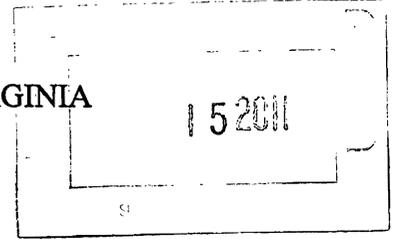


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Respondent,

v.

Supreme Court No. 11-1158

Circuit Court No. 09-F-868
(Kanawha)

RAYMOND D'ARCO,

Petitioner.

PETITIONER'S BRIEF

John A. Carr (WVSB #10461)
John A. Carr, Atty at Law, PLLC
179 Summers Street, Suite 209
Charleston, WV 25301
(304) 344-4822
Email: jcarr@jcarrlaw.com

Counsel for Petitioner

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ASSIGNMENT OF ERROR

The Trial Court Erred When It Refused To Suppress Evidence Seized From The Residence Because Law Enforcement Lacked Probable Cause To Seek A Search Warrant And The Magistrate Lacked Probable Cause To Issue A Search Warrant, In Violation Of The Fourth Amendment To The United States Constitution And Article III, Section 6, Of The West Virginia Constitution.

STATEMENT OF THE CASE

On March 10, 2008, Sgt E. S. Drennan of the Kanawha County Sheriff's Office presented an affidavit to Kanawha County Magistrate Julie M. Yeager, seeking the issuance of a search warrant for the residence of 514 Falcon Drive, Charleston, West Virginia. (A.R. 3-8).¹ The search warrant, which was issued and executed, sought *inter alia* methamphetamine and methamphetamine manufacturing equipment. (A.R. 3-8).

Based upon the items seized during this search, a Kanawha County grand jury during the September 2009 term indicted Mr. D'Arco and two other Defendants on various drug related charges. (A.R. 9-12).

On August 23, 2010, the Circuit Court of Kanawha County began a joint trial of Mr. D'Arco and a second Defendant on three counts alleging a Conspiracy, Operating a Clandestine Drug Laboratory, and Possession of Substances to be Used as Precursors. (A.R. Trial Day One, 8).

During the pretrial hearing on August 23, 2010, trial counsel for Mr. D'Arco made a motion to suppress the evidence seized upon the March 10, 2008 search warrant, arguing that there was a lack of probable cause to issue the search warrant. (A.R. Trial Day One, 11).

The circuit court held a hearing on Mr. D'Arco's motion to suppress. While the affidavit

¹ References to the Appendix Record, which was agreed to by the parties, are set forth as "A.R. ____."

supporting the search warrant was discussed, it does not appear that the document was marked as an exhibit. (A.R. Trial Day One, 11-59). The State called as a witness Sgt E.S. Drennan of the Kanawha County Sheriff's Office, the affiant for the search warrant application, who was questioned by the State and by both trial counsel for the Defendants. (A.R. Trial Day One, 18-56). The issuing magistrate, Magistrate Yeager, was not called as a witness. (A.R. Trial Day One, 11-59).

At the conclusion of Sgt. Drennan's testimony, and after hearing the arguments of counsel, the Circuit Court denied the motion to suppress. (A.R. Trial Day One, 58-59).

After a four-day trial, the jury ultimately convicted Mr. D'Arco and his co-defendant of all three counts. (A.R. 1-2). On November 22, 2010, Mr. D'Arco was sentenced to be confined for no less than one no more than five years; no less than two no more than ten years; and no less than two no more than ten years – all to be served consecutively. (A.R. 13-15).

This appeal was timely filed on August 10, 2011, following the Circuit Court's resentencing Order of July 15, 2011. (A.R. 16-17).

SUMMARY OF ARGUMENT

The Honorable Jennifer F. Bailey, Kanawha County Circuit Court Judge, should have suppressed the evidence which was seized after the search of the residence on March 10, 2008.

The Circuit Court's ultimate conclusion that probable cause existed based upon the supporting affidavit is unsupported by substantial evidence, and based on the entire record, it is clear that a mistake has been made. Specifically, the affidavit supporting the issuance of the search warrant in this case failed to provide probable cause to justify any search. First, the affidavit fails to provide any support for the allegation that Mr. D'Arco resided at 514 Falcon Drive. Moreover, as the State's witness candidly conceded at trial, the initial four "anonymous"

calls relied upon in the affidavit failed to provide the required indicia of reliability concerning the information alleged. Further, the additional investigation and surveillance conducted by law enforcement failed to either corroborate the anonymous calls or to provide an independent basis for the issuance of the search warrant. Finally, the information contained in the affidavit is stale.

Therefore, the evidence seized during the search of March 10, 2008 should be suppressed, Mr. D'Arco's conviction and sentence vacated, and this matter remanded to the Circuit Court.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

A Rule 20 oral argument is necessary in this case because it presents an important constitutional issue regarding the validity of a court ruling and the decisional process would be significantly aided by oral argument.

ARGUMENT

I. The Trial Court Erred When It Refused To Suppress Evidence Seized From The Residence Because Law Enforcement Lacked Probable Cause To Seek A Search Warrant And The Magistrate Lacked Probable Cause To Issue A Search Warrant, In Violation Of The Fourth Amendment To The United States Constitution And Article III, Section 6, Of The West Virginia Constitution.

A. Standard of Review

This Court employs a two-tier standard when reviewing a circuit court's ruling on a motion to suppress.

First, the Court reviews a circuit court's findings of fact when ruling on a motion to suppress evidence under the clearly erroneous standard. State v. Lilly, 194 W.Va. 595 (1995); Syl. Pt. 1, State v. Lacy, 196 W.Va. 104 (1996) ("When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below. Because of the highly fact-specific nature of a motion to

suppress, particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore, the circuit court's factual findings are reviewed for clear error.”); see also Syl. Pt. 1, State v. Bookheimer, 221 W.Va. 720 (2007); Syl. Pt. 13, State v. White, 227 W.Va. 231 (2011).

Second, the Court reviews *de novo* questions of law and the circuit courts ultimate conclusion as to the constitutionality of the law enforcement action. Syl. Pt. 2, State v. Lacy, 196 W. Va. 104 (1996) (“In contrast to a review of the circuit court's factual findings, the ultimate determination as to whether a search or seizure was reasonable under the Fourth Amendment to the United States Constitution and Section 6 of Article III of the West Virginia Constitution is a question of law that is reviewed *de novo*. Similarly, an appellate court reviews *de novo* whether a search warrant was too broad. Thus, a circuit court's denial of a motion to suppress evidence will be affirmed unless it is unsupported by substantial evidence, based on an erroneous interpretation of the law, or, based on the entire record, it is clear that a mistake has been made.”); Syl. Pt. 2, State v. Bookheimer, 221 W.Va. 720 (2007).

B. The Circuit Court Findings of Fact and Denial of the Motion to Suppress

At the conclusion of the suppression hearing, the trial court made the following record of its findings of fact and denial of Mr. D’Arco’s motion to suppress:

THE COURT: All right. Well, your motion’s denied. I believe there is probable cause and I believe that all in all, there was a lot of probable cause, frankly, over a several month period of time after four consistent unanimous – anonymous phone calls.

The same residence, the persons named coming and going and the tracking of the purchases of Suphedrine, the indications that several of the persons coming and going whose vehicles were – came back registered to them were in previous arrests for methamphetamine laboratories.

There's just a whole lot of information here, actually, that was followed up on, followed up on indicating that there's the suspicion of a meth lab and I hear it day in and day out.

Same set of facts leading up to these arrests. Frankly, the surveillance camera is huge and I order people on home confinement to remove those when I can remember to because I do not think persons need them at their homes and they're very typical in meth lab cases.

I hear it day in and day out, so all of the information here is something I hear on a routine basis as a Judge, frankly, on what police officers observe in these cases.

I think there is a lot of probable cause I hold that the search warrant was properly issued based on the uncontroverted testimony and the affidavit given to the magistrate.

* * *

(A.R. Trial Day One, 58-59).

To the extent that the Circuit Court failed to make necessary findings in this case, this Court has previously explained that even if a circuit court did not make any findings of fact, the matter may either be remanded with appropriate directions or the circuit court's denial of a motion to suppress upheld if there is any reasonable view of the evidence to support it. State v. Poling, 207 W.Va. 299, 531 S.E.2d 678, 683 (W.Va. 2000) (citing State v. Lacy, 196 W.Va. 104, 110 (1996)).

C. To the Extent the Circuit Court's Finding of Probable Cause Is Based Upon Facts Not in the Affidavit, It is Improper

The proper inquiry during a suppression hearing is an examination of the information presented *to magistrate at the time* the search warrant was sought and issued. Accordingly, this Court has held, "Under Rule 41(c) of the West Virginia Rules of Criminal Procedure, it is improper for a circuit court to permit testimony at a suppression hearing concerning information not contained in the search warrant affidavit to bolster the sufficiency of the affidavit unless such information had been contemporaneously recorded at the time the warrant was issued and

incorporated by reference into the search warrant affidavit.” Syl. Pt. 2, State v. Adkins, 176 W.Va. 613 (1986). A review of the record in this case reveals that neither the content of the affidavit nor the decision of magistrate to issue the warrant appears to have been the focus of the inquiry at the suppression hearing. (A.R. Trial Day One, 11-59). Instead, the inquiry appears to have examined simply whether law enforcement had probable cause *to seek* a search warrant – but not what information was actually presented to the magistrate at the time the warrant was sought. Accordingly, neither the search warrant nor the affidavit was specifically examined or discussed, and neither were marked as exhibits. (A.R. Trial Day One, 11-59). As it relates to the Circuit Court’s findings of fact and denial of the motion to suppress, however, to the extent that Sgt. Drennan provided testimony at the hearing that was not within the four corners of the affidavit, and the Circuit Court is deemed to have relied upon such testimony in denying the motion to suppress, such reliance is improper.

D. The Affidavit and Testimony of Sgt Drennan Based Upon the Affidavit Fails to Establish Probable Cause

Neither the affidavit nor the testimony of Sgt E. S. Drennan, Kanawha County Sheriff’s Office, based upon the affidavit, provides probable cause for the issuance of a search warrant. First, the affidavit fails to provide any factual basis upon which to conclude that Mr. D’Arco resided at 514 Falcon Drive. Second, the affidavit’s reference to four anonymous calls, the contents of which are brief, vague, and without sufficient corroboration – provide no additional indicia of reliability or trustworthiness. Third, further investigation failed to provide any corroboration to the allegations in the anonymous calls. Fourth, further investigation by law enforcement also failed to provide any independent basis to support a finding of probable cause. Finally, the information contained in the affidavit is stale.

It is understood that under the Fourth Amendment to the United States Constitution and Article III, Section 6 of the West Virginia Constitution, the validity of an affidavit for a search warrant is to be judged by the totality of the information contained in it. Under this rule, a conclusory affidavit is not acceptable nor is an affidavit based on hearsay acceptable unless there is a substantial basis for crediting the hearsay set out in the affidavit which can include the corroborative efforts of police officers. Syl. Pt. 4, State v. Adkins, 176 W.Va. 613 (1986); Syl. Pt. 4, State v. Hlavacek, 185 W.Va. 371 (1991).

1. The Affidavit Fails to Support the Conclusion that the Place to be Searched is Actually the Residence of Mr. D'Arco

The affidavit inexplicably fails to provide any facts upon which the Magistrate or Circuit Court could conclude that Mr. D'Arco ever resided or was present at 514 Falcon Drive. (A.R. 3-8). While the affidavit contains allegations concerning Mr. D'Arco, and alternatively, certain alleged observations of vehicles at 514 Falcon Drive, nowhere does the affidavit provide any support upon which the Magistrate or the Circuit Court could rely to believe that Mr. D'Arco lived at, owned, or was ever present at 514 Falcon Drive. (A.R. 3-8).

2. Four Anonymous Calls Fail to Establish Probable Cause

Simply put, the State has conceded that the four anonymous calls failed to establish probable cause. When he was specifically asked whether he had sought a search warrant after receiving the four anonymous calls, Sgt. Drennan admitted "I didn't think that was probable cause enough just to go out and run out and get a search warrant." (A.R. Trial Day One, 20).

The affidavit begins by recounting four "anonymous" telephone calls from an unknown individual to the Kanawha County "Meth Tip Line."² Such anonymous calls, without any

² The record is silent as to whether the tapes of the anonymous calls were ever provided to the State Prosecutor, or to Mr. D'Arco's trial counsel, prior to trial and the motion hearing.

corroboration, fail to provide a basis upon which to find probable cause. Syl. Pt. 6, State v. Hlavacek, 185 W.Va. 371 (1991) ("Generally, when information received from a confidential informant is relied upon in an affidavit for a search warrant, the affidavit must contain information which sufficiently establishes the informant's basis of knowledge and lends credibility to the informant's statements").

The four anonymous calls were placed as follows:

Search Warrant – March 30, 2008	
Call 1	October 30, 2007
Call 2	November 6, 2007
Call 3	January 11, 2008
Call 4	January 14, 2008

As recounted in the affidavit, the first anonymous call on October 30, 2007, alleged that “Raymond Darco was cooking methamphetamine underground in his basement.” (A.R. 4). The call, *placed more than four months prior to the affidavit*, did not allege where Mr. D’Arco lived.

Similarly, the second anonymous call on November 6, 2007, alleged generally that “Raymond Darco ran when he knew the police were coming and that his sister had lied to police. The caller stated “‘they’ brag about an underground methamphetamine lab that the police have not been able to locate.” Again, the caller did not allege where Mr. D’Arco lived, or provide any further details concerning who was being referred to as “they.” (A.R. 4).

The third anonymous call on January 11, 2008, alleged that Debbie Layton of Charleston had been purchasing meth making materials for Mr. D’Arco, specifically iodine online and “other products” at Wal-Mart. (A.R. 4).

The fourth anonymous call on January 14, 2008 – *nearly two months prior* to the issuance of the search warrant – reported an underground meth lab “at the residence of Raymond Darco” and claimed that “Toni Nelson” and “Debbi Layton” were purchasing unspecified “meth making products” for Raymond D’Arco. (A.R. 4). Notably, this anonymous call likewise did not provide any indication of where Mr. D’Arco lived.

As Sgt. Drennan candidly admitted during the suppression hearing, the four anonymous calls from an individual of unknown character and motivations do not provide probable cause upon which to issue a search warrant. When asked whether he sought a search warrant based upon the anonymous calls, Sgt. Drennan said that he did not, because “I didn’t think that was probable cause enough just to go out and run out and get a search warrant.” (A.R. Trial Day One, 20). Clearly, as the State conceded, the anonymous calls – *made more than two (2) months prior to the issuance of the search warrant* – did not, by themselves, possess the required specificity or reliability to establish probable cause.

3. Further Investigation, as Referred to in the Affidavit, Did Not Corroborate the Anonymous Calls

The further investigation conducted by law enforcement and detailed in the affidavit failed to corroborate the facts alleged in the anonymous calls. Syl. Pt. 7, State v. Hlavacek, 185 W.Va. 371 (1991) (“Independent police work may corroborate information contained in an affidavit for a search warrant. However, the details which are verified through further investigation must be both significant and specific in order to permit a judicial officer to impart some degree of reliability upon the confidential source of the information”); Sly. Pt. 6, State v. Bookheimer, 656 S.E.2d 471 (W.Va., 2007) (“A key issue in determining whether information provided by an informant is sufficient to establish probable cause is whether the information is reliable. An informant may establish the reliability of his information by establishing a track

record of providing accurate information. However, where a previously unknown informant provides information, the informant's lack of a track record requires some independent verification to establish the reliability of the information. Independent verification occurs when the information (or aspects of it) is corroborated by independent observations of the police officers" (citing Syl. Pt. 4, State v. Lilly, 194 W. Va. 595 (1995)).

First Anonymous Call, 10/30/2007 – the first call contained no facts other than a bare assertion that Mr. D'Arco was operating an underground meth lab, for which there was no further corroboration.

Second Anonymous Call, 11/6/2007 – the second call contained three factual allegations, none of which are corroborated by facts alleged in the affidavit:

- Mr. D'Arco ran when he knew police were coming. There is no evidence that the police ever pursued Mr. D'Arco, or that he ran when they did – let alone when this particular allegation may have occurred.
- Mr. D'Arco's sister had lied to police. There is no evidence the police ever questioned Mr. D'Arco's unidentified sister, or that she had lied to police – and again, let alone when this particular allegation may have occurred.
- "They" brag about an underground meth lab. There is no corroboration of any admission or statement by Mr. D'Arco to anyone.

Third Anonymous Call, 1/11/2008 – the third call also contained three factual allegations, none of which are corroborated by facts alleged in the affidavit:

- Debbie Layton of Clover Drive in Charleston. The affidavit could not corroborate any "Debbie Layton," either generally or one that lived on Clover Drive. Instead, the affidavit contains a reference to "Debbie Richards," though there is no allegation or confirmation that "Debbie Richards" lived at Clover Drive.
- Debbie Layton purchased iodine online for Mr. D'Arco. The affidavit fails to corroborate that *either* Debbie Layton *or* Richards ever purchased any iodine for Mr. D'Arco.
- Debbie Layton purchased "other products" at Wal-Mart. Containing no other reference to Debbie Layton, the affidavit fails to corroborate that Debbie Layton ever

made any purchase at Wal-Mart. Moreover, the affidavit fails to corroborate that Debbie Richards ever made any purchased of “other products” at Wal-Mart that were ever transferred to Mr. D’Arco or brought to 514 Falcon Drive.

Fourth Anonymous Call, 1/14/2008 – the fourth call repeated the uncorroborated allegation concerning an underground meth lab and that “Debbie Layton” purchased “meth making materials,” which are addressed above. It also contains a new allegation that “Toni Nelson” purchased meth making materials. The affidavit does not contain any corroboration for this new allegation, and instead contains only carefully shrouded speculation and innuendo. (A.R. 6-7) To be sure, the affidavit does not allege that Toni Nelson was ever observed at 514 Falcon Drive. In fact, the affidavit does not even provide a description of what Toni Nelson looks like. Instead, the affidavit claims a car was observed on one occasion at 514 Falcon Drive. Although the driver of that vehicle is not described or identified in the affidavit, the vehicle was registered to an address – which the Sgt Drennan claimed to recognize from a prior drug investigation – to a person who was related to an un-described “Toni Nelson”³ – who may have had access to the vehicle that was parked for a short time in front of 514 Falcon Drive. To be certain, there was no corroboration that a “Toni Nelson” was ever at 514 Falcon Drive, ever knew or met Mr. D’Arco – or ever provided any products of any nature to him.

4. Further Investigation Referred to in the Affidavit Fails to Provide Basis for Finding of Probable Cause

The additional factual allegations contained in the affidavit that do not address the unsuccessful efforts to corroborate the anonymous calls also fail to provide a basis to find probable cause. Syl. Pt. 4, State v. Stuart, 192 W.Va. 428 (1994) (“A police officer may rely upon an anonymous call if subsequent police work or other facts support its reliability and,

³ It is alleged that Toni Nelson had previously been convicted of Possession with Intent to Deliver Methamphetamine, but no date for that conviction was included in the affidavit.

thereby, it is sufficiently corroborated to justify the investigatory stop under the reasonable-suspicion standard").

First, the affidavit states that on only two occasions, namely in January of 2008 and on March 10, 2008, a vehicle registered to a Melissa Carte was observed at 514 Falcon Drive. (A.R. 5). However, there is no allegation that Ms. Carte was ever observed in the vehicle or at the residence. Despite the lack of any identification, the affidavit boldly recounts that a "Melissa Carte" had been previously charged with attempting to operate a clandestine -- a charge from September 2006, *nearly a year and a half before*, that did not result in a conviction! Other than the presence of a vehicle driven by an unknown occupant, there is no other allegation concerning Ms. Carte's involvement with Mr. D'Arco or with a clandestine drug lab.

Second, the affidavit states that on two back-to-back days in January of 2008 a vehicle registered to a Cheryl Goff was parked at 514 Falcon Drive. (A.R. 5-6). Again, there is no allegation that Ms. Goff was ever observed in the vehicle or at the residence. Instead, the affidavit strains to make the argument that Ms. Goff purchased legal quantities of Suphedrine months prior the registered vehicle being observed at the property. Ms. Goff is not alleged to have any criminal history or arrests -- yet, the affidavit makes the incredible stretch back to April of 2004, *almost two years before*, stating that a man named "James Briscoe" was arrested -- *but apparently never convicted* -- of operating a mobile methamphetamine lab in a vehicle registered to "Cheryl Goff."

Third, and similarly, the affidavit states that on two days, namely January 29 and March 10, 2008, a vehicle registered to Shawnette Lovejoy was in the driveway of 514 Falcon Drive. (A.R. 6). Again, there is no allegation that Ms. Lovejoy was ever observed in the vehicle or at the residence. Instead, the affidavit asserts that Shawnette Lovejoy made two (2) purchases of

Equate Brand Suphedrine at the South Charleston Wal-Mart, specifically on November 30 and December 8, 2007 – months prior to the vehicle registered to her being identified at the property. Despite any positive identification, the affidavit boldly recounts that a “Shawnette Lovejoy” had been charged with possession of a controlled substance *four (4) years prior* in March of 2006 -- *a charge that did not result in a conviction!*

Finally, the affidavit states that a single surveillance camera had been observed at 514 Falcon Drive. (A.R. 6). There is no evidence concerning how old the camera was or whether it was ever operational. No witness claims to have seen it working – and certainly no witness alleges that Mr. D’Arco had any connection to it. Instead, the affidavit takes the seemingly innocuous, commonplace surveillance camera and leaps to the following statement – “individuals who manufacture methamphetamine or conspire with others to manufacture methamphetamine will often invest in these types of cameras in order to alert them to law enforcement coming to their residence.” The Circuit Court in denying Mr. D’arco’s motion to suppress called the presence of the surveillance camera “huge,” concluding that in the court’s opinion “I do not think persons need them at their homes...” (A.R. Trial Day One, 59) Such a broad finding, premised on a belief that home surveillance systems in this State are unnecessary and indicative of criminal behavior, is simply not supported by substantial evidence.

5. Information Contained in the Affidavit is Stale

As referenced above, the information contained in the affidavit is not only lacking in detail and substance, but also timeliness. This Court has previously relied upon the U.S. Supreme Court case of Sgro v. United States, 287 U.S. 206, 210-11 (1932), in which the Supreme Court held that proof of probable cause for the issuance of a search warrant "must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable

cause at that time. Whether the proof meets this test must be determined by the circumstances of each case." State v. George, 185 W.Va. 539, 546 (W.Va. 1991). See also State v. Simmons, 171 W.Va. 722 (1983). Because the facts in this case are remote in time from the issuance of the search warrant, and are therefore stale, they cannot form the basis for a finding of probable cause.

The last of the four vague, anonymous, calls was placed on January 14, 2008 – nearly two months prior to search warrant being issued on March 10, 2008. (A.R. 4).

The additional allegations contained in the affidavit, can be summarized as follows:

Allegations in Affidavit for Search Warrant – March 10, 2008					
Name of Person Cited in Search Warrant Affidavit	Allegation from Anonymous Calls?	Person Observed at 514 Falcon Drive?	Vehicle Registered to Person at 514 Falcon Drive?	Last purchase of "Sudafed"?	Criminal History?
Debbie Layton	Yes	No	No	---	---
Debbie Richards	No	No	No	Dec 1, 2007	---
Toni Nelson	Yes	No (Driver of vehicle not identified on Mar 6, 2008)	No	Feb 18, 2008	Convicted of Poss w/Intent (No Date)
Melissa Carte	No	No	Jan 21, 2008 Mar 10, 2008	---	Charged with Operating Lab (Sep 2006)
Cheryl Goff	No	No	Jan 28, 2008 Jan 29, 2008	Dec 5, 2007	---
Shawnette Lovejoy	No	No	Jan 29, 2008 Mar 10, 2008	Dec 8, 2007	Charged with Poss Meth (Mar 2006)

(A. R. 3-8).

There are only two allegations contained in the affidavit that occurred during the month of March, 2008. The first is that a vehicle registered to Shawnette Lovejoy was observed at the property. (A. R. 6). Ms. Lovejoy was not actually identified as being at the property, and had not purchased any Suphedrine since December 8, 2007 – *three months prior*. Ms. Lovejoy’s prior criminal charge, which did not result in a conviction, was from *two years prior*. The second is that a vehicle registered to Melissa Carte was observed at the property. (A. R. 5). Ms. Carte was also not actually identified as being at the property, had no record of any Suphedrine purchases, and her prior criminal charge, which did not result in a conviction, was from *over a year and a half prior*.

There is only one allegation in the affidavit during the month of February, 2008. The affidavit alleges that Toni Nelson last purchased Suphedrine on February 18, 2008. (A. R. 6-7). However, Ms. Nelson was simply never observed at the 514 Falcon Drive.

For January of 2008, the affidavit alleges that a vehicle registered to Cheryl Goff was seen at the property twice. (A. R. 5-6). However, Ms. Goff was never actually observed at the property, had not purchased Suphedrine since the first week of December, and had no criminal record.

The facts alleged in the affidavit are simply too remote in time from the issuance of the search warrant to form the basis for probable cause upon which to issue a search warrant in this case.

CONCLUSION

The trial court erred when it refused to suppress evidence seized from the residence because law enforcement lacked probable cause to seek a search warrant and the Magistrate

lacked probable cause to issue a search warrant, in violation of the Fourth Amendment to the United States Constitution and Article III, Section 6, of the West Virginia Constitution.

Neither the affidavit nor the testimony of Sgt E. S. Drennan, Kanawha County Sheriff's Office, based upon the affidavit, provides probable cause for the issuance of a search warrant. First, the affidavit fails to provide any factual basis upon which to conclude that Mr. D'Arco resided at 514 Falcon Drive. Second, the affidavit's reference to four anonymous calls, the contents of which are brief, vague, and without sufficient corroboration – provide no additional indicia of reliability or trustworthiness. Third, further investigation failed to provide any corroboration to the allegations in the anonymous calls. Fourth, further investigation by law enforcement also failed to provide any independent basis to support a finding of probable cause. Finally, the information contained in the affidavit is stale.

Consequently, Mr. D'Arco respectfully requests this Court to suppress the evidence seized during the search of March 10, 2008, vacate Mr. D'Arco's conviction and sentence, and remand the matter to the Circuit Court for a new trial.

Respectfully submitted,

RAYMOND D'ARCO
By Counsel

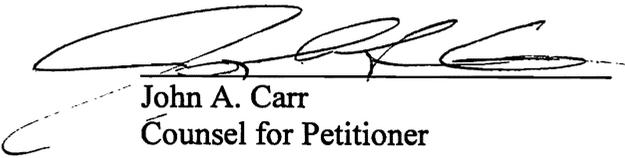


John A. Carr (WVSB #10461)
John A. Carr, Atty at Law, PLLC
179 Summers Street, Suite 209
Charleston, WV 25301
(304) 344-4822
Email: jcarr@jcarlaw.com

Counsel for Petitioner

CERTIFICATE OF SERVICE

I, John A. Carr, hereby certify that on the 16 day of November, 2011, I mailed a copy of the foregoing *Petitioner's Brief* and the *Appendix Record* to Jake Morgenstern, Assistant Attorney General, State of West Virginia, 812 Quarrier Street, 6th Floor, Charleston WV 25301, (304) 558-5830, counsel for the respondent.



John A. Carr
Counsel for Petitioner