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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Charleston County
Hon. Roger M. Young, Sr., Circuit Court Judge
Court of Appeals Appellate Case Tracking No. 2012-212981

The State, Petitioner,

v.

Bryant Kinloch, Respondent.

Opinion No. 2012-UP-432 (S.C. Ct. App. filed July 18, 2012)

BRIEF OF PETITIONER

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II. Did the Court of Appeals err in finding not preserved the issue of whether the Leon good faith exception applied? Because it was preserved, this Court should find the circuit court erred in finding the Leon good faith exception does not apply because the circuit court used the wrong standard in determining the exception does not apply.

STATEMENT OF THE CASE

Procedural History

In April 2008, the Charleston County Grand Jury indicted Respondent on charges of trafficking in heroin, trafficking in cocaine, and possession with intent to distribute heroin within proximity of a park. The Honorable Roger M. Young, Sr., held a suppression hearing January 11-12, 2010, to determine whether to suppress evidence seized as a result of the execution of a search warrant the Honorable James B. Gosnell, Jr., signed on January 2, 2008. Judge Young granted the motion to suppress.

On January 12, 2010, the State served and filed a Notice of Appeal pursuant to State v. McKnight, 287 S.C. 167, 168, 337 S.E.2d 208, 209 (1985), because the circuit court's ruling effectively precluded further prosecution of the charges against Respondent. The South Carolina Court of Appeals affirmed the circuit court's suppression of the evidence. See State v. Kinloch, Op. No. 2012-UP-432 (S.C. Ct. App. filed July 18, 2012). The State filed a timely Petition for Rehearing, which was denied by the Court on August 23, 2012. This Petition for Writ of Certiorari follows.

Factual Background

On January 2, 2008, after receiving anonymous tips regarding heroin and cocaine transactions at 609A Pleasant Grove Lane, narcotics officers Investigators Hurteau and Costanzo began surveillance of the property. (T.9-11; 38-39; 55; Court Exhibit 1, Search Warrant Affidavit; R.9-11; 38-39; 55; 98). During the investigation, Investigators Hurteau and Costanzo witnessed several individuals approach Respondent outside the residence under surveillance. The parties engaged in hand-to-hand transactions in which

Respondent exchanged something for money. (T.55-57; 69-70; Ct. Exhibit 1, Affidavit; R.55-57; 69-70; 99). After each of the exchanges, Respondent was seen counting money and entering and exiting the residence, 609A. (T.56-57; Ct. Exhibit 1, Affidavit; R.56-57; 98). Respondent had and used a key to gain access to the residence at 609A. (T.57; 71; Ct. Exhibit 1, Affidavit; R.57; 71; 99).

During surveillance, another individual was seen with Respondent in front of the residence at 609A during the transactions. The other individual was seen entering and exiting the residence at 609A with Respondent. (T.55-57; R.55-57). Later during the surveillance, Investigators Costanzo and Hurteau saw this individual leave the residence at 609A and head to between a Pizza Hut and BP gas station. (T.44-45; R.44-45). Investigator Walker then picked up surveillance of the individual and witnessed him meeting with Redondo Burns, whom Investigator Walker knew by name and sight. (T.24; R.24).

Investigator Walker witnessed a hand-to-had transaction between Burns and the individual who left the residence at 609A just prior to the meeting. (T.19-20; 25; R.19-20; 25). Investigator Walker knew Burns was involved in narcotics based on prior encounters. (T.19; R.19). The individual from the residence at 609A gave Burns something in a clear plastic bag in exchange for cash. (T.21-22; 25; Court Exhibit 1, Affidavit; R.21-22; 25; 99). Burns took the item wrapped in plastic and put it in his pocket. (T.26; R.26). Investigator Walker then followed the individual back to the residence at 609A after other officers took over surveillance of Burns. (T.31-32; R.31-32).

After Investigator Walker radioed them about the transaction, Investigators Costanzo and Hurteau watched Burns near the BP gas station. (T.44; R.44). When he exited the BP patrol officers Jacobson and Deeg approached Burns. Burns then threw a bag containing a powdered substance onto the ground. The bag was retrieved and field tested positive for heroin. (T. 27-28; 44; 67; 71-72; Court Exhibit 1, Affidavit; R.27-28; 44; 67; 71-72; 99).

As a result, Investigator Walker completed an affidavit for a search warrant and obtained a search warrant to search the residence at 609A. (Court Exhibit 1; R.98). The affidavit relayed the results of the surveillance and detailed the hand-to-hand transactions in front of the residence at 609A, the transaction between Burns and the other individual after he left the residence at 609A, and the fact the bag thrown to the ground by Burns tested positive for heroin. (Ct. Exhibit 1, Affidavit; R.99). The search of the residence produced several bags containing powdery substances. (Ct. Exhibit 1, Return; R.102).

As a result of the search of the residence at 609A, Respondent was charged with trafficking in heroin and cocaine, and with possession with intent to distribute heroin in proximity to a park. Prior to trial, Respondent moved to suppress the evidence seized on the grounds the magistrate lacked probable cause to issue the search warrant based on the affidavit provided. (T.5; Motion to Suppress Evidence; R.5; 104).

The circuit court found the magistrate lacked probable cause to issue the search warrant. He concluded based on the affidavit provided for the search warrant, there was insufficient evidence establishing a nexus between the residence at 609A and drugs. (T.92-96; R.92-96). He acknowledged the evidence of transactions taking place in front of the residence, but indicated there is nothing to link drugs to the inside of the residence.

(T.93; R.93). Further, the court discussed the transaction between Burns and the other individual seen exiting the residence at 609A. (T.94-95; R.94-95). He found there was no information in the affidavit directly linking the drugs to the residence at 609A.

ARGUMENT

I. Did the Court of Appeals err in affirming the circuit court's finding probable cause did not exist to support issuance of a search warrant and in granting Respondent's motion to suppress evidence? The search warrant affidavit supported the magistrate's finding of probable cause and the issuance of the search warrant, and both the Court of Appeals and circuit court erred in the standard applied in reviewing the magistrate's determination.

The Court of Appeals erred in the standard of review it applied in this case, and overlooked the error of law committed by the circuit court in reviewing the warrant, as well as the facts which clearly supported probable cause for the search warrant. The Court of Appeals erred in affirming the circuit court's suppression of evidence seized based on the execution of a search warrant obtained on Respondent's property. Based on a totality of the circumstances the affidavit provided to the magistrate demonstrated probable cause for issuance of the search warrant. The circuit court erred in the standard it applied to a review of the affidavit and search warrant requiring near certainty as opposed to a practical, common sense determination of whether a fair probability existed that additional evidence of Respondent's drug activities could be found in his home.

Standard of Review

The Court of Appeals incorrectly applied a standard of review deferential to the circuit court as opposed to one applicable to the consideration of a magistrate's determination of probable cause for a search warrant. The Court of Appeals relied on State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011), for its standard of review indicating: "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.'"

Wright is not the correct standard of review for a determination related to a search warrant. Wright involved whether evidence seized in plain view was seized in violation of the Fourth Amendment and did not involve a factual finding of probable cause by a magistrate court.

The correct standard of review is provided in State v. Spears, 393 S.C. 466, 483, 713 S.E.2d 324, 333 (Ct. App. 2011): "The duty of the appellate court is simply to determine whether the magistrate had a substantial basis for concluding that probable cause existed." (citing State v. Bellamy, 336 S.C. 140, 144, 519 S.E.2d 347, 349 (1999)). Further, as this Court recently explained in State v. Herring, 387 S.C. 201, 212, 692 S.E.2d 490, 495 (2009): "The duty of the reviewing court is to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed." Further: "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, 103 S.Ct. 2317, 76 L.Ed.2d 527 (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 standard does not suggest deference to the circuit court's determination; it is deference to the magistrate's factual determination of whether probable cause exists.

As a result, the proper standard to be applied in this case is whether the magistrate court had a substantial basis to conclude probable cause existed for the issuance of the

search warrant. The State believes a different result is reached when the proper standard of review is considered because the facts and circumstances, especially when deference is given to the magistrate, support the magistrate's determination of probable cause.

Probable Cause

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, ..." U.S. Const. amend. IV. In parallel with the protection of the Fourth Amendment, the South Carolina Constitution also provides a safeguard against unlawful searches and seizures: "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, ..." S.C. Const. art. I. § 10.

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); State v. King, 349 S.C. 142, 150, 561 S.E.2d 640, 644 (Ct. App. 2002). "An appellate court reviewing the decision to issue a search warrant should decide whether the magistrate had a substantial basis for concluding probable cause existed." State v. Dupree, 354 S.C. 676, 683, 583 S.E.2d 437, 441 (Ct. App. 2003); see also, State v. Baccus, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006) ("The duty of the reviewing court is to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed."). The United States Supreme Court adopted a "totality-of-the-circumstances" test for probable cause determinations:

> 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, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983) (emphasis added); see also, State v. Keith, 356 S.C. 219, 223-224, 588 S.E.2d 145, 147 (Ct. App. 2003). Further, the United States Supreme Court discussed the quantum of proof to establish probable cause and explained:

The Supreme Court 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).

A reviewing court should give great deference to a magistrate's determination of probable cause. State v. Rutledge, 373 S.C. 312, 316, 644 S.E.2d 789, 791 (Ct. App. 2007) (citing State v. Davis, 354 S.C. 348, 355, 580 S.E.2d 778, 782 (Ct. App. 2003)). The United States Supreme Court has expressly recognized "affidavits in support of search warrants should not be subject to '[t]echnical requirements of elaborate

specificity,' and that a magistrate has the 'authority . . . to draw such reasonable inferences as he will from the material supplied to him by applicants for a warrant.'" U.S. v. Bynum, 293 F.3d 192, 197 (4th Cir. 2002) (quoting Gates, 462 U.S. at 235, 240). "The term 'probable cause' does not import absolute certainty." Dupree, 354 S.C. at 683, 583 S.E.2d at 441(internal citations omitted). "Rather, in determining whether a search warrant should be issued, magistrates are concerned with probabilities and not certainties." Id.

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.

In determining whether a search warrant is supported by probable cause, the crucial element is not whether the target of the search is suspected of a crime, but whether it is reasonable to believe that the items to be seized will be found in the place to be searched. See Zurcher v. Stanford Daily, 436 U.S. 547, 555-556 (1978). "[T]he nexus

between the place to be searched and the items to be seized may be established by the nature of the item and the normal inferences of where one would likely keep such evidence." U.S. v. Anderson, 851 F.2d 727, 729 (4th Cir. 1988); see also, United States v. Grossman, 400 F.3d 212, 217-18 (4th Cir. 2005); United States v. Servance, 394 F.3d 222, 230 (4th Cir.), *vacated on other grounds*, 544 U.S. 1047, 125 S.Ct. 2308, 161 L.Ed.2d 1086 (2005); United States v. Williams, 974 F.2d 480, 481-82 (4th Cir. 1992).

The Fourth Circuit Court of Appeals has held "a sufficient nexus may be present even if the affidavit contains no factual assertions directly linking the items sought to the defendant's residence." See Anderson, 851 F.2d at 729 (upholding search warrant for residence after defendant attempted to sell firearm even though affidavit did not link firearm to residence); Williams, 974 F.2d at 481-82 (upholding search warrant for motel room of known drug dealer where motel receipt was sole connection to defendant). As the Fourth Circuit has noted:

> [W]e have upheld warrants to search suspects' residences and even temporary abodes on the basis of (1) evidence of the suspects' involvement in drug trafficking combined with (2) the reasonable suspicion (whether explicitly articulated by the applying officer or implicitly arrived at by the magistrate judge) that drug traffickers store drug-related evidence in their homes.

United States v. Williams, 548 F.3d 311, 319 (4th Cir. 2008). The Fifth Circuit also explained the reasoning for allowing a search of a residence when looking for contraband or the fruits or instrumentalities of a crime:

> The justification for allowing a search of a person's residence when that person is suspected of criminal activity is the common-sense realization that one tends to conceal fruits and instrumentalities of a crime in a place to which easy access may be had and in which privacy is nevertheless maintained. In normal situations, few places

> are more convenient than one's residence for use in planning criminal activities and hiding fruits of a crime.

United States v. Green, 634 F.2d 222, 226 (5th Cir. 1981).

The Court of Appeals has also discussed the required evidentiary standard to establish a nexus between drugs and the residence of a person suspected of dealing or possessing drugs. In State v. Keith, the Court articulated the existence of probable cause to search a residence is a common-sense determination based on a totality of the circumstances. Keith, 356 S.C. 219, 225, 588 S.E.2d 145, 148. The Court correctly explained: "In the case of drug dealers, evidence is likely to be found where the dealers live." Id. (citing United States v. Angulo-Lopez, 791 F.2d 1394, 1399 (9th Cir. 1986); State v. Scott, 303 S.C. 360, 362, 400 S.E.2d 784, 786 (Ct. App. 1991)).

The circuit court in this case, as subsequently affirmed by the Court of Appeals, found the State failed to establish a nexus between the drugs and the residence at 609A. (T.92-96; R.92-96). The affidavit, however, provided ample evidence to support the magistrate's determination probable cause existed to believe drugs would be found in the residence at 609A. In making its decision, the circuit court erred as a matter of law utilizing an incorrect standard for determining probable cause by requiring near certainty and not a "fair probability" based on a practical, common-sense determination viewing the totality of the circumstances including reasonable inferences that can be made from the affidavit.

The officers, assigned to the Charleston Police Narcotics Unit, received numerous tips, indicating drug activities took place at the residence. The tips involved transactions in heroin and cocaine. As a result, the officers conducted surveillance at the location and witnessed activities consistent with the drug transactions reported in the complaints.

First, the officers indicated two individuals arrived on scene, entered the residence at 609A with Respondent, and then left approximately one minute later. Next, the officers witnessed three to four quick hand-to-hand transactions between Respondent and other individuals at the corner of the residence at 609A. After each transaction, Respondent counted money as he re-entered the residence. His entering and exiting the residence provides more than sufficient nexus to the residence to indicate the items being transacted, which the magistrate could reasonably infer were likely to be narcotics, and the fruits of those transactions would be found in the residence.

The officers also conducted surveillance on another individual seen with Respondent during the quick hand-to-hand transactions. This individual was seen entering and leaving the residence at 609A with Respondent on several occasions. Later during their surveillance, this individual left the residence, and was followed by investigators as he went straight to a hand-to-hand transaction away from the residence. During the hand-to-hand transaction, one officer witnessed a "clear plastic wrapping" being exchanged for U.S. currency. After the transaction, the individual seen leaving the residence returned directly to the residence with the money.

The individual receiving the "clear plastic wrapping" was followed and ultimately stopped by officers. The individual discarded a clear plastic bag containing an off-white powdered substance. The officers retrieved the baggy and the substance tested positive for heroin, one of the drugs indicated in the tips being distributed from the residence. (Search warrant Affidavit; R. 99-100).

Clearly, the tips coupled with the officers' surveillance supported a "practical, common sense" conclusion Respondent and the other individual with him were involved

in narcotics dealing. Further, the dealings generally took place in front of the residence at 609A, which Respondent and the other individual were seen exiting before each transaction and re-entering with money after each transaction. Finally, all of the observations detailed in the Affidavit for the search warrant took place mere hours before the search warrant was obtained and not days or weeks, so the recent nature of the activities would heighten the likelihood drugs and the fruits of the drug transactions would be discovered in the residence at 609A.

This case is clearly distinguishable from State v. Gentile, 373 S.C. 506, 646 S.E.2d 171 (Ct. App. 2007), relied on by the circuit court and the Court of Appeals. In Gentile, the entire affidavit contained unconfirmed tips and the drug bust of a visitor to the residence. Further, there was no surveillance prior to the drug bust to determine whether the visitor received the drugs prior to coming to the residence or at the residence. Id. at 515-516; 646 S.E.2d at 175-176. In this case, however, several hand-to-hand transactions involving Respondent were witnessed occurring directly in front of the residence, a residence he routinely entered and exited at will. The magistrate could and did clearly infer drug transactions were taking place outside the residence, and because Respondent continuously entered and exited the residence around the time of the transactions, there is a clear nexus established between the drugs and their possible storage inside the residence.

The circuit court in this case utilized an incorrect standard in reviewing the magistrate's determination of probable cause. The court detailed all of the individual facts presented in the affidavit and found none of them standing alone provided a nexus to the residence. (R.92-95). He indicated the transactions could have an innocent basis in

fact as opposed to being evidence of drug dealings. However, as the United States Supreme Court found in Gates, the fact an innocent explanation exists does not foreclose a finding a probable cause. Gates, 462 U.S. at 243 (finding the fact the defendant's trip to Florida could have been a mere vacation did not change the fact it also could have been proof of drug trafficking). Further, the circuit court seemed to require a controlled buy from the residence in order to determine probable cause existed to believe drugs or the proceeds from drug transactions would be located in the residence. (R.95). Finally, he discounted the drug transaction that occurred away from the residence instead of recognizing the fact the individual conducting the transaction left the residence, conducted the transaction, and immediately returned to the residence with the proceeds of what the court found to be an actual drug transaction. (R.95).

Instead, the circuit court was required to consider the totality of the circumstances in determining whether probable cause that contraband or the fruits of the contraband would be present in the residence existed for the magistrate to issue a search warrant. The court required near certainty, especially considering his desire to have a controlled buy from the residence and the complete disregard for the facts surrounding what the circuit court found to be an actual drug transaction by the other individual seen at the residence, as opposed to determining whether the totality of the circumstances created a "fair probability" that evidence would be found in the residence at 609A. The affidavit established the requisite nexus between the residence at 609A and Respondent's drug dealing. As a result, this Court should reverse the Court of Appeals opinion affirming the circuit court's suppression of the evidence and remand the case for the State to present its evidence, including all evidence seized from the residence at 609A, at trial.

II. Did the Court of Appeals err in finding not preserved the issue of whether the Leon good faith exception applied? Because it was preserved, this Court should find the circuit court erred in finding the Leon good faith exception does not apply because the circuit court used the wrong standard in determining the exception does not apply.

The Court of Appeals erred in finding the issue of whether the Leon[1] good faith doctrine applied was not properly preserved for review on appeal and failed to apply the doctrine in this case. The Court of Appeals found the issue unpreserved for review on appeal; however, it is clear the trial court ruled on the issue and foreclosed the State's ability to raise the issue. Even if the affidavit was insufficient to establish probable cause, the circuit court used the wrong standard in determining the Leon exception does not apply. In this case, the good faith exception should apply and the evidence should not have been suppressed. Further, if the trial court's determination was made under the South Carolina Constitution and not the Fourth Amendment, the same good faith exception should apply.

Preservation

The trial court ruled the evidence from the search warrant should be suppressed because of a lack of probable cause, and then immediately ruled the good faith exception did not apply. Specifically, the court found:

> 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.

[1] United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

(R.95-96).

By making the ruling at the same time he ruled the evidence suppressed, the trial court eliminated the need for the State to separately raise the good faith argument because he made his ruling on the issue clear. The key purpose of those requirements is "to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). The circuit court clearly knew the issue of the good faith exception would be raised and addressed it in a very clear ruling without the necessity of the State making specific argument. The purpose of the preservation rules, for the judge to know and have a fair opportunity to address the issues, was clearly met in this case.

Further, the State should not be required to contest the ruling on the issue of the good faith exception in order to have it found preserved. "So long as the judge had an opportunity to rule on an issue, and did so, it was 'not incumbent upon [the losing party] to harass the judge by parading the issue before him again.'" State v. McDaniel, 320 S.C. 33, 37, 462 S.E.2d 882, 884 (Ct. App. 1995). It would have been futile for the State to continue to argue to apply a doctrine the trial court already ruled inapplicable. See Fettler v. Gentner, 396 S.C. 461, 469, 722 S.E.2d 26, 31 (Ct. App. 2012) ("This Court does not require parties to engage in futile actions in order to preserve issues for appellate review.") (quoting Staubes v. City of Folly Beach, 339 S.C. 406, 415, 529 S.E.2d 543, 547 (2000)); see also, State v. Wiles, 383 S.C. 151, 157 n.4, 679 S.E.2d 172, 175 n.4 (2009) (same); State v. Passmore, 363 S.C. 568, 584, 611 S.E.2d 273, 282 (Ct. App. 2005) ("[O]ur courts have developed the doctrine of futility, which recognizes that in

circumstances where it would be futile to raise an objection to the trial [court], failure to raise the objection will be excused."). As a result, this Court should find the issue properly preserved for review on appeal and, if necessary, consider the merits of the good faith exception.

Good Faith

The United States Supreme Court in Leon articulates that a court should not suppress the fruits of a search conducted under the authority of a warrant, even a "subsequently invalidated" warrant, unless "a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." Leon, 468 U.S. at 922 n. 23. The Supreme Court explained the limited circumstances in which an officer could not be found to have acted with "objective reasonableness," thereby excluding application of this good faith exception. The provision applicable in this case holds exclusion proper when:

> (3) "an affidavit [is] so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; or

U.S. v. Bynum, 293 F.3d 192, 195 (4th Cir. 2002) (citing Leon, 468 U.S. at 923) (internal quotation marks omitted).

The circuit court in this case misapplied the bars to application of the Leon good faith exception, just as the trial court did in Bynum. The Bynum Court noted:

> In holding that the third circumstance described by the Leon Court barred application of the good faith exception in this case, the district court misidentified when this circumstance occurs. Thus, the court stated that "[t]he good faith exception . . . does not apply" when the affidavit fails to provide "a substantial basis for determining the existence of probable cause."

Bynum, 293 F.3d at 195.

The circuit court in the instant case made the same incorrect determination: "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." (T.96; R.96). The Fourth Circuit Court of Appeals explained:

> "Substantial basis" provides the measure for determination of whether probable cause exists in the first instance. If a lack of a substantial basis also prevented application of the Leon objective good faith exception, the exception would be devoid of substance. In fact, Leon states that the third circumstance prevents a finding of objective good faith only when an officer's affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." This is a less demanding showing than the "substantial basis" threshold required to prove the existence of probable cause in the first place.

Bynum, 293 F.3d at 195 (internal citations omitted) (emphasis added).

This Court explained the application of the Leon good faith exception: "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) (emphasis added) (quoting Leon, 468 U.S. at 923). "[W]hen an officer acting in objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope, a reviewing court should not order a suppression of the evidence based on a lack of probable cause." Id. at 292, 494 S.E.2d at 803-804.

The Court's opinion in Leon itself belies the circuit court's holding that when a search warrant is not based on probable cause the good faith exception cannot apply. 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.[2] Leon, 468 U.S. at 904-905. The United States Supreme Court found, even though 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.

In this case, even if the affidavit does not provide a substantial basis for determining the existence of probable cause under the proper Gates standard, it is not "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." The affidavit cannot be described as so bare-boned that the magistrate's issuance of the warrant could be viewed as a mere rubber-stamping of the warrant application, nor is the affidavit so lacking in indicia of probable cause that it was unreasonable for the officers or the magistrate to conclude that probable cause existed. Accordingly, the circuit court erred in failing to find the Leon good faith exception

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

applied in this case to admit the evidence even if the affidavit did not support a determination of probable cause.

In addition, even if the circuit court's determination of a lack of probable cause was based on application of the South Carolina Constitution's protection in Article I, section 10, and not the Fourth Amendment to the United States Constitution, a good faith exception to the South Carolina Constitution would allow admission of the evidence in this case. This Court recently acknowledged it would recognize a Leon style "good faith exception" when "the officers reasonably believe the warrant is valid when the search is made, but is subsequently determined to be invalid" under the South Carolina Constitution. State v. Herring, 387 S.C. 201, 215 n.6, 692 S.E.2d 490, 497 n.6 (2009) ("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."); see also, State v. Thompson, 363 S.C. 192, 205 n.3, 609 S.E.2d 556, 563 n.3 (Ct. App. 2005) (acknowledging Leon good faith exception).

The officers in this case reasonably believed the search warrant was valid, and they acted in good faith in executing the search warrant. As a result, the evidence seized as a result of the execution of the search warrant based on Investigator Walker's affidavit, should have been admitted by the circuit court. If this Court finds the affidavit failed to provide the magistrate with probable cause to authorize the search warrant for the residence at 609A, the good faith exception under Leon or Herring should apply to allow admission of the evidence at trial. This Court should reverse the suppression of the

evidence seized from the residence and remand the case to the circuit court for trial including the admission of all evidence seized from the residence.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Court of Appeals opinion should be reversed and the case remanded to the circuit court for trial including the admission of all evidence seized pursuant to the search warrant.

Respectfully submitted,

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April 30, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Charleston County
Hon. Roger M. Young, Sr., Circuit Court Judge
Court of Appeals Appellate Case Tracking No. 2012-212981

The State, Petitioner,

v.

Bryant Kinloch, Respondent.

PROOF OF SERVICE

I, SALLY ELLISON, certify that I have served the within Brief of Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served. This 30th day of April, 2014.

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