STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Kershaw County
Honorable Clifton Newman, Circuit Court Judge

THE STATE,

Respondent,

vs.

ANTHONY C. DAVIS,

Appellant.

Appellate Case No. 2019-001869

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

BYRON GIPSON
Solicitor, Fifth Judicial Circuit

Post Office Box 192
Columbia, S.C. 29202-1987
(803) 576-1800

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other Authorities:

APPELLANT'S STATEMENT OF THE ISSUES ON APPEAL

I. Whether the trial court erred in denying Appellant's motion to suppress the narcotics and other items seized in the search of the apartment where the search warrant affidavit contained no information establishing the confidential informant's reliability and failed to establish sufficient probable cause?

II. Whether the trial court erred in denying Appellant's motion pursuant to Franks v. Delaware where the affidavit contained misleading statements about the alleged controlled buy that was conducted at the apartment complex?

RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

I. There were two informants. Because the affidavit provided information that a non-confidential informant visiting the apartment complex told law enforcement she just purchased the drugs in her vehicle from Appellant in Appellant's apartment, and also information that a separate confidential informant purchased cocaine from Appellant in the same apartment, a substantial basis existed in the affidavit itself to support the magistrate's determination of probable cause. The issue is not preserved for review.

II. The audio/visual recording depicts a drug transaction. Accordingly, the search warrant affidavit does not present any false information. Moreover there is no evidence that any supposed false information was provided intentionally or with reckless disregard for its truth. Further, the other information in the affidavit is sufficient to provide the magistrate with a substantial basis to establish probable cause.

STATEMENT OF THE CASE

Appellant Davis was convicted by a jury, as charged, for trafficking crack cocaine (28-100 grams), trafficking cocaine (10-28 grams), possession with intent to distribute crack cocaine within proximity of a school, and possession with intent to distribute cocaine within proximity of a school, following trial on August 7-8, 2017. Appellant was sentenced by the presiding judge, the Honorable Clifton Newman, to a concurrent nine years' imprisonment for each conviction.

STATEMENT OF FACTS

Following reports of drug-dealing, law enforcement began a narcotics investigation of a man they only knew as Black who lived at the King Haigler apartment complex in Camden. During the course of investigation, law enforcement learned "Black" was Anthony Davis, the Appellant. Tr. pp. 111-12. They observed numerous vehicles arrive at Appellant's apartment, and the people going inside Appellant's apartment, then leaving only a few minutes later. Lieutenant Bradley Lawson, an experienced narcotics officer, testified this was consistent with drug activity. Tr. pp. 114-15; pp. 149-50; p. 211. On July 15, 2016, law enforcement executed a search warrant on the apartment. The search warrant is what is challenged on appeal. Tr. p. 116.

Inside the apartment, law enforcement found Appellant in a back room on the second floor. Tr. p. 153. There was a smoked marijuana blunt, a bag with a crack cookie hidden in an athletic shoe, forty seven individually packaged bags of cocaine, digital scales with white residue, documents with Appellant's name on them, ledgers with names and monetary amounts, a pill bottle bearing Appellant's name, two phones, a letter from the apartment complex discussing Appellant's rent, and Pyrex cups with white residue. Tr. pp. 121-33. The white residue on the scales and a Pyrex cup field-tested positive for cocaine substance. Appellant told law enforcement he lived alone and was in the process of moving out of the apartment. Tr. p. 134.

The owner of the apartments testified Appellant signed the lease and as far as she knew, no one else lived at the apartment. Tr. pp. 172-73. A cell phone dump revealed a message in which Appellant provided his name and address, the same address as the apartment. Another message referred to the sender as "Blackie from earlier," and another indicates the sender lives alone. Tr. pp. 185-89. The chemist determined the weight of the contraband law enforcement seized was a total of

33 grams of crack cocaine and 16 grams of cocaine. Tr. pp. 277-78.

Appellant was the only witness for the defense. Appellant claimed the narcotics were not his. He claimed to have a housemate that went by the name of "Black," and the shoe with crack cocaine was the housemate's shoe. He claimed he was in the process of moving and moved most of his possessions out of the apartment already. He claimed this alleged housemate would use Appellant's phone so the housemate's girlfriend would not find out he was flirting with other women. Tr. pp. 318-29. He claimed he told law enforcement he had a housemate. Tr. p. 338.

Motion to suppress

Law enforcement attained a search warrant for the premises supported by an affidavit indicating law enforcement (1) received information that a man known to them only as "Black" was selling narcotics from the apartment, (2) made a traffic stop of a vehicle seen by law enforcement arriving and shortly leaving the apartments resulting in the occupants informing officers they purchased narcotics from a man named "Black" at the apartments after they were found with narcotics during the traffic stop, and (3) conducted a controlled purchase with an informant from a person known as "Black" from the apartment. Court's Exhibit 1. Therefore, **there are two informants in this case**, a confidential informant and the occupant of the vehicle who was a non-confidential informant.

Three days prior to trial, defense counsel filed a motion entitled "Motion to Controvert Search Warrant Affidavit and to Suppress Evidence," generally alleging the search warrant affidavit violated Franks v. Delaware, 438 U.S. 154 (1978). Defense counsel filed the same day a perfunctory motion entitled "Motion to Suppress Evidence," that quoted only one paragraph of the three paragraph search warrant affidavit and claimed the warrant failed to show the confidential informant

that participated in the controlled buy was reliable, but the motion made no mention of the non-confidential informant, nor addressed the claim the factual basis for the controlled buy was insufficient as is argued by Appellant in the first issue. R. pp. _____ (motions).

Prior to trial, defense counsel argued only the Franks motion, contending the incident report failed to mention the traffic stop or the discussion with the occupants of the vehicle (the non-confidential informant) who reported purchasing narcotics from Appellant. Tr. p. 22. That argument is not presented on appeal. Appellant also reported reviewing the video of a controlled purchase from the apartment and claimed it did not show an actual drug transaction. Appellant argued this contradicted the statement that the purchase of narcotics was captured in an audio/visual recording. Tr. p. 23. This is the alleged Franks violation raised as the second issue on appeal. The audio/visual recording clearly shows a transaction between a black male and the informant, although the narcotics are not readily visible in the video. Court's Exhibit 4.

A pre-trial hearing was then held, and Deputy Spivey was the first witness. He testified he was stationed down the road from King Haigler Apartments while Lieutenant Lawson and Investigator Young were sitting within view of King Haigler apartments. The fellow deputies relayed to Deputy Spivey that an SUV arrived at the apartments and an individual walked out of the car to Apartment F, then shortly returned to the vehicle and it left. Deputy Spivey pulled over the vehicle for a traffic violation and detected the odor of marijuana. The driver (the non-confidential informant) admitted she had the marijuana and passed it on to one of the passengers and told Deputy Spivey where the marijuana was located. It was located in the bra of one of the passengers. Tr. pp. 29-31. Deputy Spivey later agreed with the prosecutor that when the driver said she was coming from Apartment F, the officers already knew that. Tr. pp. 40-41. The driver said she purchased the

marijuana from "Black," which was consistent with information law enforcement already knew. Tr. p. 41, lines 13-18. The driver of the vehicle was not the confidential informant. Tr. p. 42, lines 15-25.

Deputy Spivey later that day was provided information by a confidential informant and a controlled buy was set up with the confidential informant. The informant was searched prior to the controlled buy and fitted with an audio/video wire. She drove to the apartment to make a purchase. The informant and her vehicle were always in sight of the officers during the controlled buy until she went into the apartment. Tr. pp. 36-39. Deputy Spivey testified that if you slow down the video, you can see the drug transaction in the recording. Tr. p. 39, lines 17-22.

Lieutenant Lawson also testified. He was conducting surveillance on Apartment F and saw the SUV arrive. A person left the vehicle and entered Apartment F, then returned to the vehicle a short time later. Tr. pp. 51-52. Lieutenant Lawson joined Deputy Spivey where the SUV was stopped, and heard an occupant of the vehicle state they were coming from Apartment F, which corroborated what Lieutenant Lawson just saw. She stated she purchased the marijuana found during the stop from a black male known as "Black." Tr. p. 53.

Following the testimony, defense counsel reiterated the same points he previously made in support of the alleged Franks violation. Tr. p. 59. The trial court made an initial ruling, finding the officers did not give false information in the affidavit merely because information from the occupants of the vehicle was not mentioned in the incident report. He further noted he had not seen the video yet, but tended to believe he would deny the motion to suppress. Tr. pp. 62-69. Midway through the trial court's ruling, the trial court observed, "In effect, hearing this motion to controvert the search warrant, and I think we pretty much heard the motion to suppress as well, we pretty much

heard all the testimony." Tr. p. 66, lines 3-6. This was likely more a question than a statement, as defense counsel replied, "Yes, sir." Tr. p. 66, line 7. Defense counsel did not offer any argument as to why the affidavit, absent a Franks violation, failed to provide substantial basis for the magistrate to find probable cause, which is the first issue raised in this appeal.

Later, defense counsel asked the trial court if it was prepared to make a ruling as to the argument related to the video, and the trial court responded that it viewed the video and found it corroborated the circumstances in the affidavit and did not contradict it; and further, the trial court found the magistrate had probable cause to issue the warrant. Tr. pp. 96-97.

ARGUMENT

I.

There were two informants. Because the affidavit provided information that a non-confidential informant visiting the apartment complex told law enforcement she just purchased the drugs in her vehicle from Appellant in Appellant's apartment, and also information that a separate confidential informant purchased cocaine from Appellant in the same apartment, a substantial basis existed in the affidavit itself to support the magistrate's determination of probable cause. The issue is not preserved for review.

Appellant contends the trial court erred in failing to suppress the search warrant because the magistrate lacked a reasonable basis to find probable cause. In this case, there was a non-confidential informant and also a confidential informant whose role was to participate in a controlled buy while monitored with a wire. The confidential informant's reliability, therefore, was not at issue since she was closely monitored. Fatal to his argument, Appellant fails to address the information provided by the non-confidential informant. Appellant admits a controlled purchase by itself may be sufficient to establish probable cause, but claims the affidavit fails to state facts sufficient to show the transaction was sufficiently controlled. Even if the description of the controlled purchase in the search warrant affidavit does not provide probable cause on its own, then certainly a substantial basis existed for the magistrate to issue the warrant based on the controlled purchase in tandem with the information provided by the non-confidential informant and law enforcement's own observations. Also, the issue is not preserved for review.

The issue is not preserved for review

The issue is not preserved for review. Three days prior to trial, defense counsel filed a perfunctory written motion to suppress evidence. It only quoted one paragraph of the search warrant

affidavit, excluding mention of the non-confidential informant. It alleged there was no showing the confidential informant was reliable. It did not challenge the language showing the confidential informant was used in a controlled buy or challenge the efficacy of the controlled buy. In the motion, defense counsel merely claimed, "The Affidavit contains only a bald assertion of the reliability of the confidential informant. To be valid, a search warrant affidavit must contain some factual basis for the conclusion that the confidential informant is reliable. Since the Affidavit is fatally deficient, Search Warrant 16559 is invalid. A search of premises grounded on an invalid warrant violates the Fourth Amendment to the U.S. Constitution, and under the exclusionary rule all items seized in such a search must be suppressed." R. p. ____ (Motion to Supress).

At trial, defense counsel never argued the four corners of the search warrant affidavit, on its face, did not support probable cause. The trial court mentioned the issue and found the affiant established a substantial basis for the magistrate to find probable cause to issue the warrant without any argument to the contrary by defense counsel.

"[I]t is the responsibility of trial counsel to preserve issues for appellate review." Jackson v. Speed, 326 S.C. 289, 306 S.E.2d 750, 759 (1997). The ground asserted on appeal must be supported by the objection raised at trial. State v. Silver, 314 S.C. 483, 486, 431 S.E.2d 250, 251 (1993). A "general objection that does not specify the particular ground on which the objection is based is insufficient to preserve a question for review." State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997). Just "the trial court's mentioning the issue does not preserve it for appeal." State v. Fletcher, 363 S.C. 221, 258, 609 S.E.2d 572, 591 (Ct. App. 2005) *rev'd on other grounds by* State v Fletcher, 379 SC 17, 664 S.E.2d 480 (2008). A matter is not preserved for appeal even if the trial court raises it sua sponte. Mize v. Blue Ridge Ry. Co., 219 S.C. 119, 129-30, 64 S.E.2d 253, 258

(1951). "The objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error." State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005).

In the present case, defense counsel did not raise a motion to suppress the evidence based on whether the language of the search warrant affidavit established a substantial basis to find probable cause. Further, the perfunctory written motion was insufficient because it was obvious that the reliability of the confidential informant was not at issue because the informant was used in a controlled buy. State v. Dupree, 354 S.C. 676, 691, 583 S.E.2d 437, 445 (Ct. App. 2003) (a controlled purchase alone may be sufficient to establish probable cause to issue a search warrant); State v. Davis, 354 S.C. 348, 580 S.E.2d 778 (Ct. App. 2003) (refusing to review on suppression motion where defendant relied on memorandum without elaboration and the trial court did not rule on the issue of a Franks violation). However, defense counsel never claimed the description of the controlled purchase was insufficient to show it was properly conducted as Appellant now argues on appeal. When the trial court determined there was a substantial basis for the magistrate to find probable cause, defense counsel did not object to the ruling or point out why the affidavit would lack a substantial basis. An appellant's "failure to request a more explicit ruling constitutes a waiver to any objection to the judge's general ruling." State v. McLaughlin, 307 S.C. 19, 413 S.E.2d 819 (1992), citing State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989); see State v. Morris, 307 S.C. 480, 486, 415 S.E.2d 819, 823 (Ct. App. 1992) (finding error is not preserved if the party accepts the trial court's ruling). The claim arising on appeal that the description of the controlled buy was insufficient is not preserved for review.

The search warrant affidavit

The State agrees the only information provided to the magistrate to support probable cause is

found in the search warrant affidavit. It was sufficient by itself to establish probable cause. The affidavit submitted in support of the search warrant states:

> In July of 2016 agents received information that a black male only known as "Black" has been selling/distributing narcotics from King Heigler apartment's located [at the address] apartment F in the Camden area of Kershaw County, South Carolina 29020. Agents also received information that "Black" operates a silver in color Lexus with chrome rims, agents have observed this vehicle at the apartment on several occasions.
>
> On July 8, 2016 agents with the Kershaw County Narcotics unit were conducting surveillance at King Heigler apartments and observed a dark colored SUV arrive at the apartment complex moments later the vehicle left and following a lawful traffic stop and lawful search agents located approximately 8 grams of marijuana that was located on one for [sic] the passenger's person. Agents then spoke with the occupants of the vehicle who stated that they just met with a black male known to them as "Black" at King Heigler apartments and purchased the marijuana from "Black."
>
> Within the past 72 hours agents with the Kershaw County Sheriff's Office Narcotics Unit utilized a reliable confidential informant purchased a quantity of cocaine from a black male only known as "Black." The confidential informant was wired and given recorded U.S. currency provided by the Kershaw County Sheriff's Office to make the purchase. The confidential informant met with "Black" at King Heigler apartments located at [address] apartment F in the Camden area of Kershaw County, South Carolina 29020 to make the transaction. This incident was audio/visual recorded.
>
> Based on these facts, it is believed that illegal drugs are being distributed and stored and illegal activity is taking place at this described location.

Court's Exhibit 1. The affidavit was sworn by the affiant and signed by the magistrate the same day on July 11, 2016. Court's Exhibit 1.

Standard of Review

When reviewing a decision to issue a search warrant, the reviewing court should decide whether the magistrate was provided a substantial basis for concluding probable cause existed. State

v. Dupree, 354 S.C. 676, 683, 583 S.E.2d 437, 441 (Ct. App. 2003). Applying the same standard as the magistrate, the court should base its determination on the totality of circumstances. State v. Keith, 356 S.C. 219, 223, 588 S.E.2d 145, 147 (Ct. App. 2003). The magistrate's probable cause determination should be afforded great deference on appeal. State v. Rutledge, 373 S.C. 312, 316, 644 S.E.2d 789, 791 (Ct. App. 2007).

The United States Supreme Court spoke as to the proper standard of review in Massachusetts v. Upton, 466 U.S. 727, 728 (1984), explaining:

> [T]he Fourth Amendment's requirement of probable cause for the issuance of a warrant is to be applied, not according to a fixed and rigid formula, but rather in the light of the "totality of the circumstances" made known to the magistrate. We also emphasized that the task of a reviewing court is not to conduct a de novo determination of probable cause, but only to determine whether there is substantial evidence in the record supporting the magistrate's decision to issue the warrant.

In a per curiam opinion, the United States Supreme Court found the Massachusetts Supreme Court erred in applying the proper standard for probable cause, and additionally, for "failing to grant any deference to the decision of the Magistrate to issue a warrant. Instead of merely deciding whether the evidence viewed as a whole provided a 'substantial basis' for the Magistrate's finding of probable cause, the court conducted a de novo probable-cause determination." Id. at 732-33. The Court explained, "A deferential standard of review is appropriate to further the Fourth Amendment's strong preference for searches conducted pursuant to a warrant." Id. at 733.

Substantial basis to find probable cause

Under the United States Constitution, search warrants may not be issued except "upon probable cause supported by Oath or affirmation." U.S. Const. amend. IV; State v. Baccus, 367 S.C.

41, 54, 625 S.E.2d 216, 223 (2006). In order for a magistrate to issue a search warrant, the affiant must present a sworn affidavit establishing the grounds for the warrant. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). A search warrant affidavit must contain sufficient underlying facts upon which a magistrate can base a probable cause determination. State v. Smith, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990). A search warrant may only be issued upon a finding of probable cause. Bellamy, 336 S.C. at 143, 519 S.E.2d at 348. 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)).

In deciding whether to issue a search warrant, the magistrate must "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983). 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). 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). "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." Id. "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)). "[A]n affidavit for a search warrant is not to be interpreted in '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)).

The United States Supreme Court warns:

> A grudging or negative attitude by reviewing courts toward warrants . . . is inconsistent both with the desire to encourage the use of the warrant process by police officers and with the recognition that once a warrant has been obtained, intrusion upon interests protected by the Fourth Amendment is less severe than otherwise may be the case.

Massachusetts v. Upton, 466 U.S. 727, 733 (1984) (citation and internal quotation marks omitted).

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); see State v. Scott, 303 S.C. 360, 362, 400 S.E.2d 784, 786 (Ct. App. 1991) ("In the case of drug dealers, evidence is likely to be found where the dealers live.") (quoting United States v. Angulo-Lopez, 791 F.2d 1394, 1399 (9th Cir. 1986)).

Appellant complains the affidavit lacked information providing assurances about the quality of the controlled buy. The warrant specifies the informant was wired and an audio/visual recording of the incident was produced. But even if the controls in place for the controlled buy were not wholly articulated, this overlooks the totality of information provided in the affidavit. The Maine Supreme Court addressing the adequacy of detail concerning police supervision of a controlled purchase observed, "No single fact or piece of evidence in the affidavit is conclusive, but when viewed together, all of its averments present a consistent picture proving a substantial basis justifying [the magistrate's decision that] there was a fair probability that contraband or evidence of a crime would be found at defendant's apartment." State v. Knowlton, 489 A.2d 529, 532 (Me. 1985).

The language mirrors Upton's holding, despite the lack of citation, in which the United States Supreme Court concluded a substantial basis to issue the search warrant existed, finding: "No single piece of evidence in it is conclusive. But the pieces fit neatly together and, so viewed, support the Magistrate's determination that there was a 'fair probability that contraband or evidence of a crime' would be found in Upton's motor home." Upton, at 733.

In the instant case, the fallacy of Appellant's argument is it overlooks that the information provided in the whole of the search warrant affidavit readily established probable cause. Law

enforcement's belief as to probable cause is articulated in the warrant from three sources: (1) in July 2016, information that "Black" was selling narcotics from Apartment F, which admittedly does not refer to the source of law enforcement's "information" but establishes why law enforcement was conducting surveillance; (2) law enforcement conducted surveillance and observed a vehicle arrive and shortly leave the apartments; following a traffic stop, one of the occupants of the vehicle disclosed "Black" sold the occupant of the vehicle eight grams of marijuana found on the occupant at the apartments; (3) a "reliable confidential informant" purchased cocaine from "Black" while wired and visiting Apartment F – the affidavit advises, "[t]his incident was audio/visual recorded." The information provided by the occupants of the vehicle in the second paragraph of the affidavit alone provided the substantial basis, but the assertions by the occupants of the vehicle were corroborated by the confidential informant utilized the same day.

Further, the controlled purchase as described by the affiant is strong evidence supporting probable cause. Appellant claims the warrant is deficient because it did not state that the narcotics purchased by the confidential informant were field tested or that the informant in the controlled buy was searched before and after the transaction. In Commonwealth v. Desper, 643 N.E.2d 1008 (Mass Sup. Jud. Ct. 1994), the defendant complained the affiant did not state the informant was searched before entering the building where the buy occurred. The defendant claimed it was possible that the informant arrived with drugs already on his person. The court countered, "It is possible that this occurred, but it is not at all probable." Id. at 1012. The court noted that probable cause deals with probabilities and an informant undoubtedly realizes the informant likely will be searched before entering the premises and prone to negative consequences including possible arrest, making such a scheme on the informant's part, as postulated by the defendant, unlikely. The court concluded the

magistrate authorizing the warrant in that case could reasonably conclude the supervised purchase was sufficient to establish the reliability of the informant, and therefore, the magistrate had a substantial basis to issue the warrant. Id. at 1013.

In Mustafoski v. State, 867 P.2d 824 (Alaska Ct. App. 1994), Mustafoski complained the magistrate improperly relied on the allegation of a controlled purchase of cocaine because, in Mustafoski's view, the purchase was not truly controlled because the informant was out of view when the cocaine was sold. The Alaska Court disagreed, holding "a drug purchase does not lose its 'controlled' character simply because the [informant] leaves the supervising officer's sight to enter a house to make the purchase." Id. at 828; see also United States v. Garcia, 983 F.2d 1160, 1166 (1st Cir. 1993) (in affirming denial of a motion to suppress, finding although possible, it is not probable that the informant stashed cocaine outside the sight of the detective in a controlled buy); United States v. Norris, 312 F.Supp. 3d 215 (D. Mass. 2018) (noting while not per se sufficient to establish probable cause, a controlled purchase bolsters an informant's reliability, and finding even though officers did not see the informant enter the apartment where the sale took place, the claim that the CI set up the defendant is possible, but far-fetched, and probable cause was further supported by an earlier undercover purchase by a police officer).

In United States v. Clyburn, 24 F.3d 613 (4th Cir. 1994), the Fourth Circuit Court of Appeals found a substantial basis for the magistrate to find probable cause. The informant, incarcerated for shoplifting, contacted law enforcement to claim Clyburn was selling drugs and she could purchase drugs from Clyburn. She was released from jail to participate in a controlled buy and she called from the officer's office, set up a meeting with Clyburn, and then made a controlled purchase of crack cocaine during the meeting. The Fourth Circuit observed although the informant's reliability was

questionable due to her incarceration, the subsequent controlled purchase verified the informant's allegations.

In the present case, it was conceptually possible that Appellant was set up, but not likely. Further, the confidential informant was only one of the two individuals who reportedly purchased narcotics from "Black" at apartment F, a factor profoundly absent from Appellant's analysis. In the second paragraph of the affidavit, the affiant reports a person found in possession of marijuana shortly after leaving the apartments made a statement against her penal interests and stated "Black" sold her the marijuana.[1] See State v. Driggers, 322 S.C. 506, 473 S.E.2d 57 (Ct. App. 1996) (finding non-confidential informer was more reliable than a confidential informer because the non-confidential informer exposes self to the public and liability if information proved false, and additionally, information was against the informer's best-interests; further, past reliability is not usually required when supplied by an eyewitness because the eyewitness does not have the opportunity to establish a record of previous reliability). Appellant ignores that this is information under the totality of circumstances test that supports a finding of probable cause on its own and fails to address it in his brief. Assuming, without agreeing, that the information provided by the non-confidential informant was not dispositive on its own, it still is significant evidence in conjunction with the ensuing controlled purchase later that day. Upton, supra.

In conclusion, even assuming the description of the controlled buy is not artfully stated in the warrant, the transaction described in tandem with the previous statement by a witness and participant to another transaction is sufficient to provide the magistrate a substantial basis to find probable cause. Both transactions, as described in the warrant, along with the initial reports of drug activity

found in the first paragraph of the affidavit, points to a reasonable probability that evidence of a crime would be found in apartment F. Therefore, the trial court did not err in denying the motion to suppress.

[1] Appellant was provided a copy of the incident report for this traffic stop. Tr. p. 26.

II.

The audio/visual recording depicts a drug transaction. Accordingly, the search warrant affidavit does not present any false information. Moreover there is no evidence that any supposed false information was provided intentionally or with reckless disregard for its truth. Further, the other information in the affidavit is sufficient to provide the magistrate with a substantial basis to establish probable cause.

Appellant claims the search warrant affidavit violates Franks v. Delaware, 438 U.S. 154 (1978) because, Appellant claims, the audio/visual recording does not show a drug transaction. It is patently obvious in the video that a transaction is occurring, even if the narcotics themselves are not clearly visible due to the limited quality of the video. Appellant simply failed to demonstrate that the affidavit's description of the audio/visual recording is intentionally or recklessly false. Further, the remainder of the affidavit is sufficient to provide probable cause – especially the information provided about the non-confidential informant, who is scarcely mentioned in Appellant's brief.

Standard of Review

When reviewing the appeal of a suppression hearing, the appellate court gives deference to the trial court's findings and will only reverse if there is clear error. State v. Davis, 371 S.C. 412, 415, 639 S.E.2d 457, 459 (Ct. App. 2006). This Court will uphold the trial court's ruling if supported by any evidence. Id.

Discussion

Prior to trial, Appellant made a motion to suppress the warrant pursuant to Franks, noting law enforcement claimed in the affidavit to have stopped a vehicle leaving the apartments and one of the people in the vehicle claimed to having just purchased marijuana from a person named Black at the apartment. Tr. pp. 21-22. The basis of Appellant's argument was the incident report failed to

mention the stop or the discussion with the people inside the vehicle. Tr. p. 22. That argument is not presented on appeal. Appellant also reported reviewing the video of a controlled purchase from the apartment and argued it did not show an actual drug transaction. Appellant argued that this contradicted the affidavit which referenced the video. Tr. p. 23. The video depicts what a reasonable fact-finder could believe is a drug transaction, even if the drugs are not readily visible. Court's Exhibit 4.

In Court's Exhibit 4, the controlled purchaser appears to be driving a vehicle. She exits the vehicle and knocks on the door of the apartment, clearly labeled "F." A man answers the door and she goes inside the apartment. Court's Exhibit 4 (12:55 – 13:20). At 14:02 to 14:14 in the video, while the resolution of the video is imperfect, the man approaches her, appears to have an object that he hands her, and she thanks the man. A crinkle sounding like paper currency is also heard in the video. She leaves only minutes after arriving. Court's Exhibit 4.

The affidavit submitted in support of the search warrant states:

> In July of 2016 agents received information that a black male only known as "Black" has been selling/distributing narcotics from King Heigler apartment's located [address] apartment F in the Camden area of Kershaw County, South Carolina 29020. Agents also received information that "Black" operates a silver in color Lexus with chrome rims, agents have observed this vehicle at the apartment on several occasions.
>
> On July 8, 2016 agents with the Kershaw County Narcotics unit were conducting surveillance at King Heigler apartments and observed a dark colored SUV arrive at the apartment complex moments later the vehicle left and following a lawful traffic stop and lawful search agents located approximately 8 grams of marijuana that was located on one for [sic] the passenger's person. Agents then spoke with the occupants of the vehicle who stated that they just met with a black male known to them as "Black" at King Heigler apartments and purchased the marijuana from "Black."
>
> Within the past 72 hours agents with the Kershaw county

> Sheriff's Office Narcotics Unit utilized a reliable confidential informant was wired and given recorded U.S. currency provided by the Kershaw County Sheriff's Office to make the purchase. The confidential informant met with "Black" at King Heigler apartments located at [address] apartment F in the Camden area of Kershaw County, South Carolina 29020 to make the transaction. This incident was audio/visual recorded.
>
> Based on these facts, it is believed that illegal drugs are being distributed and stored and illegal activity is taking place at this described location.

Court's Exhibit 1.

If a defendant alleges there are misstatements in a search warrant affidavit, he is entitled to an evidentiary hearing if (1) the allegations are not conclusory and are supported by more than a mere desire to cross-examine; (2) there are allegations of deliberate falsehood or reckless disregard for the truth which are supported by an offer of proof; and (3) the affiant made the allegedly false or reckless statement. Franks v. Delaware, 438 U.S. 154, 171-172 (1978); State v. Jones, 342 S.C. 121, 127, 536 S.E.2d 675, 678 (2000). Even if those criteria are met, however, no hearing is required if the alleged false or erroneous information is set aside and the remaining information in the warrant affidavit is sufficient to support a finding of probable cause. State v. Missouri, 337 S.C. 548, 524 S.E.2d 394, 396-97 (1999) (citing Franks).

A truthful showing is required to support probable cause, but it "does not mean 'truthful' in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded on hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily." Franks, 438 U.S. at 165. Instead, to be "truthful" requires the information provided by the affiant is "believed or appropriately accepted by the affiant as true." Id. Accordingly, "[a]llegations of negligence or

innocent mistake [by the affiant] are insufficient." Id. at 171. Instead, the defendant must establish a deliberate falsehood or reckless disregard for the truth. Id. "The burden of making the necessary showing is thus a heavy one to bear." United States v. Tate, 524 F.3d 449, 454 (4th Cir. 2008).

In the instant case, there is not a falsehood: the video/audio recording exists, it depicts a transaction in Apartment F, and afterwards, narcotics were recovered from the closely monitored informant who was searched before making the transaction. The information appears to have been reasonably believed by the affiant, and appropriately accepted as true. No evidence was presented that what is seen in the video/audio recording was not a drug transaction. Further, to the extent there is some sort of ambiguity or potential for misunderstanding the probative value of the recording, there is no showing that the "false" information was provided intentionally or with reckless disregard for the truth. Note the affidavit merely claims to have recorded the "incident" and does not claim the narcotics or money are clearly seen in the video, or that Appellant's hands are visible within the frame of the recording at precise moment Appellant put the narcotics in the informant's hand. See State v. Rutledge, 373 S.C. 312, 319, 644 S.E.2d 789, 792 (Ct. App. 2007) ("Rutledge . . . contends the affidavit improperly implied that the officers recovered the marijuana, seeds, and stalks from the residence itself. . . . Nowhere does the affidavit say it was found in the house."); State v. Trapp, 420 S.C. 217, 801 S.E.2d 742 (Ct. App. 2017) (noting that while the dispute between the parties on appeal was whether or not the pill bottle was on the dresser, the actual wording of the affidavit omits any reference to the dresser, and merely states the pill bottle was in plain view in the bedroom).

Generously interpreting Appellant's argument at trial or now on appeal, perhaps Appellant is claiming an omission of some important fact, the poor resolution of the video or the movement of his hands out of the frame of the video as he handed the narcotics to the informant. "When relying on an

omission, rather than on a false affirmative statement, [the appellant's] burden increases yet more." Tate at 454. The omitted facts must be material. As Tate noted, "an officer cannot be expected to include in an affidavit every piece of information gathered in the course of an investigation. . . . Instead, to be material under Franks, an omission must be such that its inclusion in the affidavit would defeat probable cause." Id. at 457 (citations and internal quotation marks omitted). This Court noted that if the affidavit, including the omitted information, still contains sufficient information to establish probable cause, then a Franks violation did not occur. State v. Porch, 417 S.C. 619, 627, 790 S.E.2d 440, 444 (Ct. App. 2016).

In the instant case, the affidavit established law enforcement received information a man going by the name of Black was selling narcotics from a specific address. Law enforcement confirmed this person drives a silver Lexus with chrome rims and the silver Lexus was observed by law enforcement at the complex on several occasions. Further, the affidavit recounts a traffic stop of an SUV seen arriving at the complex and leaving moments later. During the traffic stop an occupant admitted purchasing marijuana from a person known to them as Black. In addition, the affidavit states a reliable informant was wired and met with Black to purchase cocaine. A common sense reading of the affidavit establishes a substantial basis for the magistrate to find probable cause without reference to the recording. Further, the "incident" was recorded, and the additional information that it was difficult to see the items exchanged would not cause the affidavit to lack probable cause, since the video is sufficient to establish that a transaction is occurring.

To summarize, no false information was presented to the magistrate, the affiant's statements were not shown to be intentionally or recklessly false, and even without reference to the recording, the remainder of the search warrant affidavit contained sufficient information for the magistrate to

find a substantial basis establishing probable cause. Therefore, the trial court did not err in denying Appellant's motion.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

BYRON GIPSON
Solicitor, Fifth Judicial Circuit

BY: _____
DAVID SPENCER

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

March 9, 2021

RECEIVED
Mar 09 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Kershaw County
Honorable Clifton Newman, Circuit Court Judge

THE STATE,

Respondent,

v.

ANTHONY C. DAVIS,

Appellant.

Case No. 2019-001869

PROOF OF SERVICE

I, Shana Montgomery, certify that I have served the within Initial Brief of Respondent along with Designation Of Matter on Appellant via electronic mail to the address listed by counsel in AIS addressed to his attorney of record, Jessica Saxon, 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 9th day of March, 2021.

Shana Montgomery

Shana Montgomery
Legal Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

Shana Montgomery

From: Shana Montgomery
Sent: Tuesday, March 9, 2021 2:52 PM
To: Allgire, Mary; Saxon, Jessica
Cc: Shana Montgomery; David Spencer; William Blitch
Subject: DAVIS Anthony ; Appellate Case No. 2019-001869 ; IBOR
Attachments: 02510839.PDF

Good Afternoon,

Attached please find a copy of the Initial Brief of Respondent and Designation of Matter along with the proof of service for State v. Anthony C. Davis (2019-001869). 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.

Shana Montgomery
Legal Assistant
Office Of The Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
803-734-7239