STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Aiken County
Hon. R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2020-000653

The State, Respondent,

v.

Kelvin Jones, Petitioner.

Opinion No. 2020-UP-018 (S.C. Ct. App. filed January 29, 2020)

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

MICHAEL D. ROSS
Assistant Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General
S.C. Bar Number 15608

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

ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE

Procedural History

Petitioner was indicted at the January 2012 term of the grand jury of Aiken County for trafficking cocaine, 400 grams or more (2012-GS-02-00132), possession with intent to distribute (PWID) cocaine within the proximity of a school (2012-GS-02-00133), and possession of ecstasy (2012-GS-02-00134). (R. p. 602-09). On August 11, 2014, a hearing was held before the Honorable Edgar W. Dickson on Petitioner's motion to change venue and motion to suppress the drugs seized in the search. (R. p. 1-9). Judge Dickson granted Petitioner's change of venue motion and denied the motion to suppress the drugs. (R. p. 10-12; p. 22-25).

Petitioner proceeded to a trial by jury on February 17-19, 2015, in Dorchester County before the Honorable R. Lawton McIntosh. (R. p. 28). Prior to the beginning of the trial, Petitioner pled guilty to possession of ecstasy. (R. p. 68-73). Judge McIntosh deferred sentencing until the end of the trial. At the conclusion of trial, Petitioner was found guilty on both charges remaining charges. (R. p. 458). He was sentenced to the minimum of 25 years' imprisonment on the trafficking in cocaine charge, to 10 years on the PWID within the proximity of a school, and to 1 year on the ecstasy charge, all to be served concurrent. (R. p. 610-12; p. 466).

A notice of appeal was filed on February 24, 2015, but it was discovered that a motion for a mistrial was pending. (R. p. 498-99). Petitioner's appeal was dismissed without prejudice by consent. (R. p. 497). After further filings and hearing in circuit court, a hearing was held on July 6, 2016. Judge McIntosh issued an order denying both motions. (R. p. 550; 553). A notice of appeal was filed on September 2, 2016. The Court of Appeals affirmed the convictions and sentences. See State v. Jones, Op. No. 2020-UP-018 (S.C. Ct. App. filed January 29, 2020). A Petition for Rehearing was denied on March 27, 2020.

Petitioner served and filed a Petition for Writ of Certiorari and the State served and filed its Return. On March 9, 2021, this Court granted the Petition for Writ of Certiorari only as to Issue One raised by Petitioner.

Factual Background

On April 21, 2011, investigators with the Aiken Department of Public Safety (ADPS) executed a search warrant at Petitioner's residence located at 462 Morgan Street, which was within a half mile of Pine Crest School. (R. p. 132-34). Over a kilogram of cocaine was discovered. The investigation began after investigators received complaints of short-term traffic who frequented the residence. (R. p. 44). Acting on the complaints, on April 18, 2011, investigators coordinated with Bill Martin, who was the Solid Waste Supervisor with the Aiken Department of Public Works, to have Petitioner's trash collected as it normally would be and then brought to ADPS to be examined. (R. p. 44; SW Affidavit). Numerous items suggesting drugs were being sold out of the house and used at the house were recovered: several twisted and torn baggies, empty cigar tube wrappers, cigars that had been torn open to remove tobacco, burnt remains of a cigar that contained a green leafy material, and mail addressed to the residence. (R. p. 587-88). Additionally, the material in the trash was confirmed to be marijuana by a certified marijuana analyst. The investigators then went to a magistrate, presented him with these facts, and obtained a search warrant to search the residence. (R. p. 587-88).

Captain Marty Sawyer set up in an undercover vehicle to surveil the residence from an adjacent position. (R. p. 115-116). Investigators coordinated with the Special Response Team (SRT) to do the initial safety sweep of the house. It was noted that the SRT's job was to secure the residence, not to conduct the search. (R. p. 122; 173; 193-194; 202). Sawyer watched as a man named Ricky Lloyd approached the residence, knocked on the door, and when no one

answered, he left. (R. p. 116-117). Shortly thereafter, Sawyer saw Petitioner approach the residence with a blue backpack that seemed to be filled with something heavy making it hang low. (R. p. 117-119). Lloyd then walked back to the house where he entered. (R. p. 120). More people arrived at the house and also entered. (R. p. 120). Approximately one to one and a half minutes later, the SRT breached the home after knocking and announcing their presence. (R. p. 176; 190; 204; 221-22). Members of the SRT heard a lot of movement and commotion after the knock, so they knew no one was coming to answer the door. (R. p. 176-77; 190; 204; 221-22). As the SRT was sweeping the house, Lloyd was caught attempting to flush cocaine and his driver's license down the toilet. (R. p. 158-59; 247; 340).

Petitioner and the other occupants of the house were placed in investigative detention. (R. p. 47). Approximately $5,042 was found in Petitioner's pants in a plastic grocery store bag in denominations of mostly twenty dollar bills. (R. p. 123; 243). Over a kilo of cocaine was located in the blue backpack that Petitioner was seen carrying just minutes earlier. (R. p. 138; 145; 228; 301). Other items recovered at the house were a Smith and Wesson handgun and a pickle jar containing marijuana. (R. p. 137; 207; 227-28).

STANDARD OF REVIEW

"On review of a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling and will reverse only when there is clear error." State v. Bruce, 412 S.C. 504, 509, 772 S.E.2d 753, 755 (2015) (citing State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011)); see also, State v. Missouri, 361 S.C. 107, 111, 603 S.E.2d 594, 596 (2004) (same). "On appeals from a motion to suppress based on Fourth Amendment grounds, this Court reviews questions of law *de novo*." State v. Bash, 419 S.C. 263, 268, 797 S.E.2d 721, 723–24 (2017). "'On appeals from a motion to suppress based on Fourth Amendment grounds, this Court applies a deferential standard of review and will reverse if there is clear error.'" State v. Adams, 409 S.C. 641, 647, 763 S.E.2d 341, 344 (2014) (quoting State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010)). "The 'clear error' standard means that an appellate court will not reverse a trial court's finding of fact simply because it would have decided the case differently." State v. Moore, 415 S.C. 245, 251, 781 S.E.2d 897, 900 (2016) (quoting State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005)). "[A]ppellate courts must affirm if there is any evidence to support the trial court's ruling." Id.

ARGUMENT

I. Initially, the issue raised by Petitioner is not properly preserved for review on appeal. Even if it could be preserved for review, the issue was expressly waived by Petitioner's counsel at trial. Further, even if this Court excuses the procedural defects, the trial court properly denied Petitioner's motion to suppress drugs seized as a result of a search warrant because the magistrate had a substantial basis for finding the warrant supported by probable cause. Finally, even if the affidavit lacked probable cause, the officers operated in an objectively reasonable manner and exclusion was not warranted.

The Court of Appeals correctly affirmed Petitioner's convictions and sentences. The trial court properly denied Petitioner's motion to suppress the drugs seized as a result of a search warrant because the warrant was supported by an affidavit which established probable cause for believing drugs would be located in the residence to be searched. Additionally, as the Court of Appeals found, the issue is not properly preserved for review on appeal, and even if preserved, the issue was expressly waived by Petitioner's counsel at trial when he responded: "No objection" after the trial court asked for any objections to the admission of the evidence.

Relevant Background

Prior to trial, Petitioner moved to suppress evidence seized pursuant to the search warrant, arguing a lack of probable cause. (R. 1-9). Petitioner noted that the affidavit presented in support of the warrant did not address the reliability of the tipsters who initially raised concerns to the police. (R. 3-5). Instead, it simply notes that the detective "received complaints of short-term traffic at [the residence] that is consistent with drug sales." (R. 11). However, the affidavit also recounts a "trash pull"[1] that the detective conducted after receiving the tips. (R. 11). The detective coordinated with the garbage collector to obtain the trash that had been

[1] See California v. Greenwood, 486 U.S. 35, 37 (1988) (holding that the Fourth Amendment does not prohibit the warrantless search and seizure of garbage left for collection outside the curtilage of a home).

placed outside the residence for collection. (R. 11). Inside the can, the detective found marijuana in a cigar butt, "numerous twisted and torn baggies (indicating the packaging of marijuana for resale," and mail addressed to the residence. (R. 11). Additionally, the detective recovered cigars that had been torn open, presumably to replace tobacco with marijuana. (R. 11). According to the affidavit, the trash pull occurred the day before the detective sought the search warrant. (R. 563). The Affidavit provided:

> 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.

(R. 588).

After an evidentiary hearing on the issue, the circuit court denied Petitioner's motion to suppress. (R. 10-12). The court held that although the affidavit did not establish the reliability of the tipsters, the detective's trash pull corroborated the suspicion that drugs were being sold in the house. (R. 11-12). As such, probable cause existed for the magistrate to issue the search

warrant. (R. 12). In support of its analysis, the court specifically cited State v. Rutledge, 373 S.C. 312, 644 S.E.2d 789 (Ct. App. 2007) (holding that probable cause existed where law enforcement corroborated an anonymous tip, in part, through a trash pull).

The case subsequently proceeded to trial in front of a different circuit court judge. After jury selection, Petitioner informed the court that he would renew the objections to the introduction of evidence seized pursuant to the search warrant. (R. 37, l. 11-15). The court replied, "*I think if you don't, you'll waive them*." (R. 37, l. 16-17)(emphasis added). Petitioner subsequently clarified that his objection covered not only the sufficiency of the warrant, but also the legality of the initial trash pull. (R. 82-83). The court responded, "I note that objection. The ruling will stand as is. Are you otherwise ready to go?" (R. 83, l. 8-10). The parties then proceeded with opening statements.

Nevertheless, when the State offered the evidence seized pursuant to the search warrant, Petitioner failed to renew his objections. The court specifically asked whether Petitioner had any objections when the State offered: crime scene photos taken during the search warrant (R. 134), the sling bag containing the cocaine (R. 144), a firearm (R. 244-45), and the cocaine itself. (R. 286). On each occasion, Petitioner indicated he had no objection to the introduction of the evidence. (R. 134, 144, 244-45, 286). Petitioner now argues that an objection prior to the introduction of these pieces of evidence was unnecessary. (Pet. 18-19).

Preservation

Generally, in order to preserve an issue for appellate review, a party must make "a contemporaneous objection that is ruled upon by the trial court." State v. Sweet, 374 S.C.1, 5, 647 S.E.2d 202, 205 (2007). "In most cases, '[m]aking a motion *in limine* to exclude evidence at the beginning of trial does not preserve an issue for review because a motion *in limine* is not a

final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced.'" State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) (quoting State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996)). There is an exception: "where a judge makes a ruling on the admission of evidence on the record immediately prior to the introduction of the evidence in question, the aggrieved party does not need to renew the objection." Id.

The Forrester Court, quoting State v. Mueller, 319 S.C. 266, 268-69, 460 S.E.2d 409, 410 (Ct. App. 1995), further explained:

> Because no evidence was presented between the ruling and [the] testimony, there was no basis for the trial court to change its ruling. Thus, . . . [the] motion was not a motion in limine. The trial court's ruling in this instance was in no way preliminary, but to the contrary, was a final ruling. Accordingly, [the defendant] was not required to renew her objection to the admission of the testimony in order to preserve the issue for appeal.

Id. In Forrester, "the witness **introducing the cocaine** for the state was the initial witness in the trial." Id. (emphasis added). The Court further noted: "No evidence was taken between the trial court's ruling on the admission of the cocaine and its introduction." Id. at 642–43, 541 S.E.2d at 840.

It was clear Judge McIntosh considered Judge Dickson's ruling to be a preliminary ruling as he explained to Petitioner's counsel their need to object or else the issue would be waived. (R.37). When Petitioner's counsel again addressed the suppression, the court responded: "I note that objection. The ruling will stand as is." (R.83). This statement is not enough to constitute a final ruling on the issue, as it could be referencing his prior admonition that Petitioner would waive any issue if he did not "restor[e] our objection . . . throughout the pendency" of the trial. (R.37). It remained a preliminary, in limine ruling, and because the first witness was not the

witness who introduced the evidence sought to be suppressed, a contemporaneous objection was required. See State v. Smith, 337 S.C. 27, 32, 522 S.E.2d 598, 600 (1999).

Waiver

Even if the issue could be construed as preserved, the issue was expressly waived by Petitioner's counsel. Counsel for Petitioner repeatedly told the court that he had "no objection" when the State offered the exhibits into evidence and the court questioned: "Any objection?" (R. 134, l. 13; 144, l. 21; 245, l. 1; 286, l. 11). Replying "no objection" goes beyond a simple failure to preserve an issue. It constitutes an express waiver of the issue and argument made *in limine*. See Burke v. AnMed Health, 393 S.C. 48, 55, 710 S.E.2d 84, 88 (Ct. App. 2011)("When a party states to the trial court that it has no objection to the introduction of evidence, even though the party previously made a motion to exclude the evidence, the issue raised in the previous motion is not preserved for appellate review."); State v. Dicapua, 373 S.C. 452, 646 S.E.2d 150 (Ct. App. 2007)(holding that a defendant waived an objection to a videotape, previously raised *in limine*, by replying "no objection" when the State offered the videotape into evidence).[2]

The trial court in this case did not ask whether there were "any **additional** objections;" instead, he simply asked: "Any objection" when the State sought to introduce the evidence. The distinction matters because had the trial court asked "any additional objections" it would have been a clear indication he was acknowledging the prior ruling on the suppression was a final ruling and Petitioner's counsel did not need to continue to object. By asking "any objection" the

[2] Petitioner attempts to distinguish Dicapua by arguing the issue must have only received a preliminary ruling and not a final ruling when counsel indicated no objection to the admission of the videotape. However, the Court would not have needed to address the bar as waiver and instead would have merely indicated a preliminary ruling was not renewed with a contemporaneous objection so that the issue was not preserved. By addressing it as waiver, the Court was making clear that the ruling a statement of "no objection" waived the right to raise the issue on appeal applied no matter the nature of the prior ruling.

court is not excluding the need for counsel to continue to raise the objection related to the suppression motion.

Additionally, the response by Petitioner's counsel is significant. He did not respond: "No additional objections" instead he merely responded: "No objection, Your Honor." He did not make any effort to ensure the trial court was aware of his prior suppression request or that he was still continuing that objection to the evidence. It is more likely the trial court believed counsel for Petitioner had changed his mind regarding the merits of his prior arguments after hearing the detailed testimony from the State's witnesses and was not renewing his objections.

Even if the trial court's actions are interpreted as indicating the pre-trial ruling was final, Petitioner's response waived the argument for appellate review. Other states agree. See Livingston v. Greyhound Lines Inc., 208 A.3d 1122, 1136 (Pa. Super. 2019) (citing Jones v. Ott, 191 A.3d 782, 791-92 (Pa. 2018)) ("Statements by a party's counsel that the party has no objection to a ruling constitute an affirmative waiver that bars the party from raising that issue in post-trial motions or on appeal, even if the party had previously fully raised and preserved the issue."); see also, Burns v. Taylor, 589 S.W.3d 614, 625 (Mo. Ct. App. 2019) (finding affirmatively stating that there was no objection to the admission of an exhibit waived even plain error review); Thomas v. State, 408 S.W.3d 877, 884 (Tex. Crim. App. 2013)("Our case law makes it clear that a statement of 'no objection' when the complained-of evidence is eventually proffered at trial—at least, without more—will signal to the trial court an unambiguous intent to abandon the claim of error that was earlier preserved for appeal."); Maness v. State, 285 S.E.2d 193, 194 (Ga. Ct. App. 1981) ("When defense counsel stated that he had no objection to the introduction of the evidence, he waived any objection which might have been urged including those contained in the motion to suppress."); Erman v. State, 434 A.2d 1030, 1045 (Md. Ct.

Spec. App. 1981) (concluding that the issue of the admissibility of a statement, for which the court had previously denied a motion to suppress, "ha[d] been waived in that, at trial, [appellant] specifically advised the trial judge that there was no objection to the admission of the statement").

The Jones Court explained the rationale very clearly:

> Trial lawyers waive claims, objections, and issues all the time, and do so upon all sorts of rationales. These waivers may occur for countless strategic or tactical reasons, or may be based upon intervening developments in the trial record, or may reflect simple inadvertence or error. Our trial courts must be free to accept such unequivocal statements of counsel as consequential and binding. Thus, even if Jones had preserved her jury-charge issue in the first instance, her affirmative statement on the record that she no longer had any "issues with the charge" waived any available post-trial claim. When a trial judge directly asks for any objections, counsel must directly state them, explicitly or by reference to prior recorded objections, on pain of waiver.

Jones v. Ott, 191 A.3d 782, 791–92 (Pa. 2018). In this case, when asked if Petitioner's had: "Any objections" his counsel responded: "No objections, Your Honor." The trial court should be entitled to accept that statement as a definitive statement that Petitioner was not contesting the admissibility of the evidence, and this Court should find his response constituted a waiver of his ability to raise that issue on appeal.

Merits

Even if the Court were to excuse the failure to preserve this issue for appeal, the trial court did not err in finding the magistrate had a substantial basis upon which to find probable cause and in denying the motion to suppress the fruits of the search warrant. The trial court in this case properly determined the affidavit accompanying the search warrant provided the magistrate with a substantial basis to find probable cause. As a result, the trial court properly denied Petitioner's motion to suppress the results of the search warrant.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. "The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against **arbitrary invasions** by governmental officials." Camara v. Mun. Ct. of City & Cty. of San Francisco, 387 U.S. 523, 528 (1967) (emphasis added). "The touchstone of the Fourth Amendment is reasonableness." Florida v. Jimeno, 500 U.S. 248, 250 (1991). Thus, only unreasonable searches and seizures are prohibited. State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977). Generally, in order for a search to be reasonable under the Fourth Amendment, a law enforcement officer must obtain a search warrant prior to conducting the search. Robinson v. State, 407 S.C. 169, 185, 754 S.E.2d 862, 870 (2014).

A search warrant may issue only upon a finding of probable cause. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). "The duty of the reviewing court is to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed." State v. Baccus, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006). "A magistrate's determination of probable cause to search is entitled to **substantial deference** by this Court on review." State v. Crane, 296 S.C. 336, 339, 372 S.E.2d 587, 588 (1988) (citation omitted) (emphasis added); see also, State v. Pressley, 288 S.C. 128, 131, 341 S.E.2d 626, 628 (1986) ("Determination of probable cause to search made by a neutral and detached magistrate is entitled to **substantial deference**.") (citing Illinois v. Gates, 462 U.S. 213 (1983)); Spears, 393 S.C. at 483, 713 S.E.2d

at 333 (citing State v. Dunbar, 361 S.C. 240, 253, 603 S.E.2d 615, 622 (Ct. App. 2004)) (emphasis added).

The United States Supreme Court has announced: "Probable cause, we have often told litigants, **is not a high bar**: It requires only the kind of fair probability on which reasonable and prudent [people,] not legal technicians, act." Kaley v. United States, 571 U.S. 320, 338 (2014) (emphasis added) (quotation marks and citations omitted); see also, District of Columbia v. Wesby, —— U.S. ——, 138 S. Ct. 577, 586 (2018) (reiterating probable cause is not a high bar); United States v. Bosyk, 933 F.3d 319, 325 (4th Cir. 2019) ("Probable cause is therefore 'not a high bar.'").

In determining whether an affidavit supports a finding of probable cause, the United States Supreme Court adopted a "totality-of-the-circumstances" test:

> The task of the issuing magistrate is simply to 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). The United States Supreme Court further discussed the probable cause standard in Gates:

> As early as Locke v. United States, 7 Cranch. 339, 348, 3 L.Ed. 364 (1813), Chief Justice Marshall observed, in a closely related context, that "the term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation.... It imports a seizure made under circumstances which warrant suspicion." More recently, we said that "the quanta ... of proof" appropriate in ordinary judicial proceedings are inapplicable to the decision to issue a warrant. Finely-tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision. While an effort to fix some general, numerically precise degree of certainty corresponding to "probable cause" may not be helpful, it is clear that "only the

> probability, and not a prima facie showing, of criminal activity is the standard of probable cause."

Gates, 462 U.S. at 235 (citations omitted). Probable cause to conduct a search exists where "the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found." State v. Morris, 411 S.C. 571, 580, 769 S.E.2d 854, 859 (2015).

As the United States Supreme Court explained:

> If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.

U.S. v. Ventresca, 380 U.S. 102, 108 (1965). The Court went on to explain the preference of upholding a warrant: "Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." Id. at 109.

Here, the magistrate had a substantial basis to find probable cause. Although the affidavit did not contain any information about the reliability of the individuals who provided the initial information, the detective's subsequent investigation corroborated the suspicion that drugs were in the house. See Gates, 462 U.S. at 241 (1983)("Our decisions applying the totality-of-the-circumstances analysis outlined above have consistently recognized the value of corroboration of details of an informant's tip by independent police work."). Specifically, the detective recovered

marijuana in a cigar butt and "numerous twisted and torn baggies (indicating the packaging of marijuana for resale)" during the trash pull. (R. 11). Additionally, the detective found cigars that had been torn open, which he explained was a common way to smoke marijuana. (R. 11). When coupled with the complaints of short-term traffic at the residence that were suspicious of drug sales, the magistrate could reasonably conclude there was a fair probability that evidence of drug trafficking would be found at the residence. See e.g. State v. Bellamy, 336 S.C. 140, 145, 519 S.E.2d 347, 349 (1999)("Although the affidavit is weak on the element of the reliability of the informant, this deficiency is compensated for by the strong showing of specificity, first-hand observation, and partial corroboration."); see also United States v. Gary, 528 F.3d 324 (4th Cir. 2008)(holding that probable cause existed where a trash pull corroborated an anonymous tip).

Nevertheless, Petitioner believes the magistrate lacked a substantial basis to find probable cause. (Pet. 13). In reaching this conclusion, Petitioner challenges the initial complaints of short-term traffic at the residence, noting that the affidavit did not discuss the reliability of complainants, or the dates of the short-term traffic. (Pet. 13). According to Petitioner, the information was not a "tip" at all because it did not articulate how short-term traffic at a residence suggested drug sales inside. (Pet. 11-13). Additionally, Petitioner believes the single trash pull failed to suggest a pattern of continuous drug activity or that contraband would be found in the house. (Pet. 14).

Petitioner's argument is flawed for two reasons. First, Petitioner challenges each fact in isolation from the remainder of the affidavit. This type of analysis misses the forest for the trees. As this Court is aware, probable cause is determined based on the on the "totality of the circumstances" presented. Gates, 462 U.S. at 238. Although each individual fact may only raise a suspicion that incriminating evidence will be found, "the task of the issuing magistrate" is to

consider the affidavit as a whole. Id. Probable cause can arise from the combination of individual facts that are merely suspicious on their own. See e.g. State v. Kinloch, 410 S.C. 612, 618, 767 S.E.2d 153, 156 (2014) (holding 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 [the residence] and the subsequent surveillance of [the residence] during which seemingly drug-related behavior was observed" justified a finding of probable cause). Such is the case here. Even if the initial complaints of short-term traffic only raised a suspicion of drug dealing, when that fact is considered in conjunction with the trash pull and the evidence located, the totality of the circumstances gave the magistrate a substantial basis to find probable cause.

Second, Petitioner analyzes the affidavit in a hyper-technical fashion, reading ambiguity into a document where none exists. Such an interpretation fails to acknowledge that "affidavits 'are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once enacted under common law pleading have no proper place in this area." Gates, 462 U.S. at 236 (quoting United States v. Ventresca, 380 U.S. 102, 108 (1965). Accordingly, this Court has noted that affidavits should be interpreted in a "common sense" manner, not a "hypertechnical" one. State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 194, 525 S.E.2d 872, 881 (2000); See also State v. Dupree, 354 S.C. 676, 683, 583 S.E.2d 437, 441 (Ct. App. 2003) ("Affidavits are not meticulously drawn by lawyers, but are normally drafted by non-lawyers in the haste of a criminal investigation, and should therefore be viewed in a common sense and realistic fashion.").

The magistrate in this case only needed a little common sense to understand the significance of the initial information received by law enforcement. The words "short-term

traffic" implies various people repeatedly entering and exiting the residence in a brief time period. (R. 11). That the individuals observing this traffic communicated "complaints" to a narcotics officer indicates they assessed the traffic was suspicious. (R. 11). Common sense tells us that regular or innocuous guests would not prompt complaints to the police. Additionally, short-term visits have been recognized by this Court as a factor to consider in determining whether criminal activity related to drugs is present. See State v. Corley, 392 S.C. 125, 126, 708 S.E.2d 217, 217 (2011).

Similarly, no dissertation is needed to explain the significance of the items recovered during the trash pull. The detective found marijuana in a cigar butt, cigars that had been torn open to remove the tobacco, and "numerous twisted and torn baggies." (R. 11). The detective even made clear to the magistrate that the twisted and torn baggies indicated "the packaging of marijuana for resale." (R. 11). See e.g., People v. Hardiman, 646 N.W.2d 158, 160-162 (Mich. 2002), (holding that corner-tie baggies, in which "the drugs are placed in the corner of the baggie, that portion of the baggie is twisted or tied off, the corner is cut or torn away, and the remaining portion of the baggie is thrown away," may be considered as evidence of intent to distribute). The magistrate did not need anything else to explain the business of breaking down wholesale amounts of marijuana to repackage into smaller amounts for retail sales. Again, common sense sufficed. Further, this Court considered hollowed out cigars one factor in a determination of probable cause to search a trunk of an automobile for raw marijuana. See Morris, 411 S.C. at 581, 769 S.E.2d at 859.

Additionally, Petitioner notes that the affidavit does not identify when the complainants observed the short-term traffic. (Pet. 13). But the detective cured any deficiency by including the date of the trash pull, which occurred the day before he presented the affidavit to the

magistrate. (R. 563). This Court handled a similar issue in 192 Coin-Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000). In that case, an informant notified SLED that illegal video gambling machines were being stored at a warehouse in Greenville. Undercover SLED agents observed the machines in the warehouse and later sought a search warrant. The owners of the machines subsequently challenged the search warrant, noting the date of the informant's tip was not provided. This Court rejected that argument, holding "[t]he date on which the informant saw the illegal machines is irrelevant because SLED's corroboration was the basis of the magistrate's probable cause finding, not the informant's tip." Id. at 193, 525 S.E.2d at 881.

Petitioner also cites United States v. Lyles, 910 F.3d 787 (4th Cir. 2018) as persuasive authority demonstrating a lack of probable cause. In Lyles, the government obtained a search warrant after a trash pull revealed three marijuana plant stems, three empty packs of rolling papers, and a document addressed to the residence. Id. at 790. In assessing probable cause, the Fourth Circuit noted that the situation was unique in that the trash pull was not preceded by a tip. Id. at 793. According to the Court, the "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*." Id. at 794 (emphasis added). Given this assessment, the Court unsurprisingly found that the magistrate lacked a substantial basis to find probable cause. Id.

The case at bar is unlike Lyles because the trash pull was preceded by multiple complaints of short-term traffic at the residence. The short-term traffic inside the home raised the suspicion of drug sales. Additionally, the trash pull in this case resulted in more incriminating evidence than was the case in Lyles. Specifically, law enforcement found multiple twisted and torn baggies indicative of the resale of drugs. Additionally, law enforcement

recovered marijuana in a discarded cigar butt and cigars that had been torn open to replace the tobacco with marijuana. As such, Petitioner's reliance on Lyles is misplaced.

This case is more akin to United States v. Saunders, 828 F. App'x 900, 903 (4th Cir. 2020). In Saunders, the Fourth Circuit considered the propriety of a search warrant. The Court found that "practical, common-sense" standard demonstrating probable cause was satisfied based on two facts in the Affidavit:

> (1) the officer who submitted the Affidavit received a tip that Saunders' home was a "narcotics house" about two weeks before the search, and (2) the officer conducted a trash pull at Saunders' home immediately before applying for the warrant and discovered "a large amount of plastic baggies with twisted and torn off corners," with some of those baggies containing a white residue that the officer "believed to be a ... narcotic," The Affidavit further stated that the trash pull evidence was "consistent with the distribution and sale of narcotics."

Id. at 903. Very similar probable cause exists in this case.

Unlike the situation in Lyles, the magistrate in this case had a substantial basis to conclude probable cause existed. Although Petitioner raises perceived deficiencies in the affidavit, probable cause "is not a high bar: It requires only the kind of fair probability on which reasonable and prudent [people], not legal technicians, act." Kaley v. United States, 571 U.S. 320, 338 (2014) (quoting Florida v. Harris, 568 U.S. 237, 244 (2013)(internal quotations omitted). The affidavit in this case met that threshold when appropriately viewed based on the totality of the circumstances and the common-sense, reasonable inferences the magistrate was free to make.

Good Faith

Even if this Court excuses the procedural defects, and even if this Court finds the affidavit did not provide a substantial basis upon which to justify the magistrate's issuance of the

search warrant, the officers operated in objectively reasonable reliance on the warrant and its issuance by the magistrate to conduct the search, so exclusion is not warranted. As the United States Supreme Court explained: "suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those **unusual cases** in which exclusion will further the purposes of the exclusionary rule." United States v. Leon, 468 U.S. 897, 918 (1984). This is not one of those "unusual cases" warranting exclusion of the evidence.

The United States Supreme Court found when law enforcement acted in good faith, or in objectively reasonable reliance, on a search warrant issued by a neutral and detached magistrate, the exclusionary rule was not implicated:

> When police act under a warrant that is invalid for lack of probable cause, the exclusionary rule does not apply if the police acted "in objectively reasonable reliance" on the subsequently invalidated search warrant. We (perhaps confusingly) called this objectively reasonable reliance "good faith."

Herring v. United States, 555 U.S. 135, 142 (2009) (internal citation omitted). The Court has stressed that the "prime purpose" of the exclusionary rule "is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." United States v. Calandra, 414 U.S. 338, 347 (1974). Substantial costs to society result from the exclusion of evidence, and the United States Supreme Court has found that the deterrent effect of exclusion must outweigh and justify these costs:

> Real deterrent value is a "necessary condition for exclusion," but it is not "a sufficient" one. The analysis must also account for the "substantial social costs" generated by the rule. Exclusion exacts a heavy toll on both the judicial system and society at large. It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence. And its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment. Our cases hold that society must swallow this bitter pill when necessary, but only as a **"last**

> **resort."** For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs.

Davis v. United States, 564 U.S. 229, 237 (2011); see also, State v. Sachs, 264 S.C. 541, 566, 216 S.E.2d 501, 514 (1975) (stating "[t]he exclusionary rule is harsh medicine," and "[e]xclusion should be applied only where [the purpose of] deterrence is clearly subserved").

In regards to the deterrent effect of suppressing evidence obtained from a search warrant later found to be lacking in probable cause, the United States Supreme Court opined:

> The Court in Leon concluded that a deterrent effect was particularly absent when an officer, acting in objective good faith, obtained a search warrant from a magistrate and acted within its scope. "In most such cases, there is no police illegality and thus nothing to deter." It is the judicial officer's responsibility to determine whether probable cause exists to issue a warrant, and, in the ordinary case, police officers cannot be expected to question that determination. Because the officer's sole responsibility after obtaining a warrant is to carry out the search pursuant to it, applying the exclusionary rule in these circumstances could have no deterrent effect on a future Fourth Amendment violation by the officer.

Illinois v. Krull, 480 U.S. 340, 349 (1987). In Leon, the Court established that an officer could not be found to have acted with "objective reasonableness," excluding application of this "good faith exception," in any of the following four circumstances:

> 1) the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth;
>
> 2) the issuing magistrate wholly abandoned his judicial role . . . in such circumstances, no reasonably well trained officer should rely on the warrant;
>
> 3) relying on a warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable;"
>
> 4) when a warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—

> that the executing officers cannot reasonably presume it to be valid.

Leon, 468 U.S. at 923. None of the four exceptions to Leon's good faith rule are implicated in this case.

The United States Supreme Court "recognized that a defendant challenging a search will lose if either: (1) the warrant issued was supported by probable cause; or (2) it was not, but the officers executing it reasonably believed that it was." Pearson v. Callahan, 555 U.S. 223, 241–42 (2009). This Court applied the holding in Leon and noted: "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) (citing Leon, 468 U.S. at 923).[3]

The Court's opinion in Leon is particularly instructive for a determination of good faith in the instant case. In Leon, the trial court found the affidavit of the search warrant failed to provide probable cause because the information from the informant was not shown to be reliable and the evidence witnessed by the officers during their surveillance (evidence of packages leaving the residence and travel by the subjects) was equally consistent with innocent motives as it was with evidence of narcotics trafficking.[4] Leon, 468 U.S. at 904-905. The United States

[3] Petitioner relies heavily on State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990), which found the good faith exception did not apply when the magistrate did not have a substantial basis to find probable cause. However, as noted by Weston and by other courts, this cannot be the analysis or it would render the good faith exception meaningless. See e.g., United States v. Bynum, 293 F.3d 192, 195 (4th Cir. 2002) ("If a lack of a substantial basis also prevented application of the Leon objective good faith exception, the exception would be devoid of substance.").

[4] The determination of whether probable cause was shown occurred prior to the United States Supreme Court's holding in Gates providing for the consideration of a totality of the circumstances, and the government specifically and expressly refused to raise whether the

Supreme Court found, even though the parties conceded the search warrant was not supported by probable cause established in the affidavit, the good faith exception should apply:

> [The Officer's] application for a warrant clearly was supported by much more than a "**bare bones**" affidavit. The affidavit related the results of an extensive investigation and, . . . provided evidence sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause. Under these circumstances, the officers' reliance on the magistrate's determination of probable cause was objectively reasonable, and application of the extreme sanction of exclusion is inappropriate.

Id. at 926 (emphasis added).

The affidavit in this case was far from "bare bones." It included the basis for the investigation—complaints about short-term traffic at Petitioner's residence. It is reasonable to conclude something other than usual coming and going of friends or family was involved, otherwise it would not have generated complaints to a narcotics investigator. The affidavit explained the officers sought to conduct a trash pull as a result of the complaints. It detailed the method of the trash pull conducted and the results. The affidavit indicated several key items were located in Petitioner's trash, including twisted and torn baggies which are indicative of distribution. Additionally, they located a hollowed out and partially smoked cigar verified to contain marijuana.

This was not an affidavit entirely devoid of substance, lacking any indicia of probable cause. It was entirely reasonable for the officers to believe they were acting pursuant to a warrant based on probable cause when they executed the search of Petitioner's residence. As a result, this is not one of the few or unusual cases in which the officers did not act in an "objectively reasonable" manner by executing the search warrant authorized by a magistrate who

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warrant was based on probable cause to the Supreme Court, instead relying solely on a good faith exception.

did not act as a mere rubber stamp. As a result, even if this issue is preserved and not waived by the actions of counsel at trial, and even if a substantial basis for the magistrate's determination of probable cause when viewed through the great deference owed the magistrate's finding does not exist, this is a case in which the officers acted in good faith based on an affidavit that was not bare bones and lacking any indicia of probable case. Application of the exclusionary rule is not warranted and the trial court properly denied Petitioner's motion to suppress the results of the search warrant.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Court of Appeals opinion should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

MICHAEL D. ROSS
Assistant Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General
S.C. Bar Number 15608

BY: _____
William M. Blitch, Jr.

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

ATTORNEYS FOR RESPONDENT

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