. p. 69, line 24 – p. 70, line 4. As discussed later in the brief, because the trial court’s ruling concerning whether Appellant held an expectation of privacy was premised solely on title to the vehicle, the trial court committed an error of law in finding Appellant held an expectation of privacy in the F-150.

Defense counsel then argued the magistrate lacked a substantial basis to find probable cause, complaining that Investigator Shumard’s statements to the magistrate that there was a major collision

and that Appellant was driving recklessly were conclusory statements. Tr. pp. 71-72. In response, the prosecutor noted that defense counsel was relying on cases involving informants. In the present case, the prosecutor noted, a crime occurred. The prosecutor explained, “[I]t was a tragic wreck in which somebody went left of center. Again, that’s a crime. There’s two cars on one lane. Somebody crossed the center line.” Tr. p. 72, lines 14-23. The trial court found a substantial basis for the search warrants. Tr. pp. 74-75.

During a break in the testimony, the prosecutors informed the trial court that Investigator Shumard approached the prosecutors and told the prosecutors he realized his in camera testimony the previous day was incorrect. Investigator Shumard did take pictures at the accident scene, but he later realized the day he took the pictures was not a Saturday and the accident occurred on a Saturday. He did not work that Saturday. The prosecution noted they disclosed this to defense counsel and thought it was important to bring up to the trial court as well. Tr. pp. 178-79.

The prosecution further explained the only thing that was incorrect was Investigator Shumard’s appearance at the scene and further explained as follows: “Everything else he testified to as to relying upon the work of Officer McKenzie and Forest Acres Police Department, investigating this crime, that’s what he report [sic] – what he told [the magistrate] and before the – during the affidavit of the search warrant was all correct.” Tr. p. 179, lines 11-17.

Defense counsel requested the trial court to revisit its ruling as a result of the correction. Defense counsel essentially re-raised the points argued pre-trial. In response, the prosecution noted the affidavit made out three violations of law: (1) the collision itself, (2) the crossing of the center

line,<sup>1</sup> and (3) the failure to yield the right of way.<sup>2</sup> He noted the purpose of the search warrant was to determine what caused the three violations of the law. Tr. p. 232. He noted upon Victim's death, the crime was now reckless homicide. Tr. pp. 232-33.

The prosecution reminded the trial court that Investigator Shumard testified he familiarized himself with the incident and spoke with Officer MacKenzie, who was at the scene and talked with witnesses, before attaining the search warrant. Tr. p. 233. The prosecution further explained:

The case law that [defense counsel] cited back then, and the case law . . . , it's about informants. It's about how to know the reliability of . . . what occurred on conclusory items based upon what an informant said [with] no indication as to the reliability of the informant. This is completely different, and now we're talking about law enforcement people . . . or investigation as to what occurred. Investigator Shumard testified that he told Judge Dooley why he was there, what they had been investigating, and gave a basis as to what the incident was, and then swore as to the crimes that were committed – the affidavit that's inside the warrant. Each of the steps he made were proper as to developing probable cause for a warrant. This thing happened.

According to the Officer McKenzie and his report, which has Joe Busby's license number, his ID and that he was diving 55 with a diagram of the incident is what [is] considered. . . .

Tr. p. 234, lines 6-24. The prosecution later noted the cases defense counsel relied on were about the reliability of non-law enforcement witnesses as the basis of the affidavit. Tr. p. 237, lines 21-24. The trial court noted it had read the affidavit about ten times during the 35-40 minute in camera discussion. Tr. p. 244. The trial court noted it replayed testimony from the day before and observed that Investigator Shumard testified it was Officer McKenzie's investigation that led Investigator Shumard to seek the search warrants. Tr. pp. 246-47. The trial court then found there was a

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<sup>1</sup> See S.C. Code § 56-5-1810.

substantial basis for the magistrate based on the affidavit and the investigator's supplemental testimony to find that there was a fair probability that evidence of crime would be found in the vehicles. Tr. p. 247, lines 4-24.

**No expectation of privacy in a totaled vehicle that was relinquished to a scrapyard**

Law enforcement should be encouraged to seek search warrants, even out of an abundance of caution. However, in the present case, Appellant did not have an expectation in his totaled vehicle that was physically located and in the physical possession of the auto salvage business. Additionally, Appellant relinquished dominion and control over the vehicle, assigning the matter of the disposition of the vehicle and its title to the insurance company. The inescapable conclusion is Appellant had forsaken his interest in the vehicle with no intention of recovering it. He had abandoned his expectation of privacy in the vehicle.

“The touchstone of the Fourth Amendment is reasonableness.” Florida v. Jimeno, 500 U.S. 248, 250 (1991). There is no privacy interest in abandoned property. Hester v. United States, 265 U.S. 57, 58 (1924) (finding that containers dropped by moonshiners while being pursued by law enforcement that did not have an adequate warrant were not protected under Fourth Amendment as there was no seizure of the containers, rather, the containers were abandoned). Therefore, our Supreme Court recognized that the abandonment doctrine is an exception to the Fourth Amendment warrant requirement. State v. Dupree, 319 S.C. 454, 457, 462 S.E.2d 279, 281 (1995). The Supreme Court quoted favorably case law that made the following observations:

The distinction between abandonment in the property-law sense and abandonment in the constitutional sense is critical to a proper analysis

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<sup>2</sup> See S.C. Code § 56-5-2350.

of the issue. In the law of property, the question . . . is whether owner has voluntarily, intentionally, and unconditionally relinquished his interest in the property so that another, having acquired possession, may successfully assert his superior interest. . . . In the law of search and seizure, however, the question is whether the defendant has, in discarding the property, relinquished his reasonable expectation of privacy so that its seizure and search is reasonable within the limits of the Fourth Amendment. In essence, what is abandoned is not necessarily the defendant's property, but his reasonable expectation of privacy therein.

Id. (quoting City of St. Paul v. Vaughn, 237 N.W.2d 365, 370-71 (Minn. 1975)).

“Under a standard abandonment analysis, the question is whether the defendant has, in discarding the property, relinquished his reasonable expectation of privacy.” State v. Brown, 423 S.C. 519, 815 S.E.2d 761 (2018) (finding defendant did not retain a reasonable expectation of digital information on his cell phone after he left the phone at the scene of the burglary and cancelled service for the phone with no indication of intent to recover the cell phone) (quoting Dupree, 319 S.C. at 457, 462 S.E.2d at 281).

In the instant case, the vehicle was left at an auto-salvage yard. Further, Appellant assigned to an insurance company the ability to transfer title and dispose of the vehicle as the insurance company pleased. Nothing in the record indicates Appellant intended to recover the vehicle and law enforcement objectively could believe Appellant abandoned his interest in the vehicle. Accordingly, Appellant did not retain a privacy interest in the vehicle and therefore, was not entitled to Fourth Amendment protection of the data stored in the vehicle.

Instructive is Commonwealth v. Sero, 387 A.2d 63 (Pa. 1978), in which law enforcement obtained the murder defendant's car after he gave it away to one of his employees. The defendant claimed a search warrant should have been procured to seize the vehicle. The employee testified that

the night of the shooting, the defendant gave him the vehicle because the defendant, “never wanted to be in that car again, he never wanted to ride in it again, he didn’t want anything to do with it.” The Pennsylvania Supreme Court found the defendant intended and did abandon control of the car. The Court noted, “That legal title had not been transferred is not determinative of the legality of this search. The test for abandonment is whether the complaining party could retain a reasonable expectation of privacy in the property allegedly abandoned.” *Id.* at 69 (citations omitted).

In the present case, Appellant failed to retain an expectation of privacy. The trial court failed to take in account that title to the vehicle was not dispositive of whether Appellant retained an expectation of privacy and no evidence supports a finding that Appellant did retain an expectation of privacy.

**Appellant does not make out a statutory violation**

Appellant seeks to circumvent the lack of an expectation of privacy by recasting the Fourth Amendment issue raised as a statutory compliance issue under S.C. Code §17-13-140. However, regardless of whether the magistrate had a substantial basis to find probable cause, law enforcement followed the statute and therefore, no statutory violation occurred.

S.C. Code §17-13-140 requires, in relevant part:

A warrant issued hereunder shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for the warrant. If the magistrate, municipal judge, or other judicial officer abovementioned is satisfied that the grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. In the case of a warrant issued by a magistrate or a judge of a court of record, it shall be directed to any peace officer having jurisdiction in the county where issued, including members of the

South Carolina Law Enforcement Division, and shall be returnable to the issuing magistrate. . . .

Appellant relies on State v. McKnight, 291 S.C. 110, 352 S.C. 471 (1987). However, in that case, the officer failed to follow the clear requirements of section 17-13-140 because the officer failed to provide an affidavit in support of the warrant as required by section 17-13-140. In this case, law enforcement did provide an affidavit along with the investigator's oral statements to the magistrate. See also State v. Woods, 376 S.C. 125, 128-29, 654 S.E.2d 867, 869 (Ct. App. 2007) (finding order for blood, hair, and saliva samples improperly issued under section 17-13-140 because the officer did not provide an affidavit and was not placed under oath by the circuit court judge).

Appellant also cites State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009) in support of this argument. In Herring, the defendant argued that SLED failed to follow section 17-13-140 because SLED delivered its sworn affidavit and made a sworn statement during a telephone call with the magistrate. The defendant argued the statute was not followed because the SLED agent did not appear in person. The Supreme Court disagreed, finding the language of the statute was followed and further found that the SLED agents acted in good faith compliance with the statute. Id. at 213-15, 692 S.E.2d at 497.

Instead, in the present case, law enforcement followed the requirements of the statute. Law enforcement brought the warrant to the county magistrate. Law enforcement provided the magistrate an affidavit as required. The magistrate appeared to be satisfied that "grounds for the application exist or that there [was] probable cause to believe that they exist[ed]" as evidence by the magistrate's signature. The warrant identifies with specificity the property to be searched, Appellant's vehicle.

Therefore, Appellant failed to make out a statutory violation. Indeed, the basis of Appellant's

argument is the lack of a substantial basis to establish probable cause, not failure to follow a provision of the statute. Instead, the only question Appellant is asking for this Court to decide is whether or not the affidavit and the sworn statements made to the magistrate are sufficient for the magistrate to find probable cause – a Fourth Amendment question.

### **Probable cause determination**

“Under both the United States and South Carolina constitutions, search warrants may not be issued except ‘upon probable cause supported by Oath or affirmation.’” U.S. Const. amend. IV, S.C. Const. art. 1, § 10.” State v. Baccus, 367 S.C. 41, 54, 625 S.E.2d 216, 223 (2006). A sworn oral statement is sufficient to satisfy the “oath or affirmation” requirement under both the federal and state constitutions. State v. Dunbar, 361 S.C. 240, 603 S.E.2d 615 (2004). “Probable cause for a search warrant can be supported by information given to the affiant by other officers.” Id. at 249, 603 S.E.2d at 620 (affiant did not have knowledge of the case either from personal observation or from hearsay statements by other police officers) (citations omitted).

The task of a magistrate when determining whether to issue a search warrant is to make a practical, common sense decision as to whether, under the totality of circumstances set forth in the affidavit, including veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that evidence of crime will be found in a particular place. State v. Driggers, 322 S.C. 506, 510, 473 S.E.2d 57, 59 (Ct. App. 1996). An appellate court reviewing the decision to issue a search warrant should determine if the magistrate had a substantial basis for concluding probable cause existed. State v. Arnold, 319 S.C. 256, 260, 460 S.E.2d 403, 405 (Ct. App. 1995). When reviewing a magistrate’s decision to issue a search warrant, an appellate court must consider the

totality of circumstances. State v. Jones, 342 S.C. 121, 126, 536 S.E.2d 675, 678 (2000); State v. Keith, 356 S.C. 219, 223, 588 S.E.2d 145, 147 (Ct. App. 2003). “Although great deference must be given a magistrate’s conclusions, a magistrate may only issue a search warrant upon a finding of probable cause.” Jones.

“The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause.” State v. Philpot, 317 S.C. 458, 461, 454 S.E.2d 905, 907 (Ct. App. 1995). “A search warrant that is insufficient in itself to establish probable cause may be supplemented by sworn oral testimony.” State v. Weston, 329 S.C. 287, 290, 494 S.E.2d 801, 802 (1997). In determining the validity of the warrant, a reviewing court may consider only information brought to the magistrate’s attention. State v. Gentile, 373 S.C. 506, 513-14, 646 S.E.2d 171, 174 (Ct. App. 2007).

In State v. Williams, 262 S.C. 186, 189, 203 S.E.2d 436, 437-438 (1974), the South Carolina Supreme Court explained probable cause as it relates to the issuance of a search warrant:

In order to justify the issuance of a search warrant, probable cause must be shown, but the term ‘probable cause’ does not import absolute certainty. In determining whether there is sufficient evidence to sustain a finding of probable cause, each case stands on its own facts. The evidence need not be sufficient to support a conviction, or a verdict of guilty, or to establish guilt beyond a reasonable doubt; nor need the proof be positive, it being enough if it is such as to induce in the mind of the issuing officer an honest belief that the facts set forth exist, or as would lead a man of prudence to believe that the offense has been committed.

(citing State v. Bennett, 256 S.C. 234, 182 S.E.2d 291 (1971)).

Critically, in making a probable cause determination, “magistrates are concerned with probabilities and not certainties.” State v. Sullivan, 267 S.C. 610, 617, 230 S.E.2d 621, 624 (1976);

see Bennett, 256 S.C. at 240-241, 182 S.E.2d at 294 (“Obviously, neither the affiant nor his informer could state with absolute certainty that the weapon used to kill Green was at Bennett’s house, and such was not required.”). Probable cause “does not demand any showing that such a belief be correct or more likely true than false.” Texas v. Brown, 460 U.S. 730, 742 (1983).

Because search warrant affidavits are typically prepared by non-lawyers in the haste of criminal investigations, they must be viewed in a common sense and realistic fashion. State v. Arnold, 319 S.C. 256, 260, 460 S.E.2d 403, 405 (Ct. App. 1995). “[A]n affidavit for a search warrant is not to be interpreted in a “a hypertechnical, rather than a commonsense, manner.” United States v. Lalor, 996 F.2d 1578, 1581 (4th Cir. 1993) (quoting Illinois v. Gates, 462 U.S. 213, 236 (1983). “Affidavits must be judged on the facts presented and not on the precise wording used.” State v. Fletcher, 363 S.C. 221, 609 S.E.2d 572, 587-88 (Ct. App. 2005) *rev’d on other grounds by State v. Fletcher*, 379 S.C. 17, 664 S.E.2d 480 (2008). “Searches based on warrants will be given judicial deference to the extent that an otherwise marginal search may be justified if it meets a realistic standard of probable cause.” Arnold. “Suppression is appropriate in only a few situations, including when an affidavit is ‘so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.’” State v. Weston, 329 S.C. 287, 293, 494 S.E.2d 801, 804 (1997) (quoting United States v. Leon, 468 U.S. 897, 923 (1984)).

The search warrant affidavit offers the following description of the property sought:

This inspection/examination will be of vehicle parts, computer data (SCM, ACM, PCM, etc. if equipped), body parts any fluids and/or trace evidence pertinent to the investigation. This will include removal of any vehicle parts, computer data, body parts, any fluids, and trace evidence pertinent t[sic]

The description of the vehicle to be searched is a “2009 Ford F150 pick up truck, black, bearing SC tag JDJ-101, VIN 1FTPX14V29KB59268 registered to a Joe Lewis Busby. The vehicle is located at Copart Auto salvage 4324 Hwy 321 Gaston, SC 29053.”

The affidavit explains:

On 01/24/2015 at 1518 hours the above described vehicle was involved in a traffic collision on SC-12, within the City of Forest Acres, which involved 3 vehicles. The 2009 Ford Pick-up was travelling East on SC-12 when a 1996 Toyota pulled out into it’s [sic] right of way. The Ford struck the above vehicle and subsequently struck a West bound 2001 Chevy Tahoe occupied by a William Carroll, W/M DOB: 09/10/1933, who recently succumbed [sic] to his injuries sustained in this accident. An inspection of the above listed vehicle and data retrieved from it would assist the South Carolina Highway Patrol – MAIT and the Forest Acres Police department in determining the speed of the vehicles at impact along with the sequence of events of the collision.

Defense Exhibit 2.

Investigator Russell Shumard explained what he told the magistrate:

I had told [him] that there was a traffic collision approximately a month ago or however – however long ago it was, and that it was evidence to us that it was a major collision, that one vehicle was – driving – was reported to be driving recklessly and that another vehicle had pulled out in front of that vehicle and that the driver who was driving reckless swerved and hit an oncoming car, in which – an occupant met their demise. And showed him my three search warrants and he signed off on them.

Tr. p. 55, line 23 – p. 56, line 7.

Taken together, the affidavit was sufficient for the magistrate to find probable cause. The role of the F-150 in the accident was specified within the warrant affidavit – the Toyota swerved out in front of it, the eastbound F-150 then hit an oncoming westbound Chevy Tahoe. Investigator

Shumard's supplemental testimony specified one vehicle was driving recklessly when another vehicle pulled out in front of it. Taken in conjunction with the affidavit, it is clear the one vehicle driving recklessly is the F-150. Investigator Shumard told the magistrate, "that the driver who was driving reckless swerved and hit an oncoming car" and the passenger in that car died. Again, it is clear when taken in conjunction with the affidavit that the driver of the F-150 is the person driving recklessly and the F-150 is the vehicle that struck the Tahoe and killed the passenger. Therefore, the totality of the information provided in Investigator Shumard's affidavit and his sworn statement to the magistrate informed the magistrate that the F-150 driving down the road was driving recklessly at the time the Toyota pulled out in front of it and the F-150 swerved and hit a Chevy Tahoe in the oncoming lane. This is sufficient to establish probable cause that the F-150 was driven recklessly and contains potential evidence of the crime. Therefore, the magistrate did not err in issuing the search warrant and the trial court did not err in denying the motion to suppress.

Appellant claims that the affidavit and testimony failed to allege a crime occurred. However, Shumard told the magistrate the F-150 was driving recklessly and that it struck an oncoming car. Shumard related that a person in the oncoming car died as a result of injuries sustained in the crash. Further, either the F-150 or the Tahoe necessarily crossed into oncoming traffic; therefore, both vehicles involved in a vehicular homicide contained a fair probability that evidence of a crime would be found. See Adams v. Hunter, 343 F.Supp. 1284, 1289 (D. S.C. 1972) ("Violations of a statute in South Carolina constitute negligence and are evidence of recklessness"). Indeed, the change in velocity of the Tahoe, as indicated by expert testimony, is also evidence of reckless homicide because this evidence indicates the Tahoe was struck with substantial force.

Appellant claims that the search warrant needed to specify he was the suspect. However, that was unnecessary. The search warrant sought a search of the F-150 and the potential to find evidence of a crime was sufficient because the unnamed driver of the F-150 was reported to have been driving recklessly. Identity of the suspect beyond that was not necessary to establish probable cause that evidence of a crime would be found in the F-150. In determining whether a search warrant is supported by probable cause, the crucial element is not whether the target of the search is suspected of a crime, but whether it is reasonable to believe that the items to be seized will be found in the place to be searched. See Zurcher v. Stanford Daily, 436 U.S. 547, 555-556 (1978). “[T]he nexus between the place to be searched and the items to be seized may be established by the nature of the item and the normal inferences of where one would likely keep such evidence.” United States v. Anderson, 851 F.2d 727, 729 (4th Cir. 1988).

The affidavit and supplemental testimony established there was a collision on a city street in which a person died, and the collision occurred between a westbound vehicle and an eastbound vehicle. These facts alone are sufficient to establish a substantial basis for the magistrate to find probable cause that evidence of a crime would be found in the F-150.

#### **Basis of knowledge**

Appellant complains the magistrate erred because the warrant affidavit and testimony fails to show the basis of the affiant’s knowledge. In making this argument, Appellant complains that Investigator Shumard relied on information provided by Officer McKenzie. This ignores the established case law that a police officer may rely on information provided by other police officers to establish probable cause. “Observations of fellow officers of the Government engaged in a common

investigation are plainly a reliable basis for a warrant applied for by one of their number.” United States v. Ventresca, 380 U.S. 102, 111 (1965), see also State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006) (concluding the officer had probable cause to make the warrantless arrest based on information he received from a fellow officer and his own observations); United States v. Welebir, 498 F.2d 346, 349 n.2 (4th Cir. 1974). “The propriety of an affiant attesting to information supplied him by a fellow officer has been judicially endorsed.” State v. Sullivan, 267 S.C. 610, 615, 230 S.E.2d 621, 623 (1976). In the instant case, Investigator Shumard testified that prior to seeking the search warrant he reviewed the case with Officer McKenzie. McKenzie confirmed reviewing the case with Investigator Shumard. Further, McKenzie testified he found the F-150 in the westbound lane facing the SUV. While explaining the photographs he took at the scene that day, he described the path the truck took from the point of contact with the Toyota to the point of collision with the Tahoe as evidenced by skidmarks and leaking automotive fluids. All this was within his own observation. Further, he testified he took names of the drivers and occupants involved in the accident. There is no indication in the record that any information provided in the affidavit that could conceivably not be within McKenzie’s own observations came from any unnamed individuals rather than cooperating witnesses and bystanders.

**Evidence from seizure was cumulative to other evidence and any error was harmless beyond a reasonable doubt.**

Further, even if Appellant did retain an expectation of privacy in the F-150 located at the salvage yard and the magistrate did not have a substantial basis to find probable cause, the evidence admitted from the search was cumulative to the substantial evidence that Appellant was driving

recklessly and caused the death of the passenger in the Tahoe. There is not reversible error when evidence from an allegedly illegal search is merely cumulative to other evidence presented at trial. State v. Woods, 376 S.C. 125, 129, 654S.E.2d 867, 869-70 (Ct. App. 2007) (finding hair, blood, and saliva samples seized under a deficient search warrant was cumulative to evidence of guilt from several different sources and therefore, their admission was not reversible error). In the instant case, three eye-witnesses observed the crime in its entirety – they observed Appellant driving recklessly and collide with the Tahoe. Another witness saw Appellant driving at a high rate of speed even though he did not see the accident itself. The driver of the Tahoe testified Appellant’s vehicle came in her lane and collided with her. Sergeant Rickard’s testimony was in truth redundant in light of the overwhelming evidence of guilt. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial).

**CONCLUSION**

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

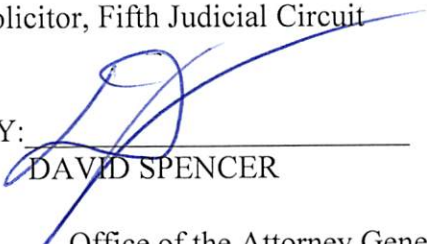
Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

January 13, 2021

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

**RECEIVED**

**Jan 13 2021**

**SC Court of Appeals**

Appeal from Richland County  
Honorable DeAndrea G. Benjamin, Circuit Court Judge

THE STATE,

Respondent,

v.

JOE LEWIS BUSBY,

Appellant.

Case No. 2019-001796

**PROOF OF SERVICE**

I, Shana Montgomery, certify that I have served the within Initial Brief of Respondent and Designation Of Matter on Appellant via electronic mail to the address listed by counsel in AIS addressed to his attorney of record, Joanna K. Delany, Esquire, S.C. Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.  
This 13th day of January, 2021.



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## Shana Montgomery

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**From:** Shana Montgomery  
**Sent:** Wednesday, January 13, 2021 9:16 AM  
**To:** Kasperski, Katriel; Delany, Joanna  
**Cc:** Shana Montgomery; David Spencer  
**Subject:** State V. Joe L. Busby; Appellate Case No. 2019-001796 ; IBOR  
**Attachments:** 02466189.PDF

Good Morning,

Attached please find a copy of the Initial Brief of Respondent and Designation of Matter along with the proof of service for State v. Joe L. Busby (2019-001796). Please confirm receipt. This Initial Brief will be submitted to the South Carolina Court of Appeals today via the AIS One Drive System. Please don't hesitate to contact our office should you have any questions or concerns.

Thank You.

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**Jan 13 2021**  
**SC Court of Appeals**