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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
The Honorable J. Cordell Maddox, Circuit Court Judge

Appellate Case No. 2019-001818

THE STATE, Respondent,

v.

NANCY ELAINE CARSWELL Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

I. The trial judge did not abuse his discretion in denying Appellant's motion for continuance.

STATEMENT OF THE CASE

Appellant was indicted by an Anderson County Grand Jury for trafficking methamphetamine. Appellant proceeded to a jury trial on October 14-17, 2019, in the Anderson County Court of General Sessions before the Honorable J. Cordell Maddox. The State was represented by Assistant Solicitors Chelsey Hucker and Mary Holahan. Hadden Lucas, Esquire. and Joey Opperman, Esquire, represented the Appellant. The jury found Appellant not guilty of trafficking, but guilty of the lesser offense of possession with intent to distribute methamphetamine. She was sentenced to twelve years' imprisonment. This appeal follows.

STATEMENT OF FACTS

On March 12, 2018, officers with the Anderson County Sherriff's Office (ACSO) narcotics division conducted surveillance of a home at 205 Fairline Drive in Anderson County based on a tip received from a confidential informant. (Tr. 331). While surveillance was being conducted several vehicles, were observed coming and going from the residence. (Tr. 332, 388). Based on the heavy flow of traffic, Detective Andres Acevedo notified units to respond to the area for proactive patrol and assistance with surveillance. (Tr. 388-389). Detective Sean Proner observed a female carrying a black and pink bag she retrieved from the trunk of a BMW into the house. (Tr. 333).

After the black BMW left the house, Stephen Earwood, with the ACSO, initiated a traffic stop on the vehicle. (Tr. 343). The driver of the vehicle was Tara Thomason. (Tr. 343). Thomason was asked if she had anything illegal in the car, to which she replied that she had a meth pipe in the trunk and a large amount of money. (Tr. 343). The car was then searched and approximately $40,000 in cash and drug residue were found. (Tr. 343).

Lieutenant Roger Scogins arrived at the scene of the traffic stop. (Tr. 357). Thomason told Scogins she got the money from selling drugs to Appellant Nancy Carswell. (Tr. 321). Based on that information Scogins directed a team to secure the residence at 205 Fairline Drive to preserve evidence and directed Detective Acevedo to obtain a search warrant. (Tr. 358).

Sergeant Alan Hendrix along with other officers were tasked with entering the residence and securing the scene. (Tr. 369). Upon entering the residence, Hendrix encountered four individuals including Appellant. (Tr. 369). Everyone was handcuffed while officers waited for the search warrant to arrive. (Tr. 371).

When the search warrant arrived, everyone was moved into the living room. (Tr. 372). The search warrant was then read aloud to Appellant and the three others by Detective Ronald

Wood. (Tr. 442). Detective Hendrix read all four individuals their Miranda rights. (Tr. 372). Afterwards the search was performed and resulted in approximately 140 grams of methamphetamine being found. (Tr. 307, 372). Appellant was arrested and indicted for trafficking methamphetamine. This appeal follows.

STANDARD OF REVIEW

"The trial court's denial of a motion for a continuance will not be disturbed on appeal absent a clear abuse of discretion." State v. Morris, 376 S.C. 189, 208, 656 S.E.2d 359, 369 (2008) (citing State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002)). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." State v. Meggett, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012). "Reversals of refusal of a continuance are about as rare as the proverbial hens` teeth." State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002). "In order for an error to warrant reversal, the error must result in prejudice to the appellant." State v. Preslar, 364 S.C. 466, 473, 613 S.E.2d 381, 385 (Ct. App. 2005).

ARGUMENT

The trial judge did not abuse his discretion in denying Appellant's motion for a continuance.

Appellant contends the trial judge erred in denying Appellant's motion for a continuance because two material witnesses who would have testified that the police began searching the house prior to obtaining a search warrant ignored subpoenas and did not appear in court for Appellant's motion to suppress the drugs found in the house where Appellant was arrested. Appellant specifically argues that this testimony was material to Appellant's motion to suppress because the law enforcement officers claimed that they did not search the home until the search warrant arrived. Appellant's argument lacks merit because although the witnesses were not there to testify, the judge had access to the substance of their testimony and based on the totality of the circumstances the judge made a decision. Further, even if they had been there to testify that the officers searched before the search warrant arrived, their testimony would not have altered the outcome of the motion to suppress because the search was justified by exigent circumstances. Lastly, even if the warrantless search was not justified, the drugs found in the house would have come in based on the inevitable discovery doctrine.

Relevant Facts

Prior to trial defense counsel moved for a continuance because two witnesses for the defense, Stephen Harris and Dylan Patterson, did not appear for the suppression hearing. (Tr.36). Defense Counsel informed the trial judge that Harris had been served with a subpoena on September 17, 2019 and that Patterson was served on October 10, 2019, but there had been no contact with the witnesses. (Tr. 42). Defense Counsel argued that the drugs found in the house should have been suppressed because these two missing witnesses would testify the officers

entered the house and began searching prior to the warrant arriving at the residence resulting in an illegal warrantless search. (Tr. 229).

No abuse of discretion

"The trial court's denial of a motion for a continuance will not be disturbed on appeal absent a clear abuse of discretion." State v. Morris, 376 S.C. 189, 208, 656 S.E.2d 359, 369 (2008) (citing State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002)). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." State v. Meggett, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012). "Reversals of refusal of a continuance are about as rare as the proverbial hens' teeth." State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002). In denying Appellant's motion to continue, the trial judge was presented with all of the evidence. Although the two witnesses were not there to testify, the judge was aware of the substance of their testimony because defense counsel introduced his private investigator's notes from her conversations with Harris and Patterson. (Court's Exhibit 1 and 2). He also heard testimony from nine officers who stated that they entered the residence to secure the scene and preserve evidence and that a search of the residence did not begin until after the search warrant arrived. (Tr. 103, 114, 121, 135, 155, 181,190-191, 196, 200, 212, 227). Appellant relies heavily on the decision in State v. Nelson[1], however the current case differs greatly because the witnesses were unavailable for the motion to suppress for which a jury was not present and the judge knew the substance of their testimony. The judge ruled that exigent circumstances existed. (Tr. 246). Whether or not exigent circumstances existed is not contested on appeal, therefore the law of the case is that the entry to the house was proper.

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[1] State v. Nelson, 847 S.E.2d 480, 491 (Ct. App. 2020).

The issue raised on appeal is whether the two missing witness were actually material to Appellant's motion to suppress the drugs found in the residence. Appellant argues that the testimony of Harris and Patterson was material to the suppression hearing because they would have testified that the officers began searching before the search warrant arrived. The testimony of these two witnesses was not material and would not have changed the outcome of the suppression hearing. The law of the case is that the entry of the home was proper. Once in the home officers are allowed to do a protective sweep of the premises. See Maryland v. Buie, 494 U.S. 325, 110 S. Ct. 1093 (1990).

Even if Harris and Patterson would have testified that the officers began their search before the search warrant arrived the drugs would not have been suppressed. There is nothing in the record indicating whether the drugs were found before or after a valid[1] search warrant arrived. "Previously, this court explained the independent source exception as follows: The '"fruit of the poisonous tree doctrine"' provides that evidence must be excluded if it would not have come to light but for the illegal actions of the police, and the evidence has been obtained by the exploitation of that illegality. However, the challenged evidence is admissible if it was obtained from a lawful source independent of the illegal conduct." State v. Moore, 429 S.C. 465, 478, 839 S.E.2d 882, 889 (2020). "The independent source doctrine teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred." Nix v. Williams, 467 U.S. 431, 444, 104 S. Ct. 2501, 2509 (1984). Based on the independent source doctrine, regardless of the illegal search if the drugs were found after the valid search warrant

[1] It is uncontested that the search warrant was valid.

arrived, they would be admissible. If the drugs were found before the search warrant arrived they would still be admissible under the inevitable discovery doctrine.

The exclusionary rule provides that evidence obtained as a result of an illegal search must be excluded. State v. Sachs, 264 S.C. 541, 560, 216 S.E.2d 501, 511 (1975). Inevitable discovery doctrine provides that illegally obtained information may nevertheless be admissible if prosecution can establish by preponderance of the evidence that the information would have ultimately been discovered by lawful means. State v. Moore, 429 S.C. 465, 839 S.E.2d 882 (2020) "The inevitable discovery doctrine is an exception to the exclusionary rule and states that if the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means, the information is admissible despite the fact it was illegally obtained." State v. Brown, 389 S.C. 473, 483, 698 S.E.2d 811, 816 (Ct. App. 2010).

Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial...Suppression in these circumstances, would do nothing whatsoever to promote the integrity of the trial process, but would inflict a wholly unacceptable burden on the administration of criminal justice. Nix v. Williams, 467 U.S. 431, 446, 104 S. Ct. 2501, 2511 (1984). Even if the witnesses had testified at the suppression hearing that the officers searched before the search warrant arrived and the nine officers did not testify that there was no search before the search warrant, the drugs would not have been suppressed, resulting in the witnesses' testimony not being material. Therefore, the trial judge did not abuse his discretion in denying Appellant's motion to continue.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court should be affirmed.

Respectfully submitted,

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APPEAL FROM ANDERSON COUNTY
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Appellate Case No. 2019-001818

THE STATE Respondent,

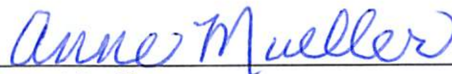
v.

NANCY ELAINE CARSWELL Appellant

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Adam Sinclair Ruffin, counsel of record for Appellant, by sending one copy by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.
This 8th day of March, 2021.



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Date:	Monday, March 8, 2021 12:11:00 PM
Attachments:	Carswell Nancy - Initial Brief Of Respondent and Designation Of Matter (02508618xD2C78).pdf

Good afternoon, Mr. Ruffin.

Attached to this email is the State's Initial Brief of Respondent and Designation of Matter in the above criminal appeal. This brief will be filed with the Court later today.

As a courtesy, please confirm your receipt of this email and the attachment by return email.

Thank you for your cooperation.

Sincerely,

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