

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

S.C. SUPREME COURT

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

Appellate Case No. 2020-001635

The State,

Respondent,

v.

Shawn Roseberry Bisnauth,

Petitioner.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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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?

ARGUMENT IN REPLY

The state has filed a return responding to the petition for writ of certiorari submitted by petitioner, Shawn Bisnauth. Petitioner submits this reply to address certain facets of the state's arguments and to note certain arguments and authorities raised by petitioner to which the state has chosen not to respond. Petitioner stands by the arguments and authorities in his petition without repeating them here. As argued in the petition, this Court should grant a writ of certiorari, reverse his convictions, and remand for new, separate trials of the charge of failure to stop for a blue light and the drug charges.

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.

Petitioner challenges the trial court's refusal to require the state to reveal the identity of the confidential informant and the Court of Appeals' failure to address this issue. In its return, the state cites decisions from other jurisdictions for the proposition that such disclosure is not required where the informant "merely provided information supplying

probable cause.” The federal and other state authorities on which the state relies 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). Another 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 does not cite any decision that addressed the precise factual situation presented here – a warrant based on an alleged controlled buy involving the active participation of the unidentified informant.

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

In its return, the state for the first time invokes *State v. Burney*, 294 S.C. 61, 362 S.E.2d 635 (1987), to argue that this Court has previously denied disclosure in a case in

which the informant participated in a controlled buy. But *Burney* was decided upon very different facts than those at issue here. In *Burney*, the informant's participation in a controlled buy was remote, some 10 months prior to the warrant and drug seizure. *See id.*, 294 S.C. at 62, 362 S.E.2d at 636. The remote controlled buy in which the informant participated was not the basis for the warrant. Rather, the informant's role was deemed to be limited to supplying information about the defendant's possession of narcotics, a mere tipster, and his participation in the transaction 10 months earlier served only to aid in establishing the informant's reliability. *Id.*, 294 S.C. at 62-63, 362 S.E.2d at 636. Under the circumstances of *Burney*, the Court found disclosure of the informant's identity was not required. *See id.*, 294 S.C. at 63, 362 S.E.2d at 636. Unlike *Burney*, in this case the informant participated in the actual alleged transaction that supplied the basis for the warrant.

The state would have this Court ignore the clear statement it made in *State v. Burns* 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 State v. Burns*, 294 S.C. 338, 340-41, 364 S.E.2d 465, 467 (1988). Even apart from this language in *Burns*, however, the state's argument is misplaced because of the factual differences between this case and the authorities on which the state relies. 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. 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 challenges the trial court's denial of his motion to sever the charge of failure to stop for a blue light from the trial of the drug offenses. The state and the Court of Appeals both agree with petitioner as to the standard that controls joinder of offenses for trial: charges may be tried together where they (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). The Court of Appeals stated but did not analyze these factors based on the facts, the nature of and proof necessary for the specific charges, or the prejudice that resulted to petitioner based on the trial of the drug charges with the failure-to-stop charge.

The state, and the cases on which the state relies, focus on a single prong of the analysis – that the charges arose out of the same circumstances. While the state claims there was “overlapping evidence” between the drug charges and the charge of failure to stop for a blue light, there is no factual validity to a claim that those charges are proved by the same evidence, another prong of the test. These distinct charges are unlike those

addressed in *State v. Beekman*, on which the state relies. *Beekman* involved charges of sexual offenses of the same general character which were committed against both the defendant's stepchildren, who were siblings, and which occurred at the same place, over the same period of time, and in a similar manner. *See Beekman*, 415 S.C. at 637-38, 785 S.E.2d at 205. No such similarities exist with respect to the drug charges and failure-to-stop charges alleged in this case.

Even if it could be said that these charges arose out of the same circumstances, they are not of the same general character and they are not proved by the same evidence, as required for joinder. Drug charges and a charge of failure to stop for a blue light have entirely distinct elements and factual underpinnings. They are of entirely different character and nature, and they are not proved by the same evidence.

The state argues, and the Court of Appeals appears to have held, that the failure-to-stop charge relates to the drug charges as evidence of flight due to the attempted search of the Sandpiper Drive location, implying that petitioner saw the police at the location to be searched and fled upon seeing them. But no evidence supports such an inference. As noted in the petition, there is no evidence petitioner saw the officers at the surveillance location. The evidence in fact established that he did *not* act in any manner consistent with flight until some time later, far away from the surveillance location, when the blue lights were activated on Interstate 77. There is no evidence that petitioner drove at a high rate of speed as he left the Sandpiper Drive location. The evidence is to the contrary – he actually stopped at a service station before proceeding toward the interstate, and he did not speed up until he had progressed some distance on the interstate. The evidence does not support an inference that he was fleeing due to the surveillance activity and with guilty knowledge,

as the state contends and the Court of Appeals appears to have held in its parenthetical reference to evidence of flight. App. p. 2.

This unwarranted inference implicates the fourth prong of the joinder test. Petitioner's right to due process and fundamental fairness required that his conviction be premised on a finding of guilt of the crime charged, not on the basis of an improper inference that has no evidentiary support. A real likelihood exists that, in convicting him of all the charges, the jury was influenced by the unwarranted inference of guilty knowledge leading to flight.

Because the joinder criteria are not met, the trial court abused its discretion in denying the motion to sever, and the Court of Appeals erred in affirming that ruling. This Court should grant a writ of certiorari, reverse the convictions, and grant petitioner a new trial on all the charges, with the drug offenses tried separately from the charge of failure to stop for a blue light.

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, veracity, and basis of knowledge of the informant, and it failed to establish the required connection to the location to be searched, the Sandpiper Drive residence. Accordingly, it did not establish probable cause for the search.

The state's return cites a great deal of case law related to search warrants and probable cause determinations, but it does not address petitioner's specific contentions or the authorities on which petitioner relies in support of his claim that the warrant was not supported by probable cause.

With respect to the issue of the warrant affidavit's lack of information concerning the reliability of the informant, the state instead focuses its attention on the reliability of the North Carolina officer who provided information to Rayford Lewis Ervin, the officer who testified at the suppression hearing. However, Ervin's testimony about what Officer Lackey may have told him and his experience with Officer Lackey is irrelevant to an evaluation of the sufficiency of the warrant affidavit. As the state acknowledges, in determining the validity of the warrant, this Court may consider *only the information presented to the magistrate*. See *State v. Gentile*, 373 S.C. 506, 513, 646 S.E.2d 171, 174 (Ct.App. 2007). The only information provided to the magistrate was the information contained in the warrant affidavit, executed by Marvin Brown. Any additional information elicited through Ervin's testimony in the suppression hearing cannot serve as the basis for a finding that the warrant affidavit was sufficient to support the magistrate's finding of probable cause.

At the heart of the warrant affidavit was information supplied by a confidential informant, also referred to as the "cooperating source" and "confidential source," who participated in the alleged controlled buy that led the officers to seek the warrant. In his petition for writ of certiorari, at pages 3-5, 17-19, petitioner points out the complete lack of information concerning the reliability, veracity, or basis of knowledge of the informant or any prior dealings between officers and the informant that may have supplied indicia of

reliability. The state does not even attempt to argue that information was supplied to the magistrate to establish the informant's reliability. Nor does the state address the authorities on which petitioner relies in pointing out the insufficiency of the affidavit on this issue, principally, *State v. Philpot*, 317 S.C. 458, 461, 454 S.E.2d 905, 907 (Ct.App. 1995), and *Gentile*, 373 S.C. at 512-13, 646 S.E.2d at 174. Nor does the state address *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), which demonstrates the kind of evidence on which a determination can be made as to the reliability of an informant, in contrast to the complete lack of such information here. In keeping with the cited authorities, this Court should find the warrant was insufficient on the issue of the informant's reliability and could not support a finding of probable cause.

Similarly, the state does not address the argument petitioner makes as to the lack of information in the warrant affidavit to establish the likelihood that drugs would be found in the location to be searched, the Sandpiper Drive residence, and the state does not address *State v. Thompson*, 419 S.C. 250, 256-57, 797 S.E.2d 716, 719 (2017), on which petitioner relies to point out the deficiency of the affidavit on the nexus issue. Rather, the state cites federal decisions that allowed searches of defendants' residences. The state's argument overlooks the lack of adequate information in the warrant affidavit to establish that the Sandpiper Drive location was in fact petitioner's residence, the other information in the affidavit that showed a different location to be his residence, and the fact that the informant – whose reliability was not established at all – supplied part of the information concerning petitioner's alleged residence on which the affidavit relied. As discussed in the petition for writ of certiorari, at pages 19-21, and pursuant to the authority of this Court's 2017 decision

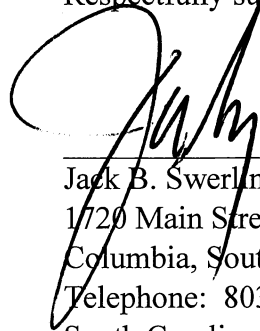
in *State v. Thompson*, the warrant affidavit failed to supply a sufficient nexus to the location to be searched, the Sandpiper Drive address, and it was therefore insufficient to support a finding of probable cause for a search of that location.

Because the warrant was invalid, the search was unlawful and the evidence seized from the Sandpiper Drive location was inadmissible. *See* U.S. Const. amend. IV; S.C. Const. art. I, § 10. The Court of Appeals held this issue was not preserved and did not address it, and the state continues to argue it is not preserved for review. 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, notwithstanding any perceived preservation issue.

CONCLUSION

Based on the arguments and authorities set out above and in the petition for writ of certiorari, 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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