STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Charleston County

Roger M. Young, Circuit Court Judge

THE STATE,

PETITIONER,

V.

BRYANT J. KINLOCH,

RESPONDENT

APPELLATE CASE NO.. 2012-212981

BRIEF OF RESPONDENT

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2. Did the Court of Appeals correctly find that the issue of whether the Leon good faith exception applied was not preserved for appellate review when the exception was not argued by the State during the suppression hearing? While the Leon good faith exception was not argued by the State at the suppression hearing, the trial court correctly found that the exception would not apply.

STATEMENT OF THE CASE

In April of 2008, the Charleston County Grand Jury indicted Respondent Kinloch for trafficking in heroin, trafficking in cocaine and possession with intent to distribute heroin within the proximity of a park, indictments #2008-GS-10-3017, 3018, 3019. On January 11, 2010, Respondent appeared before the Honorable Roger M. Young, Sr. and moved to suppress drug evidence found pursuant to the execution of a search warrant signed by the Honorable James B. Gosnell, Jr. On January 12, 2010, after hearing testimony and argument, Judge Young granted the motion to suppress the drug evidence based on the fact that there was not sufficient probable cause for the issuance of the search warrant.

On January 12, 2010, the State filed a notice of intent to appeal. The appeal was perfected and on June 19, 2012, a three judge panel of the Court of Appeals heard argument. The Court of Appeals affirmed the trial judge's suppression of the evidence in a unanimous, unpublished opinion. State v. Kinloch, Op. No. 2012-UP-432 (S.C. Ct.App. filed July 18, 2012). The State filed a petition for rehearing which was denied on August 23, 2012. The State filed a petition for writ of certiorari on October 29, 2012. On December 27, 2012, Respondent filed a return. On March 20, 2014, this Court granted the State's petition for writ of certiorari. On April 30, 2014, the State filed the brief of petitioner. This brief of respondent follows.

STATEMENT OF FACTS

On January 2, 2008, officers with the Charleston Police Department executed a search warrant for 609 Pleasant Grove Lane Apartment A, Charleston, South Carolina 29407, Respondent's residence. During the search of the residence, officers found several bags containing powdery substances. As a result of the search, Respondent was arrested and charged with trafficking in heroin and cocaine, and with possession with intent to distribute heroin within the proximity of a park.

The search warrant was signed by Judge Gosnell on January 2, 2008. The only information provided to the magistrate was contained in the affidavit in support of the search warrant:

> That on January 2, 2008, the Charleston Police Narcotics Unit conducted surveillance at 609 A Pleasant Grove Lane, Charleston, South Carolina 29407 which is located in the city and county of Charleston, South Carolina. Over the past several months the CPD Narcotics unit has received numerous complaints about heroin and cocaine transactions taking place at the above mentioned residence.
>
> On January 2, 2008 at approximately 2:00 P.M. CPD narcotics officers Cpl. C. Costanzo and Cpl. Todd Hurteau were conducting stationary surveillance at 609 apt A, Pleasant Grove Lane. CPD Officers observed two white males meet with a black male wearing a red shirt, red pants and red hat. All parties entered the residence for approximately one minute. The white males exited the residence and walked in the direction of Hwy 17.
>
> On approximately three to four other incidences the black male wearing all red clothing exited 609 A Pleasant Grove Lane and met with unknown parties at the north side of the duplex. Cpl. Hurteau and Cpl. Costanzo observed a quick hand-to-hand transaction between the the black male wearing all red and other unknown parties at the corner of this residence. Cpl. Hurteau and Cpl. Costanzo noticed that the party dressed in all red was counting money after the transactions as he walked back into the residence. During

> each transaction the subject wearing all red clothing was accompanied by a black male wearing a black puffy jacket with fur around the hoody and dark blue jeans. Cpl. Costanzo and Cpl. Hurteau observed this subject walking into and out of 609 A Pleasant Grove Lane, Apt A on several occasions.
>
> On January 2, 2008, at approximately 1700 hours Cpl. Costanzo and Cpl. Hurteau observed a black male wearing a black puffy jacket with fur around the hood and dark pants exited the residence at 609 A Pleasant Grove Lane. Investigators followed the above described subject, who was walking toward the B.P. gas station located at Hwy 17 and Wapoo Road. Inv. Walker observed the above described subject meet with a an unknown black male, who was later identified as Redondo Burns. Inv. Walker observed the unknown subject hand Burns one clear plastic wrapping in exchange for an undertermined amount of U.S. currency. After the transaction was made Cpl. Hurteau observed Burns enter the B.P. gas station. Cpl. Hurteau maintained a constant visual on Burn while he was inside the gas station. A short time later Cpl. Hurteau and Cpl. Costanzo observed Burns exit the B.P. gas Station and walk south bound on Hwy 17.
>
> Patrol officers Jacobson and Deeg approached Burns on foot at which time he discarded a clear plastic baggy containing an off-white powdered substance and a white glassine bag onto the ground between two parked cars. Cpl. Hurteau immediately retrieved the substance that field-tested positive for heroine. After the transaction with burns, Inv Bruder observed the unknown black male walk back to and enters 690 A Pleasant Grove Lane, Charleston, South Carolina 29407.
>
> Based on the above fact there is probable case to believe that heroine and the proceeds of heroine are stored inside 609 A Pleasant Grove Lane, Charleston, South Carolina 29407.

(R. pp. 99-100).

Prior to trial, Respondent moved to suppress the drug evidence, filing a written motion to suppress. (R. p. 104). During the suppression hearing, Sergeant Walker, the affiant on

the search warrant, testified that he presented no additional information to the magistrate other than the information provided in his affidavit. (R. p. 6, lines 15-20).

Important exculpatory information was omitted form the affidavit in support of the search warrant but revealed during the suppression hearing by Corporal Costanzo, one of the officers involved in the investigation. Corporal Costanzo revealed that two different vehicles came to the apartment during the course of their surveillance, a burgundy GMC Tahoe and a white BMW. (R. p. 39, lines 6-10; p. 41, lines 17-22). The people in these vehicles pulled up, entered the apartment and then left. (R. p. 64, lines 4-10). Both vehicles were stopped upon leaving the apartment. Drugs were not found in either of the vehicles. (R. p. 40, lines 9 – p. 41, 42, lines 1-16). The information in regard to the stop of the two vehicles was kept from the magistrate.

Corporal Costanzo also testified that during the course of their surveillance he observed people entering both apartment A and apartment B at 609 Pleasant Grove Lane. (R. p. 47, lines 14 – p. 48, lines 1-16). One of the individuals seen entering **both** apartment A and B was a black male with a puffy jacket and a New York Yankee hat. This is the same individual referenced in the affidavit for the search warrant making an exchange with Redondo Burns near the BP station and Pizza Hut on Highway 17. The information regarding activity at apartment B was kept from the magistrate.

Respondent argued that pursuant to State v. Gentile, 373 S.C. 506, 646 S.E.2d 171 (Ct.App. 2008), the drug evidence found inside the apartment pursuant to the search warrant should be suppressed. (R. pp. 73-80). The judge agreed and granted the motion to suppress. The judge found that the magistrate lacked probable cause to issue the search warrant. The judge found that the affidavit in support of the search warrant did not support a finding of

probable cause to search the apartment at 609A because there was no evidence to link drugs to the inside of the apartment. (R. pp. 92-96).

ARGUMENTS

1. The Court of Appeals applied the proper standard of review and correctly affirmed the trial judge's suppression of drug evidence found in appellant's apartment pursuant to a search warrant when the affidavit in support of the search warrant lacked probable cause to establish that drugs would be found inside the apartment in violation of the Fourth Amendment of the United States Constitution, Art. I, §10 of the South Carolina Constitution and S.C. Code §17-13-140.

The Court of Appeals applied the proper standard of review. In State v. Gentile, 373 S.C. 506, 512, 646 S.E.2d 171, 173 – 174 (S.C. Ct.App. 2007) the South Carolina Court of Appeals wrote, "'In criminal cases, the appellate court sits to review errors of law only' State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). We are bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000). ' A deferential standard of review likewise applies in the context of a Fourth Amendment challenge to a trial court's fact-driven affirmation of probable cause.' State v. Thompson, 363 S.C. 192, 199, 609 S.E.2d 556, 560 (Ct.App.2005)." See also State v. Brockman, 339 S.C. 57, 65-66, 528 S.E.2d 661, 665-666 (2000) (holding that whether a search warrant violated the parameters of the Fourth Amendment depends on a number of antecedent determinations, each of which is inherently fact specific and entails an inquiry into the totality of the circumstances and the appellate court must affirm if there is any evidence to support the ruling).

In affirming the trial judge's granting of Respondent's motion to suppress the Court of Appeals wrote, "We find no clear error in the circuit court's determination that the search warrant was not supported by probable cause. See State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) (stating on review of a circuit court's ruling on a motion to suppress based on the Fourth amendment, '[t]he appellate court will reverse only when there is clear error'); State v. Gentile, 373 S.C. 506, 514-516, 646 S.E.2d 171,

174-76 (Ct.App. 2007) (finding magistrate lacked a substantial basis for concluding probable cause existed, where information presented to magistrate did not adequately connect evidence of drug activity to respondent's residence)." (App. p. 2).

Petitioner's reliance on State v. Spears, 393 S.C. 466, 713, S.E.2d 324 (Ct.App. 2011) in regard to standard of review is misplaced as the Court of Appeals in Spears correctly acknowledged, "'The trial judge's factual findings on whether evidence should be suppressed due to a Fourth Amendment violation are reviewed for clear error.' State v. Baccus, 367 S.C. 41, 48–49, 625 S.E.2d 216, 220 (2006)." 393 S.C. at 482, 713 S.E.2d at 332. The trial judge and the Court of Appeals both correctly found that the magistrate lacked a substantial basis upon which to conclude that probable cause existed. Petitioner can not demonstrate clear error in these findings.

The Court of Appeals correctly affirmed the trial judge's suppression of drugs found pursuant to a search warrant lacking probable cause. The information provided to the magistrate issuing the search warrant did not contain information to establish that drugs would be found inside the apartment officers were asking to search. The magistrate was not provided reliable information that drugs would be found inside the apartment. The magistrate was not provided information that the activity observed at the residence was in fact drug activity. The magistrate lacked a substantial basis upon which to conclude that probable cause existed.

The South Carolina Legislature has imposed stricter requirements than federal law for issuing a search warrant. Both the Fourth Amendment of the United States Constitution and Article I, Section 10 of the South Carolina Constitution mandate an oath or affirmation before a neutral officer of the court before probable cause can be found and a search warrant

issued. Additionally, S.C. §17-13-140 requires that a search warrant "shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record." Oral testimony may also be used in this State to supplement a search warrant affidavit which is facially insufficient to establish probable cause. State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997).

> The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause. Mere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient.

State v. Philpot, 317 S.C. 458, 454 S.E.2d 905, 907 (Ct. App. 1995), citing State v. Smith, 301 S.C. 371, 392 S.E.2d 182 (1990).

A magistrate may issue a search warrant only upon a finding of probable cause. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). "This determination requires the magistrate to make a practical, common-sense decision of whether, given the totality of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying the information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." State v. King, 349 S.C. 142, 150, 561 S.E.2d 640, 644 (Ct.App.2002). "The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause. The magistrate should determine probable cause based on all of the information available to the magistrate at the time the warrant was issued." State v. Dupree, 354 S.C. 676, 684, 583 S.E.2d 437, 441 (Ct.App.2003) (citations omitted).

In terms of a court's review of the magistrate's decision, "[t]he 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). "In reviewing the validity of a warrant, an appellate court may consider only information brought to the magistrate's attention." State v. Thompson, 363 S.C. 192, 200, 609 S.E.2d 556, 560 (Ct.App.2005).

The affidavit in support of the search warrant, which was not supplemented through oral testimony, was not sufficient to provide the magistrate with a substantial basis for which to find probable cause to issue the search warrant for Kinloch's apartment. The judge used the correct totality of the circumstances standard in finding that the affidavit in support of the search warrant failed to provide information that there was a fair probability that drugs would be found inside the apartment. The judge correctly suppressed the drug evidence based on the illegal search warrant.

The first paragraph of the affidavit simply provides that, "Over the past several months the CPD Narcotics unit has received numerous complaints about heroin and cocaine transactions taking place at the above mentioned residence." (R. p. 99-100). The issuing magistrate was not given any information in regard to the reliability of the anonymous tips. Although Corporal Costanzo testified that a citizen told him that Kinloch had two ounces of heroin and an ounce of cocaine at a residence behind Bender's Bar on Highway 17 (R. p. 51, lines 9-14), this information was not provided to the magistrate and should not be considered. State v. Thompson, 363 S.C. 192, 200, 609 S.E.2d 556, 560 (Ct.App.2005).

The second paragraph states that two white males entered and then a minute later exited apartment A. The two white males were not stopped by police. (R. p. 60, lines 20 – p. 61, lines 1-25). As the trial judge found, "There is no evidence of any sort of transaction whatsoever of that, other than two white guys went into the house and left a minute later. For all I know they could have been a couple of people, you know, couple Mormon guys wanting to come into the house and they got thrown out." (R. p. 93, lines 1-6).

The third paragraph states that the officers conducting surveillance observed hand to hand transactions in the yard with a man dressed in red and other unknown parties. The officers observed the man dressed in red counting money and walking in and out of apartment A. None of the individuals observed making hand to hand transactions were stopped by the police. (R. p. 59, lines 11-19). While the activity in and around the apartment may have been suspicious, without further investigation, it is insufficient to establish that narcotic activity was taking place or establish a fair probability that narcotics would be found inside the apartment. See State v. Gentile, 373 S.C. 506, 646 S.E.2d 171 (Ct.App. 2008).

The third paragraph of the affidavit also states that during the hand to hand transactions the man in red was accompanied by a black man in a black puffy jacket. Officers also observed the man in the black puffy jacket walking in and out of apartment A. The fourth paragraph of the affidavit then states that officers observed the man in the black puffy jacket walk toward the BP station on Highway 17 and meet with an individual later identified as Redondo Burns. Officers observed the man in the puffy jacket hand Burns something in clear plastic wrapping in exchange for money. The fifth

paragraph states that when officers approached Burns he threw down a plastic baggy containing an off white powder which field tested positive for heroin. According to the affidavit, the man in the puffy black jacket returned to apartment A. The man in the black puffy jacket was never identified or arrested. (R. p. 48, lines 4-16).

The exchange between Burns and the man in the black puffy jacket is not sufficient to support a finding of probable cause for the search of Respondent's apartment A. In State v. Gentile, 373 S.C. 506, 646 S.E.2d 171 (Ct.App. 2008), the Court found that an affidavit in support of the search warrant for Gentile's house based on the police discovering marijuana on a visitor after he left Gentile's house was not sufficient to support a finding of probable cause. The present case is one step further removed from Gentile because Burns, the only individual found in possession of drugs prior to the issuance of the search warrant, was never inside the residence at 609 A.

The present case is easily distinguished from State v. Keith, 356 S.C. 219, 588 S.E.2d 145 (Ct. App. 2003), and State v. Scott, 303 S.C. 360, 400 S.E.2d 784 (Ct. App. 1991), because the defendants in both of those cases were found in possession of illegal drugs after leaving their residences but before the issuance of the search warrants for their residences. Here, Burns not Respondent, was found in possession of illegal drugs. There is no evidence that Burns was ever at Respondent's apartment. Respondent was not arrested until after the execution of the search warrant. While the man in the puffy black jacket was seen at the apartment, there is no information that he had drugs stored in the apartment or that he had any other connection to the apartment. It is just as likely that puffy black jacket man stored his inventory in his puffy jacket.

Petitioner argues that the affidavit established a sufficient nexus between the residence at 609A and Respondent's drug dealing to support issuance of the search warrant. The affidavit, however, fails to provide probable cause that Respondent was drug dealing. The anonymous unverified tips combined with the suspicious activity observed at the residence combined with the arrest of Burns simply do not provide probable cause to believe that Respondent was drug dealing.

The present case is distinguished from United States v. Williams, 548 F.3d 311 (4th Cir. 1992). In Williams the Government had sufficient evidence of Williams' drug trafficking to support the "defendant-dwelling nexus" and apply the Leon good faith exception. The State has not presented sufficient evidence in the present case to establish that Respondent was involved with drugs. As discussed in issue two, the Leon good faith exception does not apply.

Under the totality of the circumstances, the judge correctly suppressed drug evidence found in appellant's apartment pursuant to a search warrant when the affidavit in support of the search warrant lacked probable cause to establish that drugs would be found inside the apartment in violation of the Fourth Amendment of the United States Constitution, Art. I, §10 of the South Carolina Constitution and S.C. Code §17-13-140.

Additionally, exculpatory information was omitted from the information given to the magistrate issuing the search warrant. Corporal Costanzo testified that two different vehicles came to the apartment during the course of their surveillance, a burgundy GMC Tahoe and a white BMW. (R. p. 39, lines 6-10; p. 41, lines 17-22). The corporal testified that the people in these vehicles pulled up, entered the apartment and then left. (R. p. 64; lines 4-10). Both vehicles were stopped upon leaving the apartment. Drugs were not found

in either of the vehicles. (R. p. 40, lines 9 – p. 41, 42, lines 1-16). The information in regard to the stop of the two vehicles was not included in the affidavit presented to the magistrate.

Corporal Costanzo also testified that during the course of their surveillance he observed people entering both apartment A and apartment B at 609 Pleasant Grove Lane. (R. p. 47, lines 14 – p. 48, lines 1-16). One of the individuals seen entering both apartment A and apartment B was a black male with a puffy jacket and a New York Yankee hat. This is the same individual referenced in the affidavit for the search warrant making an exchange with Redondo Burns near the BP station and Pizza Hut on Highway 17. The information regarding activity at apartment B was omitted from the search warrant affidavit.

In Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674 (1978), the Court outlines the following two part test for challenging a warrant:

> "(1) to mandate an evidentiary hearing, the challengers' attacks must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof; and
> (2) If these requirements are met, and if, when material that is subject of the alleged falsity or recklessness disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause no hearing is required."

State v. Missouri, 337 S.C. 548, 554, 534 S.E.2d 394, 397 (1999). The Franks test also applies to acts of omission in which exculpatory material is left out of the affidavit. *See* United States v. Colkley, 299 F.2d 297 (4th Cir 1990); United States v. Vasquez, 605 F.2d 1269 (2nd Cir 1979), State v. Missouri, 337 S.C. 548, 524 S.E.2d 394 (1999). When exculpatory information is kept from the magistrate the issue becomes whether there would still be a basis for probable cause if the information were included. Id. at 337.

Thus, there will be a Franks violation if the affidavit, including the omitted data, does not contain sufficient information to establish probable cause. See id. When a Franks violation occurs evidence obtained from the warrant should be excluded. On its face the affidavit lacked probable cause. When the omitted exculpatory information is considered, the correctness of the trial judge's determination becomes even more clear.

> 2. The Court of Appeals correctly found that the issue of whether the Leon good faith exception applied was not preserved for appellate review when the exception was not argued by the State during the suppression hearing. While the Leon good faith exception was not argued by the State at the suppression hearing, the trial court correctly found that the exception would not apply.

The Leon good faith exception was not argued by the State during the suppression hearing and is therefore not preserved for appellate review. The judge commented at the end of his ruling, "So I find it's proper to suppress the search warrant, and that motion is granted. I don't think the good faith exception applies because it's clear that doesn't apply when the basis for dismissing the search warrant is lack of probable cause, and in this case I'm saying there was not sufficient probable cause for the issuance of a search warrant. So the motion to suppress is granted." (Tr. p. 96, lines 1-8). The State, however, did not argue or present any evidence of the good faith exception as a means to validate the search warrant.

The Court of Appeals correctly found that any argument that the evidence obtained pursuant to the search warrant lacking probable cause should not be suppressed based on a good faith exception was not preserved. The Court of Appeals wrote, "The State's arguments regarding good-faith exceptions are not preserved. See *State v. Freburger,* 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (finding argument asserted on

appeal unpreserved because it was not raised to and ruled upon by lower court)." (App. p. 2).

If the good faith exception issue is preserved for review, the judge correctly found that it did not apply. In United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405 (1984), the Court held that evidence obtained by officers reasonably relying on a warrant issued by a detached and neutral magistrate is admissible with four exceptions:

> (1) the magistrate 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 magistrate acted as a rubber stamp for the officers and so "wholly abandoned' his detached and neutral role;
>
> (3) an affidavit is so lacking in indicia of probable cause as to render official belief in its existence unreasonable;
>
> (4) a warrant is so facially deficient in failing to particularize the place to be searched or the things to be seized that the executing officers cannot reasonable presume it to be valid.

The Leon good faith exception does not apply in the present case. First, as discussed in issue one, exculpatory information was omitted from the information given to the magistrate issuing the search warrant. Corporal Costanzo testified that two different vehicles came to the apartment during the course of their surveillance, a burgundy GMC Tahoe and a white BMW. (R. p. 39, lines 6-10; p. 41, lines 17-22). The corporal testified that the people in these vehicles pulled up, entered the apartment and then left. (R. p. 64, lines 4-10). Both vehicles were stopped upon leaving the apartment. Drugs were not found in either of the vehicles. (R. p. 40, lines 9 – p. 41, 42, lines 1-16). The information in regard to the stop of the two vehicles was not included in the affidavit presented to the magistrate.

Corporal Costanzo also testified that during the course of their surveillance he observed people entering both apartment A and apartment B at 609 Pleasant Grove Lane. (R. p. 47, lines 14 – p. 48, lines 1-16). One of the individuals seen entering both apartment A and apartment B was a black male with a puffy jacket and a New York Yankee hat. This is the same individual referenced in the affidavit for the search warrant making an exchange with Redondo Burns near the BP station and Pizza Hut on Highway 17. The information regarding activity at apartment B was omitted from the search warrant affidavit.

The Leon good faith exception does not apply when officers fail to provide all potentially adverse information to the issuing judge. See United States v. Reilly, 76 F.3d 1271, 1280 (2d Cir., 1996); United States v. Vigrant, 176 F.3d 565, 573 (1st Cir. 1999). The officer's omission of information in the affidavit casting doubt on the probable cause determination, as discussed in issue one, misled the magistrate. By omitting the information, the magistrate unknowingly became a rubber stamp for the police.

Additionally, the affidavit in the present case is so lacking in indicia of probable cause to believe that drugs would be found inside apartment A as to render official belief in its existence unreasonable. In United States v. Bynum, 293 F.3d 192, 195 (4th Cir. 2002) the Fourth Circuit Court of Appeals wrote:

> With the correct standard in mind, we believe it is clear that even if Agent Peterson's affidavit does not provide a substantial basis for determining the existence of probable cause, *see Illinois v. Gates,* 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (requiring a magistrate judge assessing probable cause for the issuance of a search warrant to determine "whether given all the circumstances set forth in the affidavit[,] ... 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" (citations omitted)), it is not "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. 3405 (citation omitted).

In the officer's affidavit in support of the search warrant in Bynum the officer provided the following information: (1) recited that Bynum resided at the apartment that the officer sought to search and had used the apartment in drug trafficking crimes, (2) Bynum's birth date and social security number, (3) identified Bynum as a convicted felon with a criminal record in Virginia, (4) explained that a February 10 search of the same apartment had yielded 196 grams of heroin, drug paraphernalia and $10,750 in cash, and (5) related that a confidential informant who had "proven reliable" and whose information had been verified, provided information and intelligence in this investigation including identification of Bynum as a large quantity heroin dealer and observation that within the past 72 hours Bynum had possessed "a large quantity of heroin" in the apartment. The district court in Bynum found that the good faith exception of Leon should not apply because the affidavit contained only conclusory averments of three month old information based on the bare bones statement of an informant whose provenance was not in an affidavit which contained no underlying facts about the basis for the informant's information. The Fourth Circuit disagreed finding the good faith exception applied because the affidavit was not so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.

The affidavit in the present case is in stark contrast to the affidavit in Bynum. The affidavit in the present case is far more similar to the affidavit in United States v. Wilhelm, 80 F.3d 116 (4th Cir.1996). In Bynum the Court, discussing Wilhelm, wrote, "We held that the Leon good faith exception did not apply because the officer "could not reasonably rely on an unknown, unavailable informant without significant

corroboration," *id.* at 123, and the magistrate thus acted only as a "rubber stamp" in approving a "bare bones" affidavit. *Id.* at 121." United States v. Bynum, 293 F.3d at 197. Here the officer could not reasonably rely on anonymous unverified complaints about activity at the apartment without significant corroboration. The affidavit in the present case failed to provide any corroboration. While the activity in and around the apartment may have been suspicious, without further investigation, it is insufficient to establish that narcotic activity was taking place or establish a fair probability that narcotics would be found inside the apartment. See State v. Gentile, 373 S.C. 506, 646 S.E.2d 171 (Ct.App. 2008). The affidavit in the present case is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. The good faith exception of Leon is inapplicable to the present case.

Petitioner argues that if the trial judge's determination that the search warrant lacked probable cause was based on Article I, section 10 of the South Carolina Constitution, a good faith exception to the South Carolina Constitution would apply. (Brief of Petitioner p. 21). In State v. Forrester, 343 S.C. 637, 644, 541 S.E.2d 837, 840-841 (2001) the South Carolina Supreme Court wrote:

> In addition to language which mirrors the Fourth Amendment, S.C. Const. art. 1 § 10 contains an express protection of the right to privacy:
>
> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures *and unreasonable invasions of privacy* shall not be violated, ...(emphasis added).
>
> Initially, even in the absence of a specific right to privacy provision, this Court could interpret our state constitution as providing more protection than the federal counterpart. However, by articulating a specific prohibition against "unreasonable invasions of privacy," the people of South Carolina have indicated that searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution resulting in the exclusion of the discovered evidence.

While the Leon good faith exception does not apply in the present case, a good faith exception that is applicable under Leon may not be applicable under South Carolina's heightened expectation of privacy.

In a footnote in State v. Herring, 387 S.C. 201, 215, 692 S.E.2d 490, 497 n. 6 (2009), this Court wrote:

> In Covert,[1] we left open the question of whether a good faith exception applies when 'the officers reasonably believe the warrant is valid when the search is made, but is subsequently determined to be invalid.' Given our recognition of an exception for officers' good faith attempt to comply with the affidavit requirement, we find no reason not to extend such a good faith exception to a warrant reasonably believed to be valid, but later determined invalid. Accordingly, even if we were to determine the affidavit was improper, we would find the SLED agents acted in good faith and reasonably believed the warrant valid, such that the search should be upheld. (internal citation omitted).

The present case is easily distinguished from Herring where the challenges made to the search warrant involved an incorrect officer name appearing on the affidavit and the procedure of swearing the officer over the phone. There was no challenge to the actual probable cause for the search warrant as in the present case. The affidavit in the present case did not provide the magistrate with a substantial basis for determining probable cause. The affidavit is so lacking in indicia of probable cause to believe that drugs would be found inside apartment A as to render official belief in its existence unreasonable. For the same reasons the good faith exception of Leon is not applicable in

[1] State v. Covert, 382 S.C. 205, 675 S.E.2d 740 (2009).

the present case, the analogous good faith exception as discussed in Herring is inapplicable.

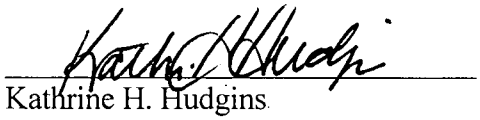
In a footnote in State v. Thompson, 363 S.C. 192, 205 609 S.E.2d 556, 563 n. 3 (Ct.App. 2005), the South Carolina Court of Appeals wrote, "This good faith exception, however, may not be employed to validate a warrant that is based on an affidavit that 'does not provide the magistrate with a substantial basis for determining the existence of probable cause.' State v. Johnson, 302 S.C. 243, 248, 395 S.E.2d 167, 170 (1990) (quoting Leon, 468 U.S. at 915, 104 S.Ct. 3405). The affidavit in the present case did not provide the magistrate with a substantial basis for determining the existence of probable cause.

The good faith exception does not apply because the officer failed to provide all potentially adverse information to the issuing judge. Additionally the good faith exception does not apply because the officer could not reasonably rely on anonymous unverified tips about drug activity at the apartment and had no significant corroboration of the tips. The affidavit failed to provide a nexus between drug dealing and Respondent's apartment because the affidavit failed to establish probable cause to believe that Respondent was involved with drugs. The magistrate acted as a rubber stamp in approving the bare bones affidavit. The affidavit in the present case is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. The good faith exception does not apply.

CONCLUSION

Based on the above arguments, the finding of the trial judge and the Court of Appeals should be affirmed.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 30th day of May, 2014.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Roger M. Young, Sr., Circuit Court Judge

THE STATE,

PETITIONER,

V.

BRYANT J. KINLOCH,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Brief of Respondent in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and upon Bryant J. Kinloch at 2 Hampden Square, Charleston, SC 29403, this 30th day of May, 2014.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR RESPONDENT.

SUBSCRIBED AND SWORN TO before me
this 30th day of May, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021 .