STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Aiken County

Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KELVIN JONES,

PETITIONER

APPELLATE CASE NO 2020-000653

OPINION NO. 2020-UP-018 (S.C. Ct. App. Filed January 29, 2020)

BRIEF OF PETITIONER

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the Court of Appeals err in finding that the issue of whether the trial judge erred in refusing to suppress drugs seized as the result of a search warrant lacking probable cause was not preserved for appellate review?

STATEMENT

In January of 2012, the Aiken County Grand Jury indicted Petitioner, Kelvin Jones, for trafficking cocaine, possession with intent to distribute cocaine within proximity of a park and possession of ecstasy, indictments #2012-GS-02-132, 133, 134. In 2014, the State obtained superseding indictment #2014-GS-02-1182 for trafficking cocaine. On August 11, 2014, Petitioner appeared before the Honorable Edgar Dickson and moved for a change of venue and moved to suppress drugs seized. Mario Pacella, Alexandra Benevento and Bakari Sellers represented Petitioner at the hearing. The case was prosecuted by the South Carolina Attorney General's office because of a conflict. Solicitor Strom Thurmond, Jr. and another lawyer from the Second Circuit Solicitor's Office were doing a "ride along" with law enforcement when the search warrant in the present case was executed. Judge Dickson granted the change of venue motion but denied the motion to suppress. (R. p. 10, Order Denying Defendant's Motion to Suppress in Stipulation).

On February 17, 2015, Petitioner pled guilty to the possession of ecstasy charge, indictment #2012-GS-02-134, and proceeded to jury trial for the trafficking and proximity charges, indictments #2014-GS-02-1182 and #2012-GS-02-133. Both the plea and the trial took place in Dorchester County before the Honorable R. Lawton McIntosh. Alexandra Benevento and Bakari Sellers represented Petitioner at the plea and trial. Megan Burchstead and Michael Ross, both of the South Carolina Attorney General's Office, represented the State. The jury returned verdicts of guilty and Judge McIntosh sentenced Petitioner to twenty-five (25) years for trafficking, ten (10) years concurrent for the proximity charge, and one year concurrent for the ecstasy charge.

On February 24, 2015, Petitioner timely filed a timely notice of intent to appeal. On February 26, 2015, two days after the notice of intent to appeal was filed, Judge McIntosh contacted Petitioner's trial counsel, Bakari Sellers, along with Assistant Attorney General Michael Ross and disclosed to the parties that it had come to his attention that the BEST bag containing the cocaine had been opened during jury deliberations. (R. p. 470-493; R. p. 494). On that same day, defense counsel Sellers filed a motion for a mistrial based on the information disclosed by Judge McIntosh.

On April 16, 2015, a hearing was held before Judge McIntosh on Petitioner's motion for a mistrial. After hearing from the parties, Judge McIntosh ultimately issued a written order filed June 15, 2015. In his order, Judge McIntosh found there was "a need to further investigate the extent of any actions on the part of the jurors which led to the opening of the 'BEST Kit' containing the drug evidence in this case." The judge indicated that "[s]uch investigation is necessary to determine whether there was any improper influence upon the jurors, or whether there was any resulting prejudice to the defendant." The judge ordered that a qualified individual at SLED examine the drug evidence to determine whether the evidence was accessed, handled, or tampered with by the jury during its deliberations. The judge further ordered that SLED report its findings concerning the drug evidence to the court as soon as such findings became available. (R. p. 494).

On September 18, 2015, Petitioner moved to dismiss the direct appeal without prejudice pending the SLED investigation and a ruling on Petitioner's motion for a mistrial. On November 25, 2015, the South Carolina Court of Appeals dismissed the appeal without prejudice to allow Judge McIntosh to rule on the post-trial motion. (R. p. 497). On April 4, 2016, Petitioner filed a

motion for a new trial based on the State's failure to disclose that a complaint had been filed against the detective who obtained and executed the search warrant. (R. p. 498).

On July 6, 2016, Judge McIntosh held a hearing in Anderson County on the two outstanding motions. In regard to the drug evidence, Judge McIntosh requested that SLED re-weigh the drugs. In regard to the non-disclosed complaint, the judge asked for briefs from both sides. In an order signed July 22, 2016, Judge McIntosh denied both motions. (R. p. 550). A motion for relief from judgment was filed on August 16, 2016, and then denied on August 25, 2016. A timely notice of intent to appeal was served on September 2, 2016, and the direct appeal perfected. On January 29, 2020, the South Carolina Court of Appeals affirmed the convictions. State v. Jones, Op. No. 2020-UP-018 (S.C.Ct.App. filed January 29, 2020). (App. p. 1-4). A timely petition for rehearing was filed and then denied on March 27, 2020. (App. pp.5-31). The petition for writ of certiorari was filed on April 27, 2020. The State filed a return on July 1, 2020. On March 9, 2021, this Court granted the petition for writ of certiorari as to issue one. This brief of Petitioner follows.

STANDARD OF REVIEW

"'On appeals from a motion to suppress based on Fourth Amendment grounds, ... this Court [the appellate court] reviews questions of law de novo.' State v. Adams, 409 S.C. 641, 647, 763 S.E.2d 341, 344 (2014). As to a circuit court's finding of fact, we must affirm 'if there is any evidence to support it," and "may reverse only for clear error.' State v. Brown, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012)." State v. Bash, 419 S.C. 263, 268, 797 S.E.2d 721, 723–24 (2017). This deferential standard of review does not bar the appellate court from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence. State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010).

ARGUMENT

1. **The Court of Appeals erred in finding that the issue of whether the trial judge erred in refusing to suppress drugs seized as the result of a search warrant lacking probable cause was not preserved for appellate review.**

On April 19, 2011, Detective John C. Medlin of the Aiken Department of Public Safety requested a search warrant from a magistrate for a residence located at 462 Morgan Street NW, in Aiken, South Carolina. The affidavit in support of the search warrant in the case was based in large part on a trash pull. The affidavit provides:

> Det. Sawyer received complaints of short-term traffic at 462 Morgan St NW that is consistent with the sale of narcotics. On April 18, 2011 Det. Medlin coordinated with Bill Martin, Solid Waste Supervisor with the Aiken Department of Public Works, to collect trash from 462 Morgan St NW. Mr. Martin did so on Monday, April 18, 2011, which is the normal trash collection day for that residence. Mr. Martin found the can and contents at the curb beside the driveway in a manner consistent with the trash being ready for collection. Mr. Martin brought the can and the contents to Det. Medlin at the ADPS headquarters. Det. Medlin and Det. Sawyer searched the contents of the can and found the following items: 1 – the burnt remains of a cigar that contained a green leafy material believed to be marijuana; 2-numerous twisted and torn baggies (indicating the packaging of marijuana for resale); 3 – empty cigar tube wrappers; 4 – cigars that had been torn open to remove the tobacco (a common tactic for smoking marijuana covertly;) 5 – mail addressed to 462 Morgan St. NW Aiken SC. Based on my experience and training, the items listed indicate the use and repackaging of narcotics for resale. Detective Royster, a certified marijuana analyst, tested the plant material found in the trash and confirmed it to be marijuana. This officer verily believes that probable cause exists as to the presence of narcotics at this residence. See Attachment B for photographs of the items found. (Exhibit #3 attached).

(R. p. 588). The affidavit was not supplemented with sworn verbal testimony. (R. p. 563).

On April 21, 2011, officers with the Aiken Department of Public Safety, including Detective Medlin and Captain Sawyer, executed the search warrant. According to Captain

Sawyer, prior to entering the house, he observed Petitioner enter the house carrying a blue sling backpack. (R. p. 117, lines 13-22). Officers entered the house five to seven minutes later. (R. p. 156, lines 16-20). Once inside the house officers found Ricky Lloyd in the bathroom attempting to flush a white powder substance. (R. p. 247, lines 10-21). Lloyd also had cash and scales. (R. p. 247, lines 23-25). Officers found Petitioner in the kitchen. (R. p. 248, lines 1-7). Captain Sawyer admitted that there were four to five other adults and a few juveniles in the house when the officers entered. (R. p. 157, lines 11-20). In another room under a couch Detective Medlin found a handgun, a pickle jar with a green leafy substance in it, cash and a blue string bag. (R. p. 227, line 17 – p. 228, lines 1-12). Inside the blue string bag officers found three ziplock bags with a white powder material and a set of scales. (R. p. 228, lines 13-19). According to Captain Sawyer, Petitioner was wearing this blue sling bag earlier. (R. p. 140, lines 7-10). The room where officers found the white powder substance under the couch was closer to the bathroom where they found Lloyd than the kitchen where they found Petitioner. (R. p. 160, lines 21-25).

Prior to trial, on August 11, 2014, Petitioner submitted a written motion to suppress. (R. p. 1). On that same day the Honorable Edgar Dickson heard the motion to suppress as well as a motion for change of venue. Judge Dickson granted the change of venue motion but, in a written order, denied the motion to suppress. (R. p. 10, Written Order Denying Motion to Suppress). A portion of the August 11, 2014, hearing was produced and made a part of the record on appeal. (R. p. 14-27). The portion of the transcript dealing with the suppression motion, however, was not available. (R. p. 560-561, Official Letter from Court Reporter). For purposes of the appeal, the parties stipulated as to the arguments made at the suppression hearing. (R. p. 562). The stipulation included nine agreed points, the written motion to suppress

as exhibit #1, the search warrant, affidavit in support and attached exhibits, as exhibit #2 and Judge Dickson's written motion denying the motion to suppress as exhibit. #3. (R. p. 562-586).

The trial was held six months later on February 17, 2015, before a different judge, the Honorable R. Lawton McIntosh. Judge McIntosh was aware of the previous order by Judge Dickson denying the motion to suppress. (R. p. 37, lines 1-8). Petitioner renewed the objection to the order denying the motion to suppress. (R. p. 37, lines 11-15). Petitioner again renewed the objection to the evidence and the motion to suppress prior to opening statements. (R. p. 82, line 16 – p. 83, lines 1-7). The judge ruled, "All right. Very Good. I note that objection. The ruling will stand as is." (R. p. 83, lines 8-9). When the State moved to admit the drugs in evidence as State's Exhibit #22, Petitioner did not object. (R. p. 286, lines 8-13). Petitioner renewed the objection at the close of the State's case. (R. p. 344, lines 12-17).

A. Error Preservation

Judge Dickson's ruling on the motion to suppress was a final ruling and Petitioner was not required to object when the drugs were admitted in evidence in order for the issue to be preserved for appellate review. Petitioner renewed the motion to suppress prior to trial and the trial judge, Judge McIntosh, noted the objection and stated that Judge Dickson's ruling would stand. (R. p. 82, line 16 – p. 83, lines 1-9). The trial judge, Judge McIntosh, did not hear the motion to suppress and would not have changed Judge Dickson's ruling without hearing the motion.

In State v. Atieh, 397 S.C. 641, 646–47, 725 S.E.2d 730, 733 (Ct. App. 2012), the South Carolina Court of Appeals wrote:

> A ruling in limine is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for

> review. See State v. Wannamaker, 346 S.C. 495, 499, 552 S.E.2d 284, 286 (2001). An exception to this rule is when the motion in limine is made "immediately prior to the introduction of the evidence in question." State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001). The South Carolina Supreme Court expanded this exception in State v. Wiles, [1]holding that even when the evidence does not immediately follow the motion in limine, if the trial court clearly indicates its ruling is final, rather than preliminary, the issue is preserved for appellate review. 383 S.C. 151, 157, 679 S.E.2d 172, 175 (2009). In Wiles, the trial court had commented to the jury about the evidence that was the subject of the motion in limine before any evidence was admitted.Id.

Judge Dickson's ruling on the motion to suppress was a final ruling and the issue is preserved for appellate review. Under the very narrow and specific facts of this case where the pre-trial ruling was a final ruling by a judge who only heard the pre-trial motion and did not preside over the trial, the admission of the challenged evidence without objection did not waive the issue. The present case is distinguished from State v. Dicapua, 383 S.C. 394, 680 S.E.2d 292 (2009), where there was no indication that the pre-trial ruling was a final ruling.

The Court of Appeals found that the issue was not preserved for appellate review writing:

> The issue of whether the trial court erred when refusing to suppress the drugs is not preserved for appellate review. See State v. Sweet, 374 S.C. 1, 5, 647 S.E.2d 202, 205 (2007) ("To properly preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court."); State v. Stokes, 339 S.C. 154, 163, 528 S.E.2d 430, 434 (Ct. App. 2000) ("Merely raising an argument in *limine* does not preserve the issue for appellate review."); State v. Atieh, 397 S.C. 641, 646, 725 S.E.2d 730, 733 (Ct. App. 2012) ("A ruling in *limine* is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review."); id. at 647, 725 S.E.2d at 733 ("[W]hen the evidence does not immediately follow the motion in *limine*, if the trial court clearly indicates its ruling is final, rather than preliminary, the issue is preserved for appellate review.").

State v. Kelvin Jones, Op. No. 2020-UP-018 (S.C.Ct.App. filed January 29, 2020). (App. p. 2).

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[1] 383 S.C. 151, 679 S.E.2d 172 (2009).

The Court of Appeals overlooked the fact that Judge Dickson's ruling was final. As discussed above, the motion to suppress was heard by Judge Dickson on August 11, 2014, six months before the trial in front of Judge McIntosh on February 17, 2015. Judge McIntosh did not hear the motion and would not have overruled the finding made by Judge Dickson. See Rule 4(b), SCRCrimP (Subsequent Applications for Order After Refusal. If any motion be made to any judge and be denied, in whole or in part, or be granted conditionally, no subsequent motion upon the same set of facts shall be made to any other judge in that action. If upon such subsequent motion any order be made, it shall be void.). Judge Dickson's ruling was final and the issue is preserved for appellate review.

In State v. Wiles, 383 S.C. 151, 156–57, 679 S.E.2d 172, 175 (2009)(n. 4 omitted), this Court wrote:

> Generally, a motion *in limine* is not a final determination; a contemporaneous objection must be made when the evidence is introduced. State v. Forrester, 343 S.C. at 642, 541 S.E.2d at 840. There is an exception to this general rule when a ruling on the motion *in limine* is made "immediately prior to the introduction of the evidence in question." *Id.* This exception is based on the fact that when the trial court's ruling is not preliminary, but instead is clearly a final ruling, there is no need to renew the objection. *Id.* (citing State v. Mueller, 319 S.C. 266, 268–69, 460 S.E.2d 409, 410 (Ct.App.1995)).
>
> In the instant case, the evidence was not immediately introduced after the motion *in limine.* Nonetheless, by his actions, the trial judge clearly indicated that his ruling was a final, rather than preliminary, one because he commented **to the jury** about petitioner's escape before any evidence was admitted.

In the present case the trial judge, Judge McIntosh, stated that Judge Dickson's denial of the motion to suppress would stand, a clear indication that Judge Dickson's ruling was a final ruling. (R. p. 82, line 16 – p. 83, lines 1-9). The final ruling exception discussed in Wiles applies in the present case and Petitioner was not required to renew the objection when the drugs were

admitted in evidence. The issue is preserved for review. The Court of Appeals erred in finding that the issue was not preserved.

B. The court erred in refusing to suppress drugs seized as the result of a search warrant lacking probable cause.

During the pre-trial hearing on August 11, 2014, Petitioner moved to suppress the drugs found as a result of the execution of the search warrant. Petitioner argued that the affidavit in support of the search warrant lacked probable cause. First, the affidavit failed to establish the reliability of the complaints received by Captain Sawyer. (R. p. 3-5). The affidavit failed to indicate the basis for any conclusion that the complaints of short-term traffic were consistent with narcotics sales. (R. p. 5). The affidavit failed to provide a time frame in regard to the short-term traffic. (R. p. 5). Second, the items recovered from the single trash pull did not provide probable cause to believe that narcotics would be found inside the house. (R. p. 5-8). Additionally, Petitioner argued that the good faith exception to the requirement of a warrant based on probable cause did not apply. (R. p. 8-9).

The judge denied the motion to suppress writing, "Although the reliability of the tipsters was never established, the officers corroborated the tip by finding twisted, torn baggies and the remnants of marijuana cigars in the trash. See State v. Rutledge, 644 S.E.2d 789 (Ct.App. 2007)(Finding probable cause for search warrant where a trash pull corroborated a tip). Therefore, probable cause existed for the magistrate to issue the warrant." (R. p. 10-12). There was, however, no tip to corroborate. The affidavit in support of the search warrant indicates "complaints of short-term traffic at ** Morgan St. NW that is consistent with the sale of narcotics." (R. p. 11). There was not a tip that drugs were inside the house or that drugs were being sold from the house. There was not a tip that anybody ever saw drugs inside the house.

The only reference to narcotics with regard to the anonymous complaints is the detective's mere conclusory statement that the short-term traffic is consistent with narcotics sales. The officers did not conduct surveillance to try and verify the complaints of short-term traffic. The magistrate was only presented with anonymous complaints of short-term traffic without a time frame and some baggies and remnants of marijuana cigars collected from the trash pull. The State failed to present the magistrate with a substantial basis for reaching his probable cause determination. The affidavit in support of the search warrant lacked probable cause. Judge Dickson erred in denying the motion to suppress.

Both the Fourth Amendment to the Unites States Constitution and Article I, § 10 of the South Carolina Constitution protect citizens from unreasonable searches and seizures. Both constitutions provide that search warrants may not be issued except upon "probable cause, supported by oath or affirmation," and particularly describing the place to be searched and the persons or things to be seized. State v. Dunbar, 361 S.C. 240, 246, 603 S.E.2d 615, 618 (Ct. App. 2004); see also State v. Weston, 329 S.C. 287, 290, 494 S.E.2d 801, 802 (1997) ("A search warrant may issue only upon a finding of probable cause.").

In State v. Kinloch, 410 S.C. 612, 616–17, 767 S.E.2d 153, 155 (2014)(fn #4 omitted), this Court wrote:

> The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const. amend. IV. A search or seizure does not violate the Fourth Amendment if it is authorized by a warrant that is supported by probable cause. Id.; see State v. Baccus, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006), cert. denied, 555 U.S. 1074, 129 S.Ct. 733, 172 L.Ed.2d 735 (2008). A warrant is supported by probable cause if, given the totality of the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place. Baccus, 367 S.C. at 50, 625 S.E.2d at 221 (citing Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)).

"When reviewing a magistrate's decision to issue a search warrant, we must consider the totality of the circumstances. See State v. Missouri, 337 S.C. 548, 524 S.E.2d 394 (1999)(citing Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)). Although great deference must be given to a magistrate's conclusions, a magistrate may only issue a search warrant upon a finding of probable cause. See State v. Bellamy, 336 S.C. 140, 519 S.E.2d 347 (1999)." State v. Jones, 342 S.C. 121, 126, 536 S.E.2d 675, 678 (2000)(fn #1 omitted).

"In reviewing a magistrate's probable cause determination, circuit court judges must determine whether the issuing magistrate had a substantial basis upon which to conclude that probable cause existed. Baccus, 367 S.C. at 50, 625 S.E.2d at 221; see also State v. Bellamy, 336 S.C. 140, 143–45, 519 S.E.2d 347, 348–49 (1999) (applying the fair probability standard and stating the duty of a reviewing court is to ensure the magistrate had a substantial basis for its probable cause determination)." Kinloch, 410 S.C. at 617, 767 S.E.2d at 155.

"An affidavit must contain sufficient underlying facts and information upon which a magistrate may make a determination of probable cause. State v. Viard, 276 S.C. 147, 276 S.E.2d 531 (1981). Mere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient. "[H]is action cannot be a mere ratification of the bare conclusions of others." Illinois v. Gates, 462 U.S. 213, 239, 103 S.Ct. 2317, 2333, 76 L.Ed.2d 527, 549 (1983)." State v. Smith, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990).

As noted by the Court of Appeals in State v. Gentile, 373 S.C. 506, 514, 646 S.E.2d 171, 174 (Ct. App. 2007), "Although we are cognizant that our decision should be based on the totality of the circumstances, for analytical purposes we find it necessary to separately address each piece of evidence presented to the magistrate." Addressing the evidence presented to the magistrate in the present case, the affidavit provided that the detective received complaints of

short-term traffic that "is consistent with the sale of narcotics." The affidavit failed to establish the veracity or reliability of the complaints of short-term traffic. The complaints were not verified by law enforcement. The affidavit failed to establish a basis of knowledge of short-term traffic. The affidavit failed to provide a time frame in regard to alleged short-term traffic. See State v. Winborne, 273 S.C. 62, 64, 254 S.E.2d 297, 298 (1979) (In order for an affidavit in support of a search warrant to show probable cause, it must state "facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time." 68 Am.Jur.2d 724 Searches and Seizures s 70. An affidavit which fails altogether to state the time of the occurrence of the facts alleged is insufficient. Anno., "Search Warrant: Sufficiency of showing as to time of occurrence of facts relied on," 100 A.L.R.2d 527, s 3 (1965). The reason for this rule is that probable cause, with time, dissipates.). Additionally, the affidavit failed to establish how short-term traffic was consistent with narcotics sales. Instead, the affidavit provided that Detective Sawyer received complaints of short-term traffic that is consistent with the sale of narcotics, a conclusory statement that gave the magistrate no basis to make a judgment regarding probable cause.

In Gentile the South Carolina Court of Appeals found that the search warrant was not supported by probable cause. Addressing whether citizen complaints about a high volume of traffic at the defendant's house, without more, was sufficient to establish that narcotics activity was taking place inside the house, the Court of Appeals wrote:

> The narcotics officers' decision to investigate Gentile was precipitated primarily by the receipt of citizen complaints regarding a high volume of traffic at Gentile's residence. Even though the officers verified the pattern of traffic at Gentile's residence, this, without additional investigation into the residence, was not sufficient to establish that narcotics activity was taking place. See State v. Hunt, 150 N.C.App. 101, 562 S.E.2d 597, 601-02 (2002) (reversing trial court's decision denying defendant's motion to suppress drug evidence and stating "[a]ll

> that the affidavit offers are complaints from citizens suspicious of drug activity in a nearby house. There is no mention of anyone ever seeing drugs on the premises. The citizens only reported heavy vehicular traffic to the house. The officer verified the traffic. His verification, as the trial court found, was not a conclusion."); Bailey v. Superior Court for County of Ventura (People), 11 Cal.App.4th 1107, 15 Cal.Rptr.2d 17, 19-20 (1992) (finding information from an anonymous informer and an unidentified citizen regarding heavy foot traffic at defendant's residence, without investigation, was insufficient to establish probable cause for the issuance of a search warrant; stating " 'heavy foot traffic' does not necessarily engender criminal behavior. True, under certain circumstances, such activity might raise suspicions, or be one indicator of possible narcotics transactions.").

Gentile, 373 S.C. at 514, 646 S.E.2d at 175.

The affidavit in Gentile did not include information about citizen complaints but was supplemented with oral testimony that the officer told the magistrate that "[T]he Charleston Police Department received citizen complaints regarding suspected narcotics traffic at Gentile's residence. Bradley testified the citizens claimed to have witnessed heavy foot traffic 'in and out of the residence, later in the afternoon up until the wee morning hours.'" In contrast to the **verified** heavy foot traffic in Gentile, the complaints in the present case were not verified. The anonymous, undated and, **unverified** complaints of "short-term traffic" in the present are not sufficient to establish probable cause for the issuance of the search warrant.

The remaining evidence presented to the magistrate in the affidavit involved items discovered during the single trash pull on April 18, 2011. The items found were listed in the affidavit as follows:

> 1 – the burnt remains of a cigar that contained a green leafy material believed to be marijuana;
> 2-numerous twisted and torn baggies (indicating the packaging of marijuana for resale);
> 3 – empty cigar tube wrappers;
> 4 – cigars that had been torn open to remove the tobacco (a common tactic for smoking marijuana covertly;)
> 5 – mail addressed to 462 Morgan St. NW Aiken SC.

> Based on my experience and training, the items listed indicate the use and repackaging of narcotics for resale. Detective Royster, a certified marijuana analyst, tested the plant material found in the trash and confirmed it to be marijuana. This officer verily believes that probable cause exists as to the presence of narcotics at this residence.

(R. p. 588)

The evidence found in the single trash pull failed to suggest a pattern of continuous drug activity and failed to support a reasonable conclusion that additional contraband would be found in the house. State v. Rutledge, 373 S.C. 312, 644 S.E.2d 789 (Ct.App. 2007), the case relied upon by the judge in his written order denying the motion to suppress, is distinguished from the present case. In Rutledge the affidavit provided the following information:

> The affiant has received information that William Rutledge and two other subjects only known as Steve and Richie are selling marijuana from 162 Bailey Ave., Rock Hill, South Carolina. Within the past 72 hours officers of the YCMDEU conducted a narcotics investigation focused on 162 Bailey Ave., Rock Hill, SC. As a result of this investigation, officers recovered marijuana, marijuana seeds and marijuana stalks from 162 Bailey Ave. A Criminal Records check of William Rutledge found that Rutledge has prior convictions for marijuana. Officers of the YCMDEU confirmed through Rock Hill Utilities that William Rutledge is drawing power at 162 Bailey Ave.

Rutledge, 373 S.C. at 315, 644 S.E.2d at 790. The confidential informant in Rutledge provided specific information about the crime being committed and the names of the people involved in the crime. The complaints in the present case did not provide information about a crime at all, simply short-term traffic. Additionally, the complaints in the present case did not provide the names of the people involved. The affidavit in Rutledge also included information linking the defendant to the residence and providing the defendant's prior criminal record involving marijuana. No such information was provided in the affidavit in the present case.

In Gentile the Court of Appeals found, under the totality of the circumstances, that the verified high volume of traffic at Gentile's house, the single unverified citizen complaint of

smelling marijuana in the vicinity of Gentile's house and the arrest and possession of marijuana by a visitor shortly after leaving Gentile's house did not support a finding of probable cause to search the house. In State v. Kinloch, 410 S.C. 612, 618, 767 S.E.2d 153, 156 (2014), this Court found the magistrate had a substantial basis for reaching his probable cause determination and wrote, "We reach this conclusion after acknowledging that independently each fact set forth in the search warrant affidavit is merely suspicious, but the totality of the circumstances—namely, the numerous tips indicating drug activity was probably present at 609 A and the subsequent surveillance of 609 A during which seemingly drug-related behavior was observed—distinguishes this case from Gentile."

Considering the totality of the circumstances in the present case, the affidavit lacked a substantial basis upon which to conclude that probable cause existed to believe that narcotics would be found in the house. The magistrate in the present case had even less basis for a probable cause determination than the magistrate did in Gentile where the Court of Appeals found the search warrant lacked in probable cause. The present case can be distinguished from Kinloch where there were numerous complaints specifically about heroine and cocaine transactions and the police conducted surveillance and observed drug transaction behavior. In the present case there were no specific complaints about drug transactions, just "short-term traffic." There was also no surveillance done in the present case to verify "short-term traffic" and no observation of drug transaction behavior.

The present case is distinguished from State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000), where a confidential informant notified SLED that Petitioner was storing illegal video gambling machines at two specific addresses. In response to the tip, undercover agents posed as potential buyers of a pool table and went to both

addresses where they observed the illegal machines. This Court wrote, "Here, the magistrate had a substantial basis for concluding a search would uncover illegal gambling machines. The information provided by the confidential informant was independently corroborated by undercover SLED agents. This verification established probable cause under the totality of the circumstances." Id. 338 S.C. at 192, 525 S.E.2d at 881. In the present case there was no independent corroboration to establish that narcotics would be found inside the house. Neither the complaints of "short-term traffic" nor the items found during the trash pull provide a substantial basis upon which to conclude that narcotics would be found inside the house.

The present case is also distinguished from State v. Bellamy, 336 S.C. 140, 145, 519 S.E.2d 347, 349 (1999), where this Court wrote, "Although the affidavit is weak on the element of reliability of the informant, this deficiency is compensated for by the strong showing of specificity, first-hand observation, and partial corroboration." As in Bellamy, in the present case the judge noted that "the reliability of the tipsters was never established." (R. p.p. 10-12). In contrast to Bellamy, the complaints in the present case were anonymous, there was no strong showing of specificity, no first-and knowledge and no corroboration. The case is also distinguished from United States v. Gary, 528 F.3d 324 (4th Cir. 2008), where the anonymous tip prior to the trash pull specifically stated that "Melvin" (Gary's first name) was selling illegal narcotics from his residence. The only complaint in the present case was about "short-term traffic" with no mention of illegal narcotic sales and no mention of Petitioner's name.

In United States v. Lyles, 910 F.3d 787, 792 (4th Cir. 2018), the Fourth Circuit Court of Appeals found that a trash pull revealing three empty packs of rolling papers, a piece of mail addressed to the home, and three marijuana stems were insufficient to provide the probable cause needed for issuance of a search warrant for the house. The Court wrote:

> The government invites the court to infer from the trash pull evidence that additional drugs probably would have been found in Lyles's home. Well perhaps, but not probably. The government's argument has several shortcomings. This was a single trash pull, and thus one less likely to reveal evidence of recurrent or ongoing activity. And from that one trash pull, as defendant argues, "[t]he tiny quantity of discarded residue gives no indication of how long ago marijuana may have been consumed in the home." Appellee Br. at 21. This case is almost singular in the sparseness of evidence pulled in one instance from the trash itself and the absence of other evidence to corroborate even that. The affidavit thus did not provide a substantial basis for the magistrate to find probable cause to search the home for evidence of marijuana possession.

Lyles, 910 F.3d at 794.

As in Lyles, the trash pull in the present case was a single trash pull less likely to reveal evidence of ongoing activity. This is especially true given there was no time frame given for the complaints of short-term traffic. These complaints do not rise to the level of the tip that proceeded the trash pull in Gary and are more analogous to the complete lack of a tip proceeding the trash pull in Lyles. The baggies and marijuana cigar remnants are only slightly more incriminating than the three packs of rolling papers and three marijuana stems found in the trash pull in Lyles. The results of the trash pull do not provide a substantial basis upon which to conclude that narcotics would be found inside the home. As in Lyles, the affidavit in the present case was insufficient to provide the probable cause needed for the issuance of a search warrant for the house. The trial judge erred in refusing to suppress the drugs found pursuant to the search warrant lacking probable cause.

The present case is also analogous to United States v. Abernathy, 843 F.3d 243 (6th Cir. 2016), where the Sixth Circuit Court of Appeals found that a trash pull revealing several marijuana roaches with marijuana residue inside, several plastic vacuumed packed heat sealed bags consistent to those used to package marijuana for resale containing marijuana residue with T2 markings (T2 is a known strain of marijuana), a USPS certified mail receipts addressed to

Jimmy Jail Abernathy [the Defendant] 5809 Tru Long Ct. Antioch TN [sic], a USPS certified mail receipts addressed to [Defendant's girlfriend], and one additional piece of mail addressed to 'current resident' at 5809 Tru Long Ct. Antioch, TN 37013 Davidson County were insufficient, standing alone, to create probable cause to search the Defendant's residence. The Sixth Circuit noted that without additional evidence of drug activity, there was no reliable nexus between the residue and paraphernalia found during the trash pull and the house. Additionally, the Sixth Circuit noted that the small amount of residue and paraphernalia found during the trash pull was insufficient to establish a fair probability that more drugs were inside the house. In the present case there was no additional evidence of drug activity to establish a nexus between the results of the trash pull and the house. The small amount of items found during the trash pull is insufficient to establish a fair probability that more drugs were inside the house. The trial judge erred in refusing to suppress the drugs found pursuant to the search warrant lacking probable cause.

The present case is factually distinguished from United States v. Briscoe, 317 F.3d 906 (8th Cir. 2003), where the Eighth Circuit Court of Appeals found that a trash pull revealing forty marijuana seeds and twenty-five marijuana stems that tested positive for tetrahydrocannabinol, the active component of marijuana were independently adequate to establish probable cause for a search warrant for the house. In Abernathy, cited above, the Sixth Circuit distinguished Briscoe writing:

> Briscoe and the cases the government cites in urging that probable cause was present here are inapposite. In Briscoe, the police found "forty marijuana seeds and twenty-five marijuana stems" in the defendant's garbage. 317 F.3d at 907. A large quantity of drug refuse in a residence's garbage suggests repeated and ongoing drug activity in the residence, and therefore creates a fair probability that more drugs remain in the home. See Elliott, 576 F.Supp. at 1581 ("[A] large quantity of discarded contraband ... might indicate its continued presence in the house."). Here, however, Detective Particelli only specified that "several"

> marijuana roaches and plastic bags were found in Defendant's garbage. The word "several" means "more than one or two but not a lot," indicating that the quantity of roaches and bags found in the trash pull was not large enough to suggest repeated or ongoing marijuana consumption in the residence. Black's Law Dictionary, 1583 (10th ed. 2014).

Abernathy, 843 F.3d at 255. Unlike the large quantity of drug refuse in Briscoe, the small amount in the present case, like the small amount found in Abernathy, does not suggest repeated and ongoing drug activity inside the house.

The present case is also factually distinguished from United States v. Leonard, 884 F.3d 730, 734-35 (7th Cir. 2018), where the Seventh Circuit Court of Appeals found that, "two trash pulls taken a week apart, both testing positive for cannabis, are sufficient standing alone to establish probable cause for a search warrant." The Seventh Circuit, citing Briscoe and Abernathy wrote:

> Both Briscoe and Abernathy support the assertion of probable cause in this case. While one search turning up marijuana in the trash might be a fluke, two indicate a trend. Whether it be a particularly large quantity of drugs, as in Briscoe, or multiple positive tests of different trash pulls within a fairly short time, both tend to "suggest[ ] repeated and ongoing drug activity in the residence," Abernathy, 843 F.3d at 255, and "create[ ] a fair probability that more drugs remain in the home[,]" id. So long as the drugs were contained in trash bags bearing sufficient indicia of residency, this is all that is necessary to establish probable cause and obtain a search warrant.

Leonard, 884 F.3d at 734. The present case involved a single trash pull revealing a small amount of drug refuse. Neither the single trash pull nor the small amount found in the present case suggest repeated and ongoing drug activity inside the house. The search warrant lacked probable cause to search the house.

As additional persuasive authority, in Raulerson v. State, 714 So. 2d 536, 537 (Fla. Dist. Ct. App. 1998), the police, after receiving an anonymous tip that residents at Raulerson's address were involved in drug activity, pulled six bags of trash from the curb in front of the home.

Inside the bags the police found two cannabis cigarette butts, stems, seeds, and pieces of suspected cannabis. A field test of the pieces tested positive for cannabis. The police obtained a search warrant based on the trash pull and anonymous tip. The Florida Court of Appeals reversed and wrote, "Although the affidavit contained relevant information that the substance found in the one-time trash pull tested positive for cannabis, we believe the affidavit lacked other sufficient material facts to indicate a fair probability that cannabis would be found in Raulerson's home." Raulerson , 714 So. 2d at 537. See also Cruz v. State, 788 So.2d 375 (Fla. Dist. Ct. App. 2001); Serrano v. State, 123 S.W.3d 53 (Tex. App. 2003).

In Gesell v. State, 751 So. 2d 104, 105 (Fla. Dist. Ct. App. 1999), the court found that a single trash pull, revealing the presence of a residual amount of marijuana in a plastic bag, coupled with an anonymous tip of suspected drug activity that is uncorroborated by the officers' observations, was insufficient to constitute probable cause for issuance of a search warrant.

In United States v. Elliott, 576 F. Supp. 1579, 1581 (S.D. Ohio 1984), the court granted the motion to suppress writing:

> We conclude that the discovery of the discarded contraband, standing alone, is insufficient to support a determination of probable cause. Despite the prompt action of the agent in seeking the warrant the day after the garbage was examined, the evidence in the garbage did not render the continued presence of marijuana probable. The affidavit does not indicate a large quantity of discarded contraband which might indicate its continued presence in the house. Instead, all we can ascertain is that at least two partially smoked marijuana cigarettes and several stems had left the home at some point in time.

Like Elliott, all that can be ascertained in the present case is that a small amount of marijuana cigar remnants and baggies left the house at some point in time.

The affidavit in the present case did not provide the magistrate with a substantial basis for determining the existence of probable cause to believe that contraband would be found inside the house. The small amount of contraband in the trash did not indicate the continued presence of

contraband in the house. The anonymous, unconfirmed, and undated complaints of short-term traffic and the baggies and marijuana cigar remnants found during the single trash pull do not suggest repeated and ongoing drug activity inside the house. The search warrant lacked probable cause.

C. The good faith exception is not applicable.

The good faith exception to the warrant requirement, found in United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.ed.2d 677 (1984), does not apply under the facts of this case. In Leon the Court noted great deference to the magistrate issuing the search warrant but wrote:

> Deference to the magistrate, however, is not boundless. It is clear, first, that the deference accorded to a magistrate's finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based. Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).[12] Second, the courts must also insist that the magistrate purport to "perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police." Aguilar v. Texas, supra, 378 U.S., at 111, 84 S.Ct., at 1512. See Illinois v. Gates, supra, 462 U.S., at 239, 103 S.Ct., at 2332. A magistrate failing to "manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application" and who acts instead as "an adjunct law enforcement officer" cannot provide valid authorization for an otherwise unconstitutional search. Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 326–327, 99 S.Ct. 2319, 2324–2325, 60 L.Ed.2d 920 (1979).
>
> Third, reviewing courts will not defer to a warrant based on an affidavit that does not "provide the magistrate with a substantial basis for determining the existence of probable cause." Illinois v. Gates, 462 U.S., at 239, 103 S.Ct., at 2332. "Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others." Ibid.

468 U.S. at 914–15, 104 S. Ct. at 3416. While the affidavit in the present case does not appear to include false information, the magistrate failed to perform his neutral and detached function and served merely as a rubber stamp for the police when he signed the search warrant that failed to provide a substantial basis for determining the existence of probable cause.

In State v. Johnson, 302 S.C. 243, 248, 395 S.E.2d 167, 170 (1990), this Court wrote:

> In Leon, the Supreme Court held that "the Fourth Amendment exclusionary rule does not bar the admission of evidence obtained by officers acting in reasonable reliance on a search warrant which was issued by a detached and neutral magistrate but ultimately found to be invalid." The dispositive issue here is whether sufficient information was given to the magistrate to perform his "neutral and detached" function rather than serve as a "rubber stamp for the police." Leon specifically precludes the application of the good faith exception in this situation. [R]eviewing courts will not defer to a warrant based on an affidavit that does not 'provide the magistrate with a substantial basis for determining the existence of probable cause.' 'Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others.'

In Johnson the affidavit in support of the search warrant failed to include any information about the reliability of the informant who provided the information and the information was not corroborated. This Court remanded the case in Johnson to determine if the affidavit was supplemented by sworn oral testimony regarding the reliability of the informant. The affidavit in the present case was not supplemented by sworn oral testimony. In denying the motion to suppress the judge in the present case wrote, "Although the reliability of the tipsters was never established, the officers corroborated the tip by finding twisted, torn baggies and the remnants of marijuana cigars in the trash. See State v. Rutledge, 644 S.E.2d 789 (Ct.App. 2007)(Finding probable cause for search warrant where a trash pull corroborated a tip). Therefore, probable cause existed for the magistrate to issue the warrant." (R. p. 10-12). Pursuant to Johnson, the anonymous, unconfirmed, and undated complaints of short-term traffic with no information in regard to reliability, alone, would not have provided a substantial basis for determining the existence of probable cause. Unlike Johnson, the magistrate in the present was also presented with the evidence from the trash pull. The baggies and marijuana cigar remnants from the single trash pull, however, combined with the complaints, still do not provide a substantial basis to determine probable cause to justify the search of the house. The good faith exception does not apply.

In State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997), this Court found that the affidavit in support of the search warrant did not provide a substantial basis to find probable cause. Finding that the good faith exception did not apply, this Court wrote, "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.' Leon, 468 U.S. at 923, 104 S.Ct. at 3421, 82 L.Ed.2d at 699. We find the affidavit in this case lacked any indicia of probable cause. Therefore the good-faith exception would not apply." Weston, 329 S.C. at 293, 494 S.E.2d at 804.

In Weston this Court found that the affidavit failed to set forth any facts as to why police believed that Weston committed the crime. In State v. Smith, 301 S.C. 371, 392 S.E.2d 182 (1990), this Court found that the affidavit "set forth no facts as to *why* police believed Smith robbed the Master Host Inn." 301 S.C. at 373, 392 S.E.2d at 183. The Smith case, like the Johnson case was remanded to determine if the affidavit was supplemented by sworn oral testimony. Again, the affidavit in the present case was not supplemented by oral sworn testimony. The affidavit in the present case failed to set forth facts to believe that drugs would be found inside the house. Like Weston, the good faith exception does not apply in the present case.

In United States v. Lyles, 910 F.3d 787, 796–97 (4th Cir. 2018), discussed above, the Court found that the good faith exception did not apply writing:

> We decline, however, to apply the good faith exception in the present case. We do not at all impugn the subjective good faith of the officer who ran the warrant application through review, including by his superior and a state prosecutor, before submitting it to the magistrate. The prosecutor's and supervisor's review of an application is often helpful in determining good faith. But those reviewers, unlike a neutral magistrate, share the officer's incentives "in the often competitive

> enterprise of ferreting out crime." Riley[2], 134 S.Ct. at 2482 (internal quotation marks omitted). The prosecutor's and supervisor's review, while unquestionably useful, "cannot be regarded as dispositive" of the good faith inquiry. Messerschmidt v. Millender, 565 U.S. 535, 554, 132 S.Ct. 1235, 182 L.Ed.2d 47 (2012). If it were, police departments might be tempted to immunize warrants through perfunctory superior review, thereby displacing the need for "a neutral and detached magistrate" to make an independent assessment of an affidavit's probable cause, Riley, 134 S.Ct. at 2482 (internal quotation marks omitted).

The affidavit in the present case is lacking any indicia of probable to cause to believe that contraband would be found inside the house. As discussed above, the affidavit failed to suggest a pattern of continuous drug activity and failed to support a reasonable conclusion that additional contraband would be found in the house. The Leon good faith exception does not apply in this case. The judge erred in refusing to suppress the drugs found inside the house pursuant to a search warrant lacking probable cause.

[2] Riley v. California, 573 U.S. 373, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014).

CONCLUSION

Based on the above argument, this Court should reverse the convictions for trafficking cocaine and possession with intent to distribute cocaine within proximity of a park.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of April, 2021.