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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.

APPELLATE CASE NO. 2019-001869

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENTS IN REPLY

I.

Appellant's argument that 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 is preserved for review.

Respondent's argument that Appellant's first issue is not preserved for review obfuscates the rules of error preservation. As stated in Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012),

> [E]rror preservation has been a critical part of appellate practice in this State for a long time, serving to ensure…that we do not reach issues which were not ruled upon by the trial court … "*Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review*." (quoting Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)) (emphasis added).

As the appellate courts of this state have repeatedly held, "error preservation rules do not require a party to use *the exact name of a legal doctrine* in order to preserve an issue for appellate review." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (emphasis added); see also S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 302–03, 641 S.E.2d 903, 907 (2007) (holding an objection, though not phrased "in the exact terms used in the issues on appeal" "provided a meaningful objection with sufficient specificity to allow the trial court to rule on the issue"). "Instead, a litigant is only required to fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue." Hubbard v. Rowe, 192 S.C. 12, 19, 5 S.E.2d 187, 189 (1939).

Prior to trial Counsel Aiken filed a written motion to suppress the evidence seized under the search warrant. R. X. (Motion). In the motion Counsel Aiken argued that the search warrant was facially invalid and fatally deficient because the affidavit contained "only a bald assertion of the reliability of the confidential informant. To be valid, a search warrant *must contain some factual basis for the conclusion that the confidential informant is reliable*." Id. (emphasis added).

In a pre-trial hearing the court took up the motion to suppress as well as the motion to controvert the search warrant affidavit based on a violation of Franks v. Delaware[1] at the same time. After hearing testimony and argument, the trial court ruled:

> And so what the reviewing court is looking at is *whether the magistrate had a substantial basis for concluding that probable cause existed, and that the affidavit must contain sufficient underlying facts and information upon which the magistrate can make a determination of probable cause.* And in reviewing the validity of the warrant, the reviewing court may consider only information brought to the magistrate's attention.
>
> 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.*
>
> …
>
> I think that reading the affidavit, the magistrate would not be required to know the entire history of the relationship between this first drug buy, the question of the informant, and the other information placed on the affidavit, the affidavit itself being a controlled purchase made from Black at King Haigler Apartments and that that purchase being within that period of time *by an informant who proved to be reliable based on the circumstances*.
>
> In my mind, *the circumstances of a controlled purchase -- I can't say that I have been given information of the informant being reliable based on the past history of working for law enforcement, but based on the controlled purchase, that provides sufficient reliability and a reasonable basis, substantial basis for the magistrate concluding that probable cause to issue the search warrant existed.*

R. 65, l. 19-R. 69, l. 9 (emphasis added).

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1 438 U.S. 154 (1978)

Far from merely "mentioning" the issue of the confidential informant's reliability, as suggested by Respondent, the court ruled on the reliability of the informant finding that the circumstances of the controlled purchase provided a sufficient factual basis for the conclusion that the informant was reliable. Thus, Counsel Aiken raised the issue of the confidential informant's reliability through the written motion, the court heard testimony regarding the search warrant affidavit, and then the court ruled that the controlled buy in and of itself rendered the confidential informant reliable.

Despite Respondent's argument to the contrary, the jurisprudence of this state makes clear that errors are preserved for review even though trial counsel did not use the exact legal term when objecting or make the exact legal argument later advanced on appeal. In State v. Mitchell, 378 S.C. 305, 662 S.E.2d 493 (Ct. App. 2008) *cert. dismissed as improvidently granted*, Feb. 2010, the state sought to admit the written statement of a co-defendant which implicated Mitchell through the officer who had taken the statement. Id. at 310, 662 S.E.2d at 496. The co-defendant who had been an uncooperative witness during the trial, was eventually removed from the proceedings before the statement could be introduced and before he could be cross-examined. Id. The state argued the statement was admissible under South Carolina Rules of Evidence Rule 804(a)(2) and (b)(3). Id. Defense counsel objected to the statement, arguing that he could not cross-examine the written statement or attack its credibility. Id. The court accepted the state's argument and the statement was entered through the officer. Id.

On appeal the state argued that the issue was not preserved for appeal because defense counsel had never explicitly raised the issue of due process to the trial court. Id. at 497-98, 662 S.E.2d at 312-13. In reversing the trial court's admission of the statement this Court held

> [E]ven though Mitchell's attorneys did not cite Crawford[2] during trial or explain on appeal why this decision is applicable, we hold Mitchell presented a sufficient basis for an assertion of reversible error. At trial, defense counsel argued the statement at issue was "a blanket statement that there's some culpability of my client" and he had "no opportunity to test [Johnson's] credibility." Even without a citation to Crawford, these assertions were sufficient to direct the trial judge's attention to the problems attendant to admission of an incriminating statement when the declarant is unavailable for cross-examination by the accused.

Id. at 498, S.E. 2d at 313.

In State v. Brannon, 388 S.C. 498, 697 S.E.2d 593 (2010), Brannon moved for a directed verdict at trial on the charge of resisting arrest arguing that an arrest was not being made when he encountered and then fled from police. Id. at 501, 697 S.E.2d at 595. On appeal, this Court used a seizure analysis to find Brannon was not under arrest when he ran from the police and the resisting arrest conviction was reversed. Id. The state appealed from this Court arguing that this Court had violated the rules of error preservation by using a seizure analysis to determine whether an arrest of Brannon was being made. The state asserted that the seizure argument was not preserved for appellate review because Brannon had never used the terms "seizure" or "Fourth Amendment" in his motion for a directed verdict. Id. at 501-02, 697 S.E.2d at 595-96. The Supreme Court disagreed with the state, stating that,

> Error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review. Instead, a litigant is only required to fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue. In this case, Brannon met this requirement by arguing an arrest was not being made when he ran from police.

Id.

Counsel Aiken raised the issue of the lack of a factual basis to support the reliability of the informant to the trial court. The court subsequently ruled that the informant was reliable solely because the informant had participated in a controlled buy. The court stated that the

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2 Crawford v. Washington, 541 U.S. 36 (2004)

circumstances of the controlled buy, which were testified to during the hearing but were not provided to the magistrate, made the confidential informant reliable. R. 36, l. 13-R. 37, l. 4; R. 68, ll. 8-16. Thus, much like in Mitchell and Brannon, *supra*, even though the original argument may not have been articulated in the most artful manner, the issue was raised to and ruled upon by the trial court and is preserved for review.

II.

The identity of the informant who purportedly made a statement to law enforcement during a traffic stop was not known to the magistrate when the search warrant was issued and therefore cannot be classified as a "non-confidential informant."

Respondent argues that there were two informants utilized in this case. One being the confidential informant and the other being a "non-confidential" informant. Respondent attributes the second paragraph in the search warrant affidavit to this supposed "non-confidential" informant. However, the classification as "non-confidential" is misleading.

At the time the magistrate reviewed the affidavit and issued the search warrant the identity of the person who made the alleged statement about purchasing drugs from King Haigler apartments was not known to him. Consequently, if the occupant of the vehicle is an informant as Respondent asserts, they would be a confidential or undisclosed informant because the state chose to withhold their identity[3] from the magistrate.

Presumably, Respondent argues that the occupant of the vehicle is a non-confidential informant because "a non-confidential informant should be given a higher level of credibility as he exposes himself to public view and to possible criminal and civil liability should the information he supplied prove to be false." State v. Driggers, 322 S.C. 506, 511, 473 S.E.2d 57, 60 (Ct. App. 1996). However, the identity of the person who made the statement was never revealed to the issuing magistrate so the "higher lever of credibility" that Respondent seeks to improperly impute upon the occupant of the vehicle does not exist.

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3 At trial the state argued that the names of the people involved in the traffic stop were not used because of the potential for those individuals to be used as confidential informants in other cases. R. 26-27.

Importantly, an informer is simply "one who gives information." Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 3.3 (6th ed. 2020). Therefore, in the broadest sense of the word, everyone who gives information to the police might be called an informant. However, a distinction can be drawn between the average citizen who finds themselves a victim or witness to a crime and an informant who is themselves part of the "criminal milieu." Id. As Justice Harlan pointed out in United States v. Harris, 403 U.S. 573 (1971),

> [T]he ordinary citizen who has never before reported a crime to the police may, in fact, be more reliable than one who supplies information on a regular basis. "The latter is likely to be someone who is himself involved in criminal activity or is, at least, someone who enjoys the confidence of criminals.

The informant relied upon in the second paragraph of the search warrant affidavit is not a "citizen-informer," eyewitness, or victim but a person caught having committed a crime – one who is part of the "criminal milieu" and therefore one who does not receive a higher level of credibility. The reliability that Respondent is attempting to convey by calling them a "non-confidential" informant is merely a feeble attempt to distract from the deficiencies in the search warrant affidavit.

Respondent's argument fails to recognize that the affidavit only contains bald assertions and conclusions without providing an adequate basis for those conclusions. The search warrant affidavit provided three sources of information that, taken apart or together, did not amount to probable cause. Three weak links do not make a strong chain. There are no public, named sources of information in the affidavit. The record shows, and Respondent concedes, that the only information before the magistrate was that within the affidavit. The information provided by the undisclosed informant in paragraph two lacks the detail necessary to support a finding of probable cause as the undisclosed informant did not state which of the apartments they had

supposedly entered to purchase drugs, nor did the undisclosed informant offer any physical details of "Black" outside of stating he was a black male. Just like the information in the third paragraph of the affidavit, the statements in the second paragraph are no more than the bare conclusions of others, lacking in specificity and without any information supporting the credibility of the informant. See Illinois v. Gates, 462 U.S. 213 (1983), State v. Philpot, 317 S.C. 458, 454 S.E.2d 905 (Ct. App. 1995); State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 192, 525 S.E.2d 872, 881 (2000).

CONCLUSION

Based on the foregoing reasons, along with the reasons set forth in Appellant's Initial Brief, Appellant respectfully requests that this Court reverse his convictions and sentences and remand this case to the Kershaw County Court of General Sessions for a new trial.

Jessica M. Saxon
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Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of March, 2021.

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APPELLATE CASE NO. 2019-001869

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above-referenced case has been served upon David A. Spencer, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Anthony C. Davis, #373518, at Wateree River Correctional Institution, PO Box 189, Rembert, SC 29128-0189, this 19th day of March, 2021.

s/Jessica M. Saxon
Jessica M. Saxon
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ATTORNEY FOR APPELLANT