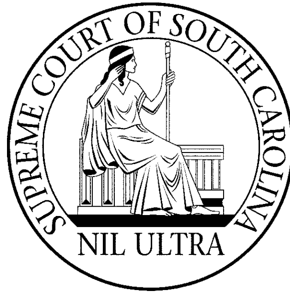

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 25
June 20, 2018
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

James Clyde Dill Jr., Petitioner.

Appellate Case No. 2016-000654

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Laurens County
Eugene C. Griffith Jr., Circuit Court Judge

Opinion No. 27816
Heard December 13, 2017 – Filed June 20, 2018

REVERSED

Appellate Defender Taylor Davis Gilliam, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Senior Assistant Attorney General David A. Spencer, both of Columbia; and Solicitor David Matthew Stumbo, of Greenwood, all for Respondent.

JUSTICE JAMES: James Clyde Dill Jr. was convicted of manufacturing methamphetamine, and the trial court sentenced him to a prison term of ten years. Dill appealed his conviction, and the court of appeals affirmed. *State v. Dill*, Op.

No. 2016-UP-010 (S.C. Ct. App. filed Jan. 13, 2016). This Court granted Dill's petition for a writ of certiorari. We reverse Dill's conviction.

FACTUAL AND PROCEDURAL HISTORY

Laurens County Sheriff's Sergeant Justin Moody requested a local magistrate to issue a search warrant for Dill's residence. In pertinent part, Sergeant Moody's affidavit stated:

> Laurens County Sheriff's Office has received information in the last 72 hours that at the above listed location an active methamphetamine lab is in operation. A confidential informant working in an undercover capacity with the Laurens County Sheriff's Office was at this location and did see numerous items that are used in the manufacturing of methamphetamine.

The affidavit also included the following items as the property sought to be recovered from the residence:

> Any and all items of evidentiary value to include but not limited to ephedrine based medications, lithium strips and any and all parts of lithium batteries, bottles, tubing, hydrogen peroxide, salt, cold packs and contents of such, toluene, liquid drain cleaner, and any currency, firearms, surveillance equipment electronic and otherwise, and any and all other items that could be used in the illegal manufacturing, distribution, or cultivation of illegal narcotics.

Sergeant Moody testified at the pretrial suppression hearing before the trial court that he supplemented his affidavit with oral testimony to the magistrate, specifically that the individual who provided information to him was reliable and had been used in two prior cases in which arrests had been made. The magistrate issued the search warrant.

Laurens County Sheriff's deputies searched Dill's residence. Including Dill, five or six individuals were inside the residence at the time of the search. Neither an active methamphetamine lab nor methamphetamine was discovered in Dill's residence. Law enforcement seized five one-pound containers of salt (some full and some partially empty), two bottles of Coleman brand camping fuel, a sixteen-ounce

bottle of hydrogen peroxide, a bottle of unknown fluid, and a roll of aluminum foil.[1] Law enforcement did not discover any ephedrine-based medications (or empty blister packs of ephedrine-based medications), lithium strips or batteries, drain cleaners, cold packs, sulfuric acid, or toluene, all of which are commonly used in the manufacture of methamphetamine. Law enforcement located an empty plastic bottle near the back door of the residence. As noted below, a State's witness characterized the empty bottle as a hydrochloric acid (HCL) generator. At the conclusion of the search, law enforcement placed the seized items in buckets, took four photographs, and immediately destroyed the items without testing for methamphetamine or fingerprints. The items were destroyed without being tested because methamphetamine is highly volatile and may present a danger if placed in storage or tested for methamphetamine. Dill was arrested and indicted for manufacturing methamphetamine.

Dill moved pretrial to suppress the evidence found during the execution of the search warrant for lack of probable cause or, in the alternative, for the trial court to require the State to reveal the identity of the confidential informant. Dill questioned the sufficiency of the search warrant affidavit and the legality of the search warrant itself. He claimed there was a facial inconsistency in the search warrant affidavit, which first stated there was an "active methamphetamine lab" at the residence but then concluded with a more ambiguous statement that there were only "numerous items" present on the premises that could be used in the manufacture of methamphetamine. Dill noted, "As far as the position that I have in arguing that the warrant should not have been issued based upon the veracity of information provided by the affiant, I am hampered to the point of almost being unable to make an argument . . . ." Dill explained:

> The [m]agistrate whose job is to issue these warrants needs to be provided certain information. If the standard has reached the point where we reached a level of information provided by the statement saying, "Hi, I have a badge, somebody, and I'm not going to tell you who told me something and I'm not going to tell you what but take my

[1] Law enforcement also discovered a "fairly large number" of hypodermic needles. The trial court concluded the needles were drug paraphernalia and thus irrelevant to the manufacturing charge; therefore, the trial court excluded the term "paraphernalia" from its jury charge on the law regarding the manufacture of methamphetamine. Dill did not request the trial court to instruct the jury to disregard the presence of the hypodermic needles.

> word for it, this stuff is there." If that is the standard then we really don't need the Magistrates to sign off on that, if that is all it takes.

Dill acknowledged the importance of protecting the identity of confidential informants but argued it was unnecessary in this situation since it had been over a year since the incident occurred.

In response to Dill's argument that the State should be required to divulge the informant's identity, the State argued to the trial court that the person who provided law enforcement the information was not a "confidential informant" working undercover for the Sheriff's Office, but was a "mere tipster" whose identity was not required to be revealed.[2] The State noted, "[A]lthough the affidavit says this is a confidential informant working with the Laurens County Sheriff's Office, we are not disputing that they, that this person worked with the Sheriff's Office. But . . . they weren't working with the Sheriff's Office with regards to this actual incident." The trial court questioned this characterization:

> Isn't that kind of self-serving? You put an undercover informant and say, I want you to try to set up Detective Revis over here. And then every case he makes is, he was just working while these other half of a dozen would get a special privilege because he was just working on that one case. The other twelve was not. That is not exactly why we hired him. But we made the other twelve cases and he just accidentally stumbled on those. I mean, isn't that kind of self-serving. . . . You can't create a situation and use it as a shield.

Sergeant Moody testified at the pretrial suppression hearing that he received information "from an individual of a *possible* manufacturing of methamphetamine at [Dill's] residence." (emphasis added). In his warrant affidavit, Sergeant Moody did not attribute this information to the informant who told him he saw numerous items at the residence that are used in the manufacture of methamphetamine. Sergeant Moody testified he supplemented his affidavit with oral testimony to the magistrate that the individual who provided information to him was reliable and had

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[2] *See State v. Humphries*, 354 S.C. 87, 90, 579 S.E.2d 613, 615 (2003) (providing "an informant's identity need not be disclosed where he possesses only a peripheral knowledge of the crime or is a mere 'tipster' who supplies a lead to law enforcement").

been used in two other cases where arrests had been made. Sergeant Moody did not supplement his affidavit with any other oral testimony to the magistrate.

Dill contended there was no way for him to question or defend against the accusation without knowing the identity of the confidential informant. Again characterizing the informant as a mere tipster, the State responded, "[T]he fact that a confidential informant, the term being used in the search warrant is irrelevant because it is not being used as a term of art in law that this was an active participant. But rather this was just someone supplying information."

Dill argued that Sergeant Moody characterized the informant in his affidavit as a "confidential informant working in an undercover capacity" in order to enhance the informant's standing and credibility before the magistrate. He argued a sergeant in the narcotics division would surely know the legal distinction between a mere tipster and a confidential informant working undercover for law enforcement. Dill questioned whether the warrant would have been issued if the affidavit and supporting oral testimony had conceded that the person who provided the tip to law enforcement was a mere tipster, as opposed to a confidential informant working undercover. The trial court ruled the information was provided to Sergeant Moody by a "mere tipster" whose identity need not be revealed and denied Dill's motion to suppress the evidence seized.

Sergeant Moody did not testify before the jury. The State's primary trial witness was Lieutenant Jimmy Sharpton, a "meth tech" for the Sheriff's Office. He explained his duties included identifying methamphetamine ingredients and paraphernalia, disassembling active labs, and preparing seized items for disposal. Lieutenant Sharpton testified he received specialized training and certification regarding the recognition, investigation, and disposal of methamphetamine labs. The trial court qualified him as an expert in the field of "methamphetamine lab identification and cleanup."

Lieutenant Sharpton testified he assisted in executing the search warrant and seizing the materials found at Dill's residence. He confirmed law enforcement seized the aforementioned table salt, Coleman lantern fuel, bottle of hydrogen peroxide, and roll of aluminum foil. Lieutenant Sharpton explained the role of each of these items in the manufacture of methamphetamine.

Lieutenant Sharpton also testified he discovered what he considered to be an HCL generator outside the back door of the residence. He explained an HCL generator is a tool used during the last step of making methamphetamine and is commonly constructed using a plastic bottle with a hole cut for a tube to vent the

HCL gas. The record includes a photograph of what Lieutenant Sharpton described as "what is left of the generator," specifically an empty plastic bottle with no cap and what Lieutenant Sharpton testified is a tube running out the side or top of the bottle. When asked to explain the significance of the presence of the seized items and an HCL generator, Lieutenant Sharpton replied, "[S]omeone had been manufacturing meth at that location."

Lieutenant Sharpton testified he placed the seized items in five-gallon buckets, in which the items were transported from Dill's residence. He highlighted the dangers present in methamphetamine labs and the disposal process and testified all the items seized from Dill's residence were destroyed for safety reasons. He explained these items were not tested for methamphetamine residue and were not fingerprinted due to the hazardous nature of methamphetamine. Lieutenant Sharpton testified that the fact that every ingredient used to make methamphetamine was not present at the residence did not mean methamphetamine had not been made earlier on the property. He noted many experienced methamphetamine "cooks" rapidly dispose of certain items.

At the conclusion of the State's case, the trial court denied Dill's motion for a directed verdict. Dill did not present any evidence. The jury convicted Dill of manufacturing methamphetamine, and the trial court sentenced him to a prison term of ten years. Dill appealed, and the court of appeals affirmed in an unpublished opinion. *State v. Dill*, Op. No. 2016-UP-010 (S.C. Ct. App. filed Jan. 13, 2016). This Court granted Dill's petition for a writ of certiorari. Dill argues the court of appeals erred in affirming the trial court's (1) conclusion the magistrate properly determined probable cause existed to issue a search warrant; (2) refusal to find the search warrant invalid because the magistrate was misled by false information; (3) refusal to require the State to reveal the identity of a confidential informant; and (4) denial of his motion for directed verdict. Our analysis of the first issue is dispositive of this appeal.

DISCUSSION

Search Warrant: Probable Cause

Dill argues the court of appeals erred in affirming the trial court's refusal to suppress evidence found during the execution of the search warrant. He contends the search warrant affidavit and supplemental oral testimony were insufficient for the magistrate to establish a substantial basis for probable cause. We agree.

"The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. Evidence seized in violation of the Fourth Amendment must be excluded from trial." *State v. Khingratsaiphon*, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002). A search or seizure is reasonable under the Fourth Amendment when it is authorized by a warrant that is supported by probable cause. *State v. Kinloch*, 410 S.C. 612, 616, 767 S.E.2d 153, 155 (2014).

In South Carolina, search warrants shall be issued "only upon affidavit sworn to before the magistrate . . . establishing the grounds for the warrant." S.C. Code Ann. § 17-13-140 (2014). Probable cause determinations are evaluated under a totality-of-the-circumstances test in which:

> 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). "[A] warrant based solely on information provided by a confidential informant must contain information supporting the credibility of the informant and the basis of his knowledge. However, independent verification by law enforcement officers cures any defect." *State v. 192 Coin-Operated Video Game Machs.*, 338 S.C. 176, 192, 525 S.E.2d 872, 881 (2000). "Mere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient." *State v. Smith*, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990). Sworn oral testimony is permissible to supplement search warrant affidavits which are facially insufficient to establish probable cause. *See State v. Weston*, 329 S.C. 287, 292, 494 S.E.2d 801, 803 (1997).

"A reviewing court should give great deference to a magistrate's determination of probable cause." *Id.* at 290, 494 S.E.2d at 802. "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).

Dill challenges the veracity of the statements included in the search warrant affidavit. However, without questioning the veracity of those statements, we find Sergeant Moody's affidavit and oral testimony before the magistrate were insufficient for the magistrate to conclude there was a fair probability that evidence

of Dill's manufacturing of methamphetamine would be found at his residence. The affidavit, as written, conveys only that the informant informed law enforcement he saw "numerous items that are used in the manufacture of methamphetamine." The affidavit does not relate what those items were, nor does the affidavit relate what was being done with the items. It simply relates there were unnamed items that can be used in the manufacture of methamphetamine. Also, the affidavit, as written, supplies no information supporting the initial mere conclusory assertion that there was "an active methamphetamine lab . . . in operation." In particular, the affidavit does not relate who gave Moody this crucial information. Sergeant Moody's oral testimony to the magistrate did not provide any information as to the source of the information that an active lab was in operation; therefore, there was nothing presented to the magistrate to support a finding of probable cause that there was an active lab in operation.[3]

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[3] Our review of whether Sergeant Moody's affidavit and oral testimony established probable cause is limited to the information he provided to the magistrate in those two settings. However, we must note that our conclusion that Sergeant Moody's affidavit and oral testimony fell short of establishing probable cause is borne out by his testimony at the pretrial suppression hearing. Sergeant Moody testified he learned "from an individual of a possible manufacturing of methamphetamine at [Dill's] residence." During the suppression hearing, Sergeant Moody related for the first time that this information came from the same informant who gave him the information about the unnamed methamphetamine ingredients being in Dill's residence. This information is of interest for two reasons. First, Sergeant Moody did not relate in either his affidavit or his oral testimony to the magistrate that the information about an active lab came from the same informant who provided the information concerning the presence of items that could be used in the manufacture of methamphetamine. Second, during the pretrial suppression hearing, Sergeant Moody referenced this information—arguably the backbone of the State's case—in terms of an individual telling him of the "possible" manufacturing of methamphetamine at Dill's residence. This uncorroborated information couched in terms of a "possibility" would not have provided the magistrate with "a substantial basis upon which to conclude that probable cause existed." *See Baccus*, 367 S.C. at 50, 625 S.E.2d at 221.

As to the informant's credibility, Sergeant Moody's affidavit noted the confidential informant was working in an undercover capacity with the Laurens County Sheriff's Office. Sergeant Moody's oral testimony before the magistrate that the informant was reliable and had been used twice before further bolstered the informant's credibility. *See Weston*, 329 S.C. at 292, 494 S.E.2d at 803 (providing sworn oral testimony may be used to supplement search warrant affidavits). Arguably, this information would give the magistrate sufficient basis to conclude that information attributed to the informant was likely true. However, that does not end our inquiry. We must look specifically at the information in the affidavit that was attributed to the informant. Applying a common sense reading to the affidavit, the initial conclusory statement that an active methamphetamine lab was present at Dill's residence was not attributed to the informant, and law enforcement did not obtain independent verification of this particular information through surveillance or otherwise. *See Smith*, 301 S.C. at 373, 392 S.E.2d at 183 ("Mere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient."); *Weston*, 329 S.C. at 291, 494 S.E.2d at 803 (providing a search warrant affidavit could not have provided a substantial basis for finding probable cause to search the defendant's car because the affidavit failed to set forth any facts as to why law enforcement believed the defendant committed the crime and the first three sentences of the affidavit contained mere conclusory statements). Sergeant Moody's affidavit and oral testimony supported only a finding by the magistrate that "numerous [but unnamed] items that are used in the manufacturing of methamphetamine" were in Dill's residence. Many ingredients used in the manufacturing of methamphetamine, according to Lieutenant Sharpton, are common household items.

We must give "great deference" to a magistrate's finding of probable cause. *See Weston*, 329 S.C. at 290, 494 S.E.2d at 802. However, given the totality of the circumstances, we find the magistrate lacked a substantial basis for concluding probable cause existed for a search of Dill's residence. *See Baccus*, 367 S.C. at 50, 625 S.E.2d at 221 ("The duty of the reviewing court is to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed."). Under the narrow facts of this case, the search warrant was therefore invalid.

CONCLUSION

Since the search warrant was invalid, the trial court erred in admitting the evidence obtained during the search of Dill's residence. *See Baccus*, 367 S.C. at 52, 625 S.E.2d at 222 (providing the suppression of evidence to be an appropriate remedy when evidence is seized pursuant to an invalid search warrant). This

evidence formed the sole basis for Dill's conviction. We therefore **REVERSE** the court of appeals and **REVERSE** Dill's conviction.[4]

BEATTY, C.J., KITTREDGE, HEARN and FEW, JJ., concur.

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[4] Because this issue is dispositive of the appeal, we decline to address Dill's remaining arguments. *See State v. Allen*, 370 S.C. 88, 102, 634 S.E.2d 653, 660 (2006) (declining to address an appellant's remaining issues when disposition of a prior issue is dispositive of the appeal).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The Forfeited Land Commission of Bamberg County, Plaintiff,

v.

Eartha Dean Moody Beard, et al., Ralph Johnson, et al., of whom Ralph Johnson is answering as Defendant - Third Party Plaintiff,

v.

Bank One, N.A., Conseco Finance Servicing Corp., Equity One, Inc., JPMorgan Chase Bank, National Association, as trustee for the C-Bass Mortgage Loan Asset-Backed Certificates, Series 2005-CB2, and Mark D. Johnson, JOHN DOE AND MARY ROE, fictitious names representing any unknown minors, incompetents, persons in the military, persons imprisoned and persons under any legal disability and RICHARD ROE AND SARAH DOE, fictitious names representing unknown devisees, distributees, or personal representatives of LILLIAN G. BROWN, GERALDINE G. REED, RETHA G. GREGGS, LILLIE D. GRAY, GEORGE DAVIS, JULIA DAVIS, VIVIAN DAVIS, MARGARET DAVIS, LILLIE MAE DAVIS, LECIA RICE, ROY H. SETZLER, DYAN SETZLER, LUCIOUS WRIGHT, JULIA JONES, EDITH K. GILMORE, EDDIE GRIMES, HENRY C. GUESS, WILLIE THOMPSON, BESSIE THOMPSON, ANNIE MAE WHITE, and also all other unknown persons claiming any right, title, estate, or lien upon the real estate which is the subject of this action, Third Party Defendants,

Of Whom Ralph Johnson is the Respondent and Coretta McMillan is the Appellant.

Appellate Case No. 2014-002727

Appeal From Bamberg County
Edgar W. Dickson, Circuit Court Judge

Opinion No. Op. 5570
Heard October 5, 2017 – Filed June 20, 2018

REVERSED AND REMANDED

Michael C. Tanner, of Michael C. Tanner, LLC, of Bamberg; Zipporah O. Sumpter, of Sumpter Law Office, and Thomas Ray Sims, Sr., of Thomas Ray Sims Attorney, both of Orangeburg, for Appellant.

James Martin Harvey, Jr., of Harvey & Kulmala, of Barnwell, for Respondent.

LOCKEMY, C.J.: Coretta McMillan appeals a circuit court order quieting title in favor of Ralph Johnson for a property he purchased at a tax sale. On appeal, she argues the circuit court erred in (1) failing to overturn the tax sale despite concluding the notice of levy was not posted on the property, (2) finding the two-year statute of limitations expired prior to McMillan filing her counterclaim, (3) ruling the Forfeited Land Commission properly assigned its bid to Johnson, and (4) declining to find the tax sale void as a matter of law because it was not held in strict compliance with statutory requirements. We reverse and remand.

Facts and Procedural History

Bessie and Willis[1] Thompson (collectively, the Decedents) died in 2004 and 2005, respectively. At the time of their deaths, the Decedents owned a single-family home in Bamberg County (the Residence). Willis devised the Residence to McMillan and his two other grandchildren; however, the Decedents' estate was not submitted to probate and the Decedents remained the record owners of the property.[2]

Although McMillan paid the 2005 property tax for the Residence, she did not notify Bamberg County of the Decedents' death nor did she provide a substitute address where the tax notices should be mailed. In the spring of 2007, Bamberg County sent a letter to the Residence stating the 2006 property tax remained unpaid. In May 2007, Bamberg County sent a second notice to the Residence via certified mail. According to Bamberg County records, the certified envelope was returned as undelivered with the receipt marked "Deceased" above the Decedents' names. McMillan did not receive the delinquent tax notices, and in the summer of 2007 she rented the Residence to Bernard Hallman.

After the second delinquent tax notice was returned as undelivered, Bamberg County referred the Residence to its Delinquent Tax Office (Tax Office) to post a notice of levy on the property and to include the property in a tax sale. The tax sale took place in November 2007, and pursuant to statute, the Tax Office submitted a minimum bid on behalf of the Forfeited Land Commission (FLC)—a commission within each county which exists to bid on real property otherwise not sold at a tax sale, and which holds title to that property until it can be sold or disposed of on such terms as appear to be in the county's best interest.[3] However, following the tax sale, Johnson contacted the Tax Office with an offer to purchase several dozen of the properties that had not been sold, including the Residence. The Tax Office agreed to assign Johnson the bids it had submitted on behalf of the FLC, thereby allowing Johnson to purchase the Residence and thirty-eight other properties for the minimum bid amount.

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[1] Mr. Thompson is referred to as both Willis and Willie in the record.
[2] McMillan is the only heir still a party to this action.
[3] S.C. Code Ann. § 12-51-55 (Supp. 2017); S.C. Code Ann. §§ 12-59-10 to -150 (2014 & Supp. 2017).

In January 2009, McMillan, apparently unaware the Residence had been sold in 2007, paid a portion of the outstanding property taxes. Bamberg County subsequently sent McMillan a letter acknowledging receipt of her payment and informing her there were still delinquent taxes on the Residence. The letter did not mention the tax sale.

When Johnson acquired a deed for the Residence in February 2009, he learned it was still occupied. Johnson first personally contacted the tenant, Hallman, requesting that he move out of the Residence. In January 2010, after Hallman had still not vacated the Residence, Johnson filed an eviction action against him in magistrate's court.

Hallman subsequently notified McMillan of the eviction action. McMillan responded by contacting Johnson to inform him she had recently paid a portion of the outstanding property taxes and would be challenging the eviction action. However, the magistrate held Johnson's eviction action in abeyance when, in February 2010, the FLC filed a separate action in the circuit court to set aside the tax deeds for the Residence and the thirty-eight other properties Johnson acquired following the tax sale.

In its lawsuit against Johnson, the FLC alleged the Tax Office had inappropriately assigned its bids to Johnson without the FLC's authority and had not conducted the tax sale in compliance with the "rigid statutory structure." Johnson answered, denying the tax sale was improper and asserting he had negotiated the purchase with the Tax Office, who was acting on behalf of the FLC when it assigned Johnson the bids. Johnson further claimed his deeds could not be challenged due to the lapse of the two-year statute of limitations contained in section 12-51-160 of the South Carolina Code (2014). Johnson also filed a cross-claim and third-party complaint seeking to quiet title as to McMillan and the owners of the other properties.

At a November 2013 hearing on the FLC's action, McMillan appeared and informed the court she was an heir of the Decedents. The FLC abandoned its suit, and the circuit court dismissed the FLC's complaint and Johnson's counterclaims against the FLC with prejudice. The circuit court then entered a default judgment in favor of Johnson on his cross-claims to quiet title for all of the properties he acquired by virtue of the tax sale except for the Residence.

On April 8, 2014, McMillan filed an answer and counterclaim to Johnson's quiet title action. In his reply, Johnson maintained McMillan could not contest the validity of the tax sale because the claim was barred by the two-year statute of limitations. The circuit court held a bench trial in September 2014.

At trial, Johnson acknowledged he did not attend the tax sale but contended he had received a valid assignment of the bid for the Residence from the Tax Office, who was acting on behalf of the FLC. Johnson also testified he had paid over $3,000 in property taxes since acquiring the Residence.

Sharon Williams, the Delinquent Tax Collector for the Tax Office, testified as to the county's procedure for collecting delinquent taxes. She explained that after the second tax notice was returned to their office with the envelope marked "Deceased" above the Decedents' names, the next step would have been to post a notice of levy at the Residence. When asked if the Residence was properly posted, she said she believed so because only the copy of the notice of levy was in the county file, not the brightly colored notice that would have been posted on the property. However, she acknowledged she had no personal knowledge regarding whether the Residence was posted because she was not the Delinquent Tax Collector at the time. Williams noted that although the file contained places for witnesses to the posting to sign, no one had acknowledged witnessing the posting of the Residence. She testified the Tax Office's current posting process involved a witness and photographs but was unaware of the previous posting process.

Although Hallman had lived at the Residence since 2007, he testified he did not receive any mail regarding property taxes nor did he ever see a notice of levy posted on the property. Hallman acknowledged receiving a letter from Johnson explaining Johnson had purchased the Residence and wanted Hallman to vacate; Hallman said he subsequently forwarded the letter to McMillan.

McMillan confirmed Hallman gave her the letter from Johnson, but testified Hallman had not forwarded any delinquent tax notices. McMillan also denied seeing a notice of levy posted on the Residence or receiving any notices at her personal address notifying her of the tax sale.

Following the bench trial, the circuit court issued an order quieting title in favor of Johnson. The circuit court found (1) the Tax Office was authorized to assign the bids to Johnson; (2) Bamberg County and the Tax Office had complied with all of the statutory procedures for conducting a tax sale except for posting a notice of levy on the Residence; (3) McMillan waited an excess of four years after learning of Johnson's deed to challenge the tax sale; and (4) Johnson's action to evict Hallman was an affirmative step that triggered the two-year statute of limitations, which ran on January 26, 2012. This appeal followed.

STANDARD OF REVIEW

"An action to remove a cloud on and quiet title to land is one in equity." *Bryan v. Freeman*, 253 S.C. 50, 52, 168 S.E.2d 793, 793 (1969). In actions at equity, tried before a judge alone, we are free to find the facts according to our own view of the preponderance of the evidence. *Townes Assocs. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). "However, this broad scope of review does not require an appellate court to disregard the findings below or ignore the fact that the [circuit court] is in the better position to assess the credibility of the witnesses." *Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001).

LAW/ANALYSIS

I. Challenge to the Tax Sale [4]

McMillan contends that in light of the fact the circuit court found the Tax Office failed to post a notice of levy on the Residence, the circuit court erred by concluding her challenge to the tax sale was barred by the statute of limitations. We agree.

"This [c]ourt has consistently held the enforcing agencies of government to strict compliance with all the legal requirements surrounding tax sales." *Dibble v. Bryant*, 274 S.C. 481, 483, 265 S.E.2d 673, 675 (1980). "[A]ll requirements of the law leading up to tax sales [that] are intended for the protection of the taxpayer against surprise or the sacrifice of his property are to be regarded [as] mandatory and are to be strictly enforced." *Donohue v. Ward*, 298 S.C. 75, 83, 378 S.E.2d

[4] This discussion combines McMillan's first, second, and fourth issues on appeal.

261, 265 (Ct. App. 1989) (citing *Osborne v. Vallentine*, 196 S.C. 90, 94, 12 S.E.2d 856, 858 (1941)). "The rationale behind posting [a tax sale] notice is to notify the defaulting taxpayer that delinquent property taxes are due." *Smith v. Barr*, 375 S.C. 157, 161, 650 S.E.2d 486, 488 (Ct. App. 2007).

Section 12-51-40 of the South Carolina Code (2014) lays out the statutory procedure for the sale of a defaulting taxpayer's property. The delinquent tax collector is required to mail a notice of delinquent property taxes to the defaulting taxpayer. § 12-51-40(a). If the taxes remain unpaid after thirty days, the delinquent tax collector is permitted to take exclusive possession of the property by mailing notice to the defaulting taxpayer by "certified mail, return receipt requested-restricted delivery." § 12-51-40(b). However, if the certified mail notice is returned, the delinquent tax collector must "take exclusive physical possession of the property against which the taxes . . . were assessed by posting a notice at one or more conspicuous places on the premises, . . . reading: 'Seized by person officially charged with the collection of delinquent taxes . . . to be sold for delinquent taxes.'" § 12-51-40(c).

Under section 12-51-160 of the South Carolina Code (2014), "[a]n action for the recovery of land sold pursuant to this chapter or for the recovery of the possession must not be maintained unless brought within two years from the date of sale . . . ." This court has found the purpose of the statute of limitations in section 12-51-160 is "to create a time limit during which one who lost title to property through a tax sale, after proper notice, may attempt to regain title." *Corbin v. Carlin*, 366 S.C. 187, 194, 620 S.E.2d 745, 749 (Ct. App. 2005).

In the instant case, we agree with the circuit court that McMillan proved by a preponderance of the evidence that the Tax Office did not properly post a notice of levy on the Residence prior to the tax sale. Williams, the current Delinquent Tax Collector for Bamberg County, was able to testify about what was in the file for the Residence. She testified the file contained the certified mail envelopes that were sent to the Residence and were returned and marked that the Decedents were deceased. Because the certified letters were returned, the Tax Office was required to post the notice at the Residence. Williams stated she assumed the Residence had been posted in compliance with section 12-51-40(c) because only the copy of the notice of levy was in the file, not the brightly colored notice that would have been posted on the property. However, Williams agreed she did not witness the

Residence being posted and acknowledged the place in the folder where a witness to the posting would sign had not been completed. Furthermore, both Hallman and McMillan testified they never saw a notice of levy posted at the Residence. Accordingly, we find a preponderance of the evidence shows the notice of levy was not posted, and therefore, the tax sale was not conducted in compliance with the statutory requirements.

Next, turning to the question of whether the statute of limitations should apply to bar McMillan's action, we note there are two seemingly divergent lines of cases "regarding if and when the statute of limitations beings to run in situations such as this." *King v. James*, 388 S.C. 16, 26, 694 S.E.2d 35, 40 (Ct. App. 2010).

A number of courts have indicated that when a tax sale is not held in strict compliance with the statute, such a defect is jurisdictional and the statute of limitations may not run at all. *See In re Ryan Inv. Co.*, 335 S.C. 392, 395, 517 S.E.2d 692, 693 (1999) ("Even actual notice is insufficient to uphold a tax sale absent strict compliance with statutory requirements."); *Aldridge v. Rutledge*, 269 S.C. 475, 478, 238 S.E.2d 165, 166 (1977) ("Without strict compliance with the statutory requirements, a tax sale may not be upheld."); *Donohue v. Ward*, 298 S.C. at 83, 378 S.E.2d at 265 ("[F]ailure to give the required notice is a fundamental defect in the tax proceedings which renders the proceedings absolutely void."); *Rives v. Bulsa,* 325 S.C. 287, 293, 478 S.E.2d 878, 881 (Ct. App. 1996) ("Failure to give the required notice is a fundamental defect in the tax proceedings which renders the proceedings absolutely void."); *Smith v. Barr*, 375 S.C. at 164, 650 S.E.2d at 490 ([T]he failure to give the required statutory notice renders the tax sale invalid."); *Reeping v. Jebbco, LLC*, 402 S.C. 195, 202, 740 S.E.2d 504, 507 (Ct. App. 2013) ("[T]he statute of limitations did not preclude the [property owner's] claim . . . as the failure to give proper notice rendered the tax sale void.").

There are also cases in which our courts have suggested that even in the absence of strict compliance, the statute of limitations will begin to run when the purchaser at a tax sale comes into possession. *See Dibble v. Bryant*, 274 S.C. at 487, 265 S.E.2d at 677 ("The statute [of limitations] was intended to bar a defaulting and ousted taxpayer from maintaining an action to defeat the title of the tax sale purchaser and recover the land if brought more than two years from the date the purchaser came into possession."); *Scott v. Boyle*, 271 S.C. 252, 256, 246 S.E.2d

878, 889 (1978) (finding the statute of limitations did not bar an action to set aside a tax deed brought six years after the sale because there was insufficient evidence the purchaser had been in possession of the property in excess of two years); *Glymph v. Smith*, 180 S.C. 382, 384, 185 S.E. 911, 914 (1936) (holding the two-year statute of limitations did not begin to run because the sheriff never took possession of the subject property, and the purchaser was never put into possession following the execution of the tax deed); *Gardner v. Reedy*, 62 S.C. 503, 503, 40 S.E. 947, 947-48 (1902) (finding a taxpayer "could not bring his action until there was a person on the land withholding possession from him").

In *Leysath v. Leysath*, 209 S.C. 342, 349-50, 40 S.E.2d 233, 236-37 (1946), our supreme court addressed the distinction between jurisdictional defects, which render the tax sale void and the statute of limitations inapplicable, and defects it called "mere irregularities," which will render the tax sale void but only if challenged within the statutory timeframe. The court wrote:

> It appears to be the general rule that a short statute of limitation[s] of the kind under consideration does not apply where, by reason of some jurisdictional defect, the tax deed is absolutely void upon its face; and perhaps the majority of the courts hold that the bar of the statute does not apply if there are jurisdictional or fundamental defects in the tax proceedings which render such proceedings absolutely void. But the courts following the majority rule are not in entire accord as to the jurisdictional grounds which render a tax deed absolutely void. In some states defects which in others are deemed jurisdictional are considered mere irregularities.

Id. at 349, 40 S.E.2d at 236. Nonetheless, the *Leysath* court declined to "lay down a general rule defining those defects in tax proceedings which should be considered as mere irregularities, to which the statute under consideration would apply, and those which should be deemed jurisdictional, so as to render the statute inapplicable." *Id.* at 351, 40 S.E.2d at 237. With regard to the defects in the tax sale which the delinquent property owner complained of in that case—(1) the attempted levy was posted not by the tax collector, but by the assistant tax collector; (2) the assistant tax collector did not carry the tax executions with him

when he posted the levy; and (3) the accumulated interest was improperly included in the tax executions—the court held, "[W]e do not think that the[se] can be properly classified as jurisdictional defects within the purview of the rule which we have stated, but rather are among the irregularities which the statute in question was framed to cover and set at rest." *Id.* at 349-50, 40 S.E.2d at 236.

We find that the failure to provide the required statutory notice is the type of jurisdictional defect contemplated in *Leysath* that renders the tax sale void and the statute of limitations inapplicable. *See Rives,* 325 S.C. at 293, 478 S.E.2d at 881 ("Failure to give the required notice is a fundamental defect in the tax proceedings which renders the proceedings absolutely void.") Here, the circuit court held, and we agree, that the notice of levy was not posted on the Residence prior to the tax sale as required by section 12-51-40(c). Consequently, we find the statute of limitations did not run because the tax sale was void from the onset.

Furthermore, assuming the statute of limitations applied in the present case, we do not believe it would prevent McMillan from challenging Johnson's deed. Although Johnson filed an eviction action, Hallman continued to live in the Residence as McMillan's tenant, and the magistrate never issued an eviction order. Because Johnson did not oust McMillan of possession, Johnson could not be said to have "withheld possession" from McMillan so as to trigger the statute of limitations. Accordingly, we reverse the circuit court's holding that the two-year statute of limitations barred McMillan's action to set aside Johnson's tax deed for the Residence.

Because the tax sale is void, we remand this case to the circuit court to determine what amount, if any, Johnson is entitled to receive.

II. Assignment of the FLC's Bid

McMillan also argues the circuit court erred in finding the FLC properly assigned Johnson its bid for the Residence. Because our decision to void the tax sale is dispositive of this issue, we decline to rule on it. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding appellate courts need not address remaining issues when the resolution of a prior issue is dispositive).

CONCLUSION

For the foregoing reasons, the decision of the circuit court is

REVERSED AND REMANDED. [5]

HUFF and SHORT, JJ., concur.

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[5] This case has taken longer than usual in the appellate process. A vacancy occurred on this court in 2016 with the election of former Chief Judge John Few to the South Carolina Supreme Court and Associate Judge James Lockemy to the position of Chief Judge. Former Chief Justice Costa Pleicones appointed Circuit Judge Tanya Gee as an Acting Judge of this court in the summer of that year. Judge Gee served as a law clerk, Chief Staff Attorney, and Clerk of Court for the Court of Appeals. After this appointment she was going to be, temporarily at least, a judge on the court. No one has ever held this number of positions on this court. Judge Gee was filled with pride and happiness, as were her colleagues. She was assigned this case as her first case as a Judge on the court in which she had devoted so much of her life. Fate intervened before she could sit on a panel to hear this case and be recorded as issuing an opinion for the Court of Appeals. A disease that has caused so much sadness to so many ended her life on September 28, 2016. The appellate process had to begin anew after her death. This note records her positions, her work, and her devotion to this court in so many roles, culminating at the time of her death as a member of the South Carolina Court of Appeals.