OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 14

April 10, 2007
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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DISCUSSION

Respondent was charged with accessory before the fact to the murders of the officers pursuant to S.C. Code Ann. § 16-1-40 (2003), which states:

> A person who aids in the commission of a felony or is an accessory before the fact in the commission of a felony by counseling, hiring, or otherwise procuring the felony to be committed is guilty of a felony and, upon conviction, must be punished in the manner prescribed for the punishment of the principal felon.

The punishment prescribed for the principal felon, *i.e.* for murder, is that a person who is convicted of or pleads guilty to murder must be punished by death, by life imprisonment, or by a mandatory minimum imprisonment term of thirty years. S.C. Code Ann. § 16-3-20(A) (2003). Therefore, a plain reading of §16-3-20(A) and §16-1-40 indicates that one who is charged with accessory before the fact to murder is clearly subject to the punishments of life imprisonment or a mandatory minimum imprisonment term of thirty years because these are the punishments rendered when one is found guilty of murder.[3] However, respondent's eligibility for the death penalty is not so clear. A review of § 16-3-20 is necessary to determine her eligibility.

S.C. Code Ann. § 16-3-20 (2003) states:

> (A) A person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years. If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to subsections (B) and (C), and a

[3] *See, e.g.*, State v. Lewis, 293 S.C. 107, 359 S.E.2d 66 (1987).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Cally R. Forrest, Jr., Respondent,

v.

A.S. Price Mechanical and
O'Steen Adjusting Services, Appellants.

Appeal From Richland County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 4227
Heard March 6, 2007 – Filed April 2, 2007

AFFIRMED

Duke K. McCall, Jr., Rebecca H. Zabel and Zandra Johnson, all of Greenville, for Appellants.

Belinda Ellison, of Lexington and James B. Richardson, of Columbia, for Respondent.

KITTREDGE, J.: In this workers' compensation case, Cally R. Forrest, Jr. sustained injuries from a work-related accident while employed

by Appellant A.S. Price Mechanical.[1] Appellant concedes that Forrest is entitled to lifetime medical and workers' compensation benefits. Appellant assigns error to the Workers' Compensation Commission's computation of Forrest's compensation, the finding that Forrest has reached maximum medical improvement (MMI), and the admission of Forrest's vocational expert's report. We affirm.

I.

With the exception of four semesters spent at Clemson University, Forrest was employed full-time since graduating from high school in 1995, usually working multiple jobs.[2] As a high school student, Forrest worked regularly, including seasonal, full-time work with Monetta Peach Packers. He continued seasonal employment with Monetta Peach Packers until his injury on May 26, 2001. During the remaining months of the year, Forrest worked for several employers, including Appellant A.S. Price Mechanical, Price's Metal Shop, Gibson Construction Company, and J.E. Oswalt & Sons ("Oswalt").

After leaving Clemson in December of 1998, Forrest began working full-time for Larry Price at Price's Metal Shop.[3] Forrest also worked for Appellant on the weekends. In the fall of 1999, Forrest's job with Appellant changed from part-time to full-time, and he began working for Larry Price only part-time. When work with Appellant was slow, Forrest would work for Gibson Construction Company. Eventually, his job with Gibson Construction Company became full-time, and he worked for Appellant only

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[1] The employer's carrier, O'Steen Adjusting Services, is also an appellant.

[2] Forrest testified that although he received a scholarship to attend Clemson, he left after two years because he wanted to work full-time and get married.

[3] Larry Price is Forrest's father-in-law and Allen Price's uncle. Allen Price is the owner of Appellant A.S. Price Mechanical.

part-time. By the start of the 2000 peach season, the specific construction Forrest was working on was completed with Gibson Construction Company, and Forrest once again began his seasonal work with Monetta Peach Packers.

At the end of the peach season in 2000, Forrest began working full-time for Oswalt and part-time with Appellant. When the peach season began in 2001, he left his job at Oswalt and went back to Monetta Peach Packers. Forrest testified he intended to go back to work for Oswalt at the end of the 2001 peach season. He further noted that the owner of Oswalt and one of the owners of Monetta Peach Packers were friends and knew of his intentions.

Forrest was injured during the 2001 peach season when he fell from a roof while working part-time for Appellant. Forrest was twenty-four years old at the time of the accident. The injuries rendered him a paraplegic.

Appellant agreed to pay Forrest workers' compensation at a rate of $490.00. This amount reflected Forrest's combined wages from Appellant and Monetta Peach Packers.

The single commissioner subsequently adjusted the compensation rate to $532.72. This compensation rate represented Forrest's average weekly wage from January 1, 2001 to May 26, 2001, while working for Appellant, Monetta Peach Packers, and Oswalt. The Commission adopted the order of the single commissioner. The circuit court held the Commission's findings were supported by substantial evidence and affirmed.

II.

The Administrative Procedures Act establishes the standard of review for decisions by the South Carolina Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). "In workers' compensation cases, the Full Commission is the ultimate fact finder." Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). This court reviews facts based on the substantial evidence standard. Thompson v. S.C. Steel Erectors, 369 S.C. 606, 612, 632 S.E.2d 874, 877 (Ct. App. 2006). Under the substantial evidence standard, the appellate court

may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact. S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2006). The appellate court may reverse or modify the Commission's decision only if the claimant's substantial rights have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Id. "Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the Full Commission reached." Shealy, 341 S.C. at 455, 535 S.E.2d at 442.

III.

Appellant argues the circuit court erred in affirming the Commission's computation of Forrest's average weekly wage of $532.72. First, Appellant asserts that the doctrines of estoppel and laches preclude Forrest from asserting a different wage than the parties agreed upon. Next, Appellant objects to the inclusion of Oswalt as an employer in the rate computation, and maintains that Forrest was not employed with Oswalt at the time of his injury. Appellant contends any wages earned as a result of his previous employment with Oswalt are irrelevant per section 42-1-40 of the South Carolina Code (Supp. 2006). Finally, Appellant argues there are no exceptional circumstances justifying an adjustment or computation of Forrest's average weekly wage in a method other than that employed originally.

At the outset we hold that the doctrines of estoppel and laches do not preclude the Commission from adjusting the average weekly wage prior to the administrative body's final determination. Appellant's argument stems from the fact that Forrest's initial compensation rate was $300 per week until he requested that this rate be increased to include wages earned from Monetta Peach Packers. Appellant states it agreed to the new calculation ($490 per week) and filed a new Form 15 with the Commission in exchange for Forrest agreeing to withdraw his request for a hearing. Forrest filed a new Form 19 with the Commission confirming his acceptance of the rate, and Appellant maintains it relied to its detriment on Forrest's promise of acceptance.

The circuit court correctly held that neither a Form 15 nor a Form 19 is a final judgment. Section 42-17-10 of the South Carolina Code (1985) allows the Commission to adjust a claimant's compensation rate after the filing of the claim, even when the parties agree to the preliminary compensation rate. Section 42-17-10 provides: "All such agreements [between the claimant and employer as to rate of compensation] shall be subject to adjustment and correction as to the compensable rate if subsequent to filing with the Commission it is determined that such rate does not reflect the correct average weekly wage of the claimant." Moreover, Appellant has failed to establish any detrimental reliance.

On the merits, we disagree with Appellant's contention that the Commission erred in including Oswalt as an employer in Forrest's average weekly wage computation. Section 42-1-40 of the South Carolina Code (Supp. 2006) defines "average weekly wage" for the purposes of computing compensation and sets forth four different methods of calculation.[4] The

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[4] Section 42-1-40 provides as follows:

> "Average weekly wages" means the earnings of the injured employee *in the employment in which he was working at the time of the injury* during the period of fifty-two weeks immediately preceding the date of the injury . . . . "Average weekly wage" must be calculated by taking the total wages paid for the last four quarters immediately preceding the quarter in which the injury occurred . . . divided by fifty-two or by the actual number of weeks for which wages were paid, whichever is less. When the employment, prior to the injury, extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed, as long as results fair and just to both parties will be obtained. Where, by reason of a shortness of time during which the employee has

methods for calculating average weekly wage explained in section 42-1-40 have been interpreted by our courts to implement the "usual" job situation with one employer. See Foreman v. Jackson Minit Markets, Inc. 265 S.C. 164, 167, 217 S.E.2d 214, 215 (1975) (summarizing the four different methods of calculating average weekly wage in the predecessor to section 42-1-40). However, section 42-1-40 further provides that when exceptional reasons make one of the standard approaches unfair to either the employer or employee, "such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury." We note that exceptional circumstances have been found where an employee has multiple employers at the same time. See, e.g. Brunson v. Wal-Mart Stores, Inc., 344 S.C. 107, 111, 542 S.E.2d 732, 734 (Ct. App. 2001) (listing several cases where multiple employment has been sufficient to justify exceptional circumstances).

Appellant argues section 42-1-40 requires that the wage being earned at the time of the injury be the wage that controls the compensation rate. On the date of the injury, Appellant correctly points out that Forrest only worked for Appellant and Monetta Peach Packers.

The Commission found that the following "exceptional circumstances" justified deviation from the usual statutory method of average weekly wage computation: (1) Forrest's young age of twenty-four years at the time of

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> been in the employment of his employer or the casual nature or terms of his employment, it is impracticable to compute the average weekly wages as defined in this section, regard is to be had to the average weekly amount which during the fifty-two weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.

(Emphasis added.)

injury;[5] (2) Forrest's demonstration of the interest, aptitude, ability, work ethic, and work history to be both a welder or maintenance worker and an employee who had worked year-round with multiple employers; (3) the fact that Forrest worked for Monetta Peach Packers during the peach season for several months each year since he was fifteen and had worked for two or three additional employers to complete his annual earnings and year-round employment; (4) the severity of Forrest's injury; and (5) the fact that Appellant knew that Forrest regularly worked full-time and part-time for multiple employers.

The circuit court did not err in affirming the Commission.[6] The Commission acted within its broad discretion in determining that exceptional circumstances existed. In finding exceptional circumstances in other cases, this court has reasoned that "[section 42-1-40] provides an elasticity or flexibility with a view toward always achieving the ultimate objective of reflecting fairly a claimant's probable future earning loss." Sellers v. Pinedale Residential Ctr., 350 S.C. 183, 191, 564 S.E.2d 694, 698 (Ct. App. 2002). "Moreover, it is well established that the objective of wage calculation is to arrive at a fair approximation of the claimant's probable future earning capacity." Elliott v. S.C. Dep't of Transp., 362 S.C. 234, 238, 607 S.E.2d 90, 92 (Ct. App. 2004). "Disability reaches into the future, not the past; loss as a result of the injury must be thought of in terms of its impact on probable future earnings." Id. (citing Bennett v. Gary Smith Builders, 271 S.C. 94, 98-99, 245 S.E.2d 129, 131 (1978)).

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[5] The Commission's order states Forrest was twenty-three at the time of injury. Forrest's testimony and birth date (May 22, 1977) show, however, that Forrest turned twenty-four four days prior to his accident.

[6] We recognize the difficulty with the factor concerning the severity of a claimant's injury and the implication of a sliding scale relationship between injury and determination of average weekly wage. But see Sellers v. Pinedale Residential Ctr., 350 S.C. 183, 191, 564 S.E.2d 694, 699 (Ct. App. 2002) (finding the extent of Sellers' injury was a factor warranting a ruling of exceptional circumstances).

Forrest's work history demonstrates a laudable, strong work ethic. There is no reason to second-guess the Commission's finding that, were it not for his injury and subsequent paraplegia, Forrest would be working full-time and part-time, year-round for several different employers because of his commitment to seasonal employment with Monetta Peach Packers. To arrive at a fair average weekly wage in this case, it was reasonable for the Commission to examine Forrest's actual work history. The Commission looked to the period from January 1, 2001 until the date of Forrest's injury on May 26, 2001—a twenty-one-week period. This time period reflected Forrest's true earnings and thus a fair estimation of his future earning capacity. The rate of compensation determined by the Commission is consonant with the statutory scheme, as well as a fair rate to both Forrest and Appellant.

Appellant attempts to distinguish this case from Sellers v. Pinedale Residential Ctr., 350 S.C. 183, 564 S.E.2d 694 (Ct. App. 2002), a case relied upon by the Commission. This case is not distinguishable in any meaningful way that Appellant urges. In Sellers, a case where exceptional circumstances were found to exist, a sixteen-year-old became a paraplegic as a result of a job injury. 350 S.C. at 186, 564 S.E.2d at 696. The Commission noted the similarity between the two claimants (Sellers and Forrest) in that they were both of a young age and regularly worked three jobs. Appellant contends in Sellers the claimant demonstrated that he planned to become a master electrician, which warranted the Commission increasing his compensation rate to that of an electrician. Unlike the claimant in Sellers, Appellant argues Forrest has made no such showing. Appellant contends Forrest "has voluntarily assumed a pattern of work that is somewhat unconventional[.]" By conceding Forrest's "pattern of work," Appellant in effect lends support to the Commission's reliance on Forrest's true work history. This reliance on Forrest's demonstrated work history supports the Commission's finding of exceptional circumstances. If anything, Forrest presents a stronger case for a finding of exceptional circumstances than Sellers did.

As for the argument that Forrest's testimony about intending to return to work for Oswalt is too speculative to determine future earnings, we find substantial evidence supports the Commission's findings. Forrest's future

work plans, interrupted by his injury, may be reasonably gauged by his work history.

Perhaps Forrest's strong work ethic is "unconventional," but that is no reason to discount his actual work history and earnings. The law mandates the Commission evaluate each case (including a claimant's average weekly wage) in accordance with its particular facts. The quest here is one for truth in light of the particular case, not by resort to an employer's idea of what is "conventional" that can be advanced when an employer is up against a claimant with a solid work ethic and a demonstrable pattern of consistent work and earnings. Substantial evidence supports the Commission's determination of Forrest's average weekly wage.

IV.

As for Appellant's remaining assignments of error, we affirm pursuant to Rule 220(b)(2), SCACR, and the following authorities: Gadson v. Mikasa Corp., 368 S.C. 214, 224, 628 S.E.2d 262, 268 (Ct. App. 2006) (noting that MMI is a factual determination left to the discretion of the Commission); Dodge v. Bruccoli, Clark, Layman, Inc., 334 S.C. 574, 580-81, 514 S.E.2d 593, 596 (Ct. App. 1999) (finding MMI "indicate[s] that a person has reached such a plateau that in the physician's opinion there is no further medical care or treatment which will lessen the degree of impairment[,]" while disability is the "incapacity because of an injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment"); Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005) (noting the qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's sound discretion); Peterson v. Nat'l R.R. Passenger Corp., 365 S.C. 391, 399, 618 S.E.2d 903, 907 (2005) ("Defects in an expert witness' education and experience go to the weight, not the admissibility, of the expert's testimony."); Gadson, 368 S.C. at 229, 628 S.E.2d at 270 (finding that the Commission acted within its discretion in allowing a certified rehabilitation counselor with a master's degree to render an opinion on employability).

V.

For the reasons stated above, the order of the circuit court is

AFFIRMED.

ANDERSON, and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

State of South Carolina, Respondent,

v.

William White Rutledge, Appellant.

Appeal from York County
Jackson V. Gregory, Circuit Court Judge

Opinion No. 4230
Heard March 6, 2007 – Filed April 9, 2007

AFFIRMED

Daniel D. D'Agostino, of York, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliot, Assistant Attorney General Shawn L. Reeves, all of Columbia; and Solicitor Thomas E. Pope, of York, for Respondent.

HEARN, C.J.: William White Rutledge appeals his conviction for simple possession of marijuana, first offense, arguing the trial court erred in ruling that the search warrant was sufficient to establish probable cause, and in determining that the affidavit in support of the warrant was valid. We affirm.

FACTS

This case began when narcotics officers from the Rock Hill Police Department assigned to the York County Multi-Jurisdictional Drug Enforcement Unit received an anonymous tip through Crime Stoppers regarding drug activity at 162 Bailey Avenue in Rock Hill. The anonymous informant stated that Rutledge and two other men were selling marijuana at that address. Based on the tip, the officers checked the electric company records and determined that the electricity at that address was registered in Rutledge's name. The officers also checked Rutledge's criminal history and discovered he had two prior convictions for simple possession of marijuana in 1990 and 1991. The officers conducted surveillance for several days at the address, but did not see any activity at the residence. The officers then conducted a "trash pull" at the address. The trash can was located at the curb in front of 162 Bailey Avenue, but not on the property itself. The officers found marijuana seeds and stalks inside, about midway down the trash can.

Based on this information the officers went to the magistrate seeking a search warrant for the residence. The affidavit supporting the search warrant stated, in pertinent part:

> The affiant, who is a certified Law Enforcement officer assigned to the York County Multi-Jurisdictional Drug Enforcement Unit and has several years law enforcement experience, to include narcotics investigations, states the following facts to support probable cause to search the premises within the curtilage of the property listed within:
>
> The affiant has received information that William Rutledge and two other subjects only known as Steve

> and Richie are selling marijuana from 162 Bailey Ave., Rock Hill, South Carolina.
>
> Within the past 72 hours officers of the YCMDEU conducted a narcotics investigation focused on 162 Bailey Ave., Rock Hill, SC. As a result of this investigation, officers recovered marijuana, marijuana seeds and marijuana stalks from 162 Bailey Ave. A Criminal Records check of William Rutledge found that Rutledge has prior convictions for marijuana. Officers of the YCMDEU confirmed through Rock Hill Utilities that William Rutledge is drawing power at 162 Bailey Ave.
>
> Based on the affiant's training and experience in narcotics investigations, it is believed that drug dealers keep contraband, proceeds of drug sales and records of drug transactions that may include written records, photographs, video tapes, audio tapes, computer hard drives and disks within secure locations of their residences and out buildings within the curtilage of their property. See oral testimony.

In addition, the following oral testimony was provided with the affidavit:

> On July 21, 2005 Officer Cantey of the York County Multi Jurisdictional Drug Enforcement Unit conducted a narcotics investigation focused on the illegal drug activities occurring at 162 Bailey Ave., Rock Hill, County of York, South Carolina. During the investigation the trash from the residence was located in front of the residence. The trash was located off the property and sat out for normal pick-up. This date is the regularly scheduled day for the garbage collection from the residence. During the investigation, marijuana was recovered from the trash of the residence.

Based on this information, the magistrate issued the search warrant.

When they executed the search warrant, officers found marijuana on the kitchen counter. Rutledge acknowledged to the officers that the marijuana was his, and told the officers that there was also a marijuana plant in the house that belonged to him. The officers found the plant inside what the officer described as "a hydroponics marijuana grower" in Rutledge's bedroom.

After a bench trial, Rutledge was convicted of simple possession of marijuana, first offense, and sentenced to thirty days incarceration or to pay a fine of $100 plus court costs and assessments, for a total of $432.50. This appeal followed.

STANDARD OF REVIEW

An appellate court reviewing the decision to issue a search warrant should decide whether the magistrate had a substantial basis for concluding that probable cause existed. State v. Philpot, 317 S.C. 458, 461, 454 S.E.2d 905, 907 (Ct. App. 1995). A reviewing court should give great deference to a magistrate's determination of probable cause. State v. Davis, 354 S.C. 348, 355, 580 S.E.2d 778, 782 (Ct. App. 2003).

LAW / ANALYSIS

Rutledge argues the circuit court erred in determining that the affidavit was sufficient to demonstrate probable cause, and in failing to determine that the search warrant was misleading and therefore invalid. We disagree.

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). Search warrants may be issued "only upon affidavit sworn before the magistrate . . . establishing the grounds for the warrant." S.C. Code Ann. § 17-13-140 (1985). Oral testimony may be used to supplement search warrant affidavits. State v. Jones, 342 S.C. 121, 128, 536 S.E.2d 675, 678-79 (2000). The magistrate's task in determining whether to issue the search warrant is to

make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, there is a fair probability that contraband or evidence of a crime will be found in a particular place. State v. Dunbar, 361 S.C. 240, 246, 603 S.E.2d 615, 618 (Ct. App. 2004).

I. Insufficiency Argument

Rutledge first argues that the affidavit was insufficient to demonstrate probable cause. Specifically, he argues that the affidavit fails to detail the "investigation" referred to, to mention that the trash can where the marijuana was found was in the public domain and not on the property of the residence, and because the confidential informant's reliability was not established. We disagree.

The affidavit stated that the officers had "received information that William Rutledge and two other subjects only known as Steve and Richie are selling marijuana from 162 Bailey Ave., Rock Hill, South Carolina." This tip provided the specific crime being committed, the names of the people involved in the crime, and the specific location where the activity was occurring. See Bellamy, 336 S.C. at 144, 519 S.E.2d at 349 (noting that specificity of information provided by a confidential informant indicates greater reliability). Because an anonymous informant is correct about some facts, that informant is more likely correct about other facts, including illegal activity. Illinois v. Gates, 462 U.S. 213, 244 (1983).

Rutledge cites State v. Coin Operated Video Games Machines, 338 S.C. 176, 525 S.E.2d 872 (2000), to attack the reliability of the confidential informant's tip. This case holds that 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. Id. However, the warrant in this case was not based solely on the tip from the confidential informant. The marijuana the officers found in the trash can in front of the residence, and Rutledge's prior convictions for marijuana serve as additional evidence of a crime, while along with the electric bill registered in Rutledge's name, also substantiating the credibility of the informant and the veracity of his statements. See Bellamy, 336 S.C. at 144-45, 519 S.E.2d at 349 (finding confirmation of the reliability of an informant's information, which detailed

the caliber and/or make of three guns, when the information correlated with 3 of 20 guns that had been stolen from a police station).

Given all the circumstances in the affidavit and the supporting oral testimony, including the informant's information, the electric bill in Rutledge's name, Rutledge's prior convictions, and the marijuana found in the trash can in front of the residence, we conclude that the magistrate had substantial basis for concluding that probable cause existed to issue a search warrant of the residence. Accordingly, we find the affidavit was sufficient.

II. Misleading Argument

Rutledge next argues that the affidavit was misleading, demonstrating a reckless disregard for the truth, because it overstates the evidence the officers had of any ongoing illegal activity. Specifically, he argues that the affidavit should have disclosed the lack of independent evidence of ongoing illegal activities at the residence, should have indicated that the marijuana, seeds, and stalks were discovered in a trash can off the property, and that Rutledge's prior convictions were in 1990 and 1991. He thus requests that the alleged distorted facts in the affidavit be disregarded pursuant to Franks v. Delaware, 438 U.S. 154 (1978), in considering the affidavit's sufficiency to demonstrate probable cause. We disagree.

There is a presumption of validity with respect to the affidavit supporting the search warrant. Id. at 171. Rutledge contends first that the affidavit incorrectly informed the magistrate that illegal activities at the residence were ongoing. However, the anonymous tip and the marijuana found in the trash can within seventy-two hours of the affidavit's submission support such a contention.

Rutledge next contends the affidavit improperly implied that the officers recovered the marijuana, seeds, and stalks from the residence itself. But, the affidavit merely states, "[O]fficers recovered marijuana, marijuana seeds, and marijuana stalks from 162 Bailey Avenue." Nowhere does the affidavit say it was found in the house. Further, the affiant's oral testimony stated exactly how and where the officers found the trash can and the

marijuana. These statements do not constitute a reckless disregard for the truth.

Finally, Rutledge argues that the officers improperly left out the dates and severity of Rutledge's marijuana convictions. However, the exculpatory value of that information is dubious. Rutledge contends that the omission of that information left the magistrate with the impression that Rutledge was involved with illegal narcotics. But the inclusion of the specific date and type of conviction could still allow that impression. Further, there is no Franks violation if the affidavit, including the omitted exculpatory information, still contains sufficient evidence to establish probable cause. Id. Had the affidavit noted the dates of Rutledge's prior marijuana convictions, the substantial basis for probable cause would not be diminished, because any doubt as to current illegal activities at the residence would be obviated by the recent informant's tip and discovery of marijuana outside the residence. Therefore, we find nothing in the affidavit demonstrates a reckless disregard for the truth.

CONCLUSION

Based on the foregoing, Rutledge's conviction for simple possession of marijuana, first offense, is

AFFIRMED.

GOOLSBY and STILWELL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Travis Anthony Ladson, Appellant.

Appeal From Dorchester County
Steven H. John, Circuit Court Judge

Opinion No. 4232
Heard March 6, 2007 – Filed April 9, 2007

REVERSED AND REMANDED

Appellate Defender Aileen P. Clare, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor David M. Pascoe, Jr., of Summerville, for Respondent.

KITTREDGE, J.: Travis Anthony Ladson was convicted of first-degree burglary following a three-day trial. Ladson was sentenced on November 10, 2004, to prison for a non-parolable term of twenty-five years. Ladson timely appealed his conviction and sentence. In accordance with standard procedure, Ladson promptly requested the transcript of the trial from the court reporter. Approximately ten months later, in August of 2005, the court reporter finally disclosed that there was no record of the trial court proceedings.

Because of the complete absence of a transcript, Ladson moved this court to reverse the convictions and sentences and for a new trial. Based on the State's assurance that the record could be easily reconstructed, a judge of this court denied Ladson's motion and remanded the matter to the trial court to reconstruct the record. More than a year after the trial, the trial judge convened a hearing with trial counsel in an effort to reconstruct the record.

We now have before us what the State contends is a reconstructed record of the trial court proceedings sufficient to permit appellate review. Ladson contends the conclusory and summary nature of the purported record on appeal does not permit meaningful appellate review. Because we find the reconstructed record insufficient for meaningful review of direct appeal issues, we reverse and remand for a new trial.

I.

On January 5, 2006, pursuant to this court's order, the trial judge held a hearing to reconstruct the record for appeal.[1] It was clear from the outset of

[1] As the original trial took place more than a year before this reconstruction hearing, it was obviously quite difficult to reconstruct the record. Although the hearing was orderly, it took on a conversational tone—counsel and the trial court often informally discussed their recollections of the earlier trial. In fairness to the outstanding trial judge and the parties' trial counsel, the order of this court left no option but to attempt a reconstruction of the record. As the trial court noted at the outset of the January 26, 2006, hearing, it would do the "best it can … to reconstruct the record."

this hearing that reconstructing the record from scratch, after such a substantial delay, would be an uphill struggle. The State presented two affidavits from witnesses and "summarized" the testimony of the other witnesses.

The information provided by the State was conclusory. The State usually prefaced its recall of witness testimony with statements like "his testimony generally would be," "he testified generally to the following," and "the next witness . . . will be by summation." Ladson took issue with the State's summary reconstruction of the record. The trial judge, noting that he no longer had his handwritten notes from the trial, typically would conclude with respect to a particular witness that the State presented "an accurate summation of the testimony," or the State's general description was "a correct summation of the testimony," or "the summation presented by the State . . . [was] a correct statement."

When the State concluded its summary of the testimony of one witness, the trial court concurred with the summary as "an accurate reflection of her testimony," and further held that the witness was "qualified as an expert in her field, and . . . the court found her testimony to be credible." The trial court then remarked, "I do not believe there was any question, at any point in time, as to the chain of evidence regarding these particular fingerprints." The State corrected the trial court and noted that the witness was not qualified as an expert and further that Ladson's trial counsel had preliminarily objected to the chain of custody. The trial court promptly agreed and explained the confusion by referring to another witness.

The State, too, had difficulty recalling the witnesses and the testimony. For example, the State had completely forgotten about one witness, whose identity was determined only by reference to Ladson's trial counsel's notes. As the Solicitor acknowledged, "the final witness that I have to admit I discovered from [Ladson's trial counsel's] notes."

There is even a dispute as to whether Ladson testified in his own defense. Ladson claims he did not testify. The trial court found otherwise, noting the "court's remembrance and recollection that the Defendant was not credible, and did not help himself in his testimony before the jury."

The trial court appeared equally confident that the jury returned its verdict the same day it began its deliberations: "My only recollection is that, after the court answered [a question from the jury], that the jury came out relatively soon after that with a verdict." When confronted with a different recollection from Ladson's counsel (claiming the jury was excused for the day and reached a verdict the following day), the trial court responded, "I usually require the jury to stay for as long as it takes [until it] come[s] back with a verdict. I don't ever remember an occasion where I have allowed a jury to go home and come back." The trial court's recollection was proven faulty when the State called attention to the juror note dated November 9, 2004, and the jury's verdict dated the next day, November 10.

The trial court and the State are confident that Ladson made timely objections at trial and moved for a directed verdict "based upon the evidence." Presumably, the State believes these concessions enlighten Ladson and us to the specific issues to address on appeal.

On January 26, 2006, the trial court issued an "Order for the Record on Appeal."

II.

Ladson maintains the reconstructed record does not allow for meaningful review of his direct appeal. The State disagrees and asserts this court should find the record adequate for appellate review of the claims Ladson raised at the reconstructed hearing.

It is clear from the record before us that all parties made a diligent effort to reconstruct the record. Despite these good faith efforts, the reconstructed record is largely conclusory, with testimony, objections, and the like recalled only in summary fashion. Thus, we must first determine the analytical framework for assessing the sufficiency of a reconstructed record, followed by a determination if the law warrants a new trial under the record before us.

We recognize that the excellent trial judge did the best he could to reconstruct this case under difficult circumstances. Approximately ten months transpired after the appeal was filed before the court reporter notified the parties (for a reason that is unclear) that her recording equipment failed and no part of the trial was recorded.[2] The court reporter's delay in disclosing the lack of a transcript made a bad situation worse, as the passage of time clearly dimmed the recall of the participants. We, too, must accept our share of the blame, for the remand order of this court required the trial court to reconstruct the record, with no option given to simply conclude that the record could not be reconstructed with the specificity to support meaningful appellate review. Cf. Koon, 358 S.C. at 367, 595 S.E.2d at 460 (denying request to remand for reconstruction of a post-conviction hearing after appellant failed to allege specifics regarding his assignments of error); and Whitehead, 352 S.C. at 221, 574 S.E.2d at 203 (remanding matter to circuit court for reconstruction hearing and instructing, "If the circuit court judge determines that reconstruction is not possible, he shall notify this Court . . . .").

The hearing to reconstruct the record for this three-day trial on a violent, non-parolable offense took place on January 5, 2006, more than a year after Ladson was convicted and sentenced. We are mindful of the tremendous workloads faced by our fine trial court judges. It is simply unrealistic and unreasonable to think that a trial judge and counsel can—under these circumstances—reconstruct a proper record that will permit meaningful appellate review, especially in light of our issue preservation rules. The continuing dispute as to whether Ladson even testified (much less the content of his purported testimony) is but one example of the trial court and counsel groping in the dark as to what actually happened at trial.

Most cases around the country addressing this subject concern situations where only a part of the trial transcript is unavailable. In many such circumstances, meaningful appellate review can occur and the rights of the parties are not prejudiced. In this case, we are essentially left with a bare bones summary of the evidence (with more remaining unknown than known)

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[2] At oral argument, the State commented that the court reporter "used tapes that just wouldn't hold sound."

. . .

In doing so he properly considered the affidavits of counsel and the court reporter as to what happened. The fact that the notes of the court reporter were lost and the trial judge had no independent recollection of the incident under inquiry did not preclude him from determining the question upon the basis of the affidavits submitted. Their probative value was for him to determine and his conclusions thereabout are binding on the court.

251 S.C. at 333-34, 162 S.E.2d at 278 (internal citations omitted).

Whitehead inculcates:

Petitioner sought a remand to reconstruct the record of his first PCR hearing. See China v. Parrott, supra. We now grant his motion and remand the case to Jasper County for a hearing to reconstruct the first PCR record. This hearing should be held within 45 days of the date this opinion is filed. If the circuit court judge determines that reconstruction is not possible, he shall notify this Court and the parties within 15 days of the reconstruction hearing. If the record is reconstructed, the parties shall notify this Court and the matter will proceed according to King v. State, supra.

352 S.C. at 221, 574 S.E.2d at 203.

Our supreme court in Koon succinctly instructs as to the judicial duty if the original trial record is deficient:

Where a transcript has been lost or destroyed, a court may remand to have the record reconstructed. See Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002); China v. Parrott, 251 S.C. 329, 162 S.E.2d 276 (1968) (trial judge reconstructed the record where court reporter records were unavailable).

358 S.C. at 367, 595 S.E.2d at 460.

Finally, this court edifies in Dolive:

At oral argument, counsel was queried by the court in regard to an identification of appellate issues based on the reconstructed record. Counsel for the State was unable to identify the appellate issues with any degree of exactitude.

Because the reconstructed record is profoundly deficient in guiding the court to preserved appellate issues, I come to the ineluctable conclusion that a retrial is mandated.

I **VOTE** to **REVERSE and REMAND** the convictions and sentences of Travis Anthony Ladson for a new trial.