IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	**)**	
	)	
Respondent,	**)**	
	)	
vs.	**)**	**No. SC 87860**
	)	
BRIAN EDWARD NEHER,	**)**	
	)	
Appellant.	**)**	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF BARTON COUNTY, MISSOURI
TWENTY-EIGHTH JUDICIAL CIRCUIT
THE HONORABLE JAMES R. BICKEL, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Brian Neher appeals his conviction following a bench trial in the Circuit Court of Barton County, Missouri, before the Honorable James R. Bickel, for manufacturing a controlled substance, § 195.211,[1] possession of a controlled substance, § 195.202, possession of a methamphetamine precursor drug with intent to manufacture amphetamine or methamphetamine, § 195.246, possession of a chemical with intent to create a controlled substance, § 195.420, and possession of drug paraphernalia with intent to use, § 195.233. The court sentenced Mr. Neher to concurrent terms of imprisonment of ten, five, four, four, and four years, respectively. After the Missouri Court of Appeals, Southern District, issued its opinion in SD 27153, this Court granted Mr. Neher's application for transfer pursuant to Rule 83.04. This Court has jurisdiction of this appeal under Article V, Section 3, Mo. Const. (as amended 1976).

[1] All statutory citations are to RSMo 2000, unless otherwise stated.

STATEMENT OF FACTS

Then-Barton County Sheriff William Griffitt applied for a search warrant on August 30, 2004, to search Brian Neher's home (Tr. 4-5).[2] The affidavit stated:

> Your affiant, being a duly sworn peace officer in the State of Missouri, received a phone call from a reliable confidential informant on today's date of 08-30-2004, about a Brian Neher who resides at 4 SE 95th Rd in Barton County. Brian Neher lives in a white trailer house, which is approximately a 16x60 and lives on a dead end road in Barton County. It is better described as the first trailer house west of the railroad tracks, and it is the trailer house right next to his parents [sic] house on 95th rd. The confidential informant has previously given information to your affiant which has been corroborated and found to be reliable.
>
> The confidential informant contacted your affiant, Sheriff William A Griffitt on today's date of 08-30-2004 and stated the Brian Neher was cooking meth late last night (8/29-30/04). The confidential informant also stated that Neher has all the chemicals used in the [sic] manufacturing methamphetamine. The confidential informant also stated that he also is in possession of paraphernalia for the manufacturing and use of methamphetamine.

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[2] The Record on Appeal consists of a suppression hearing transcript (Hr.Tr.), a trial transcript (Tr.), and a legal file (L.F.).

> Nehr [sic] is a known drug user, and manufacturer in Barton and Jasper Counties, and also has a criminal history for possession of controlled substance [sic]. One of his associates who was at the residence on 08-29-2004, was a Carl Dale Carter who also has an extensive criminal history involving dangerous drugs including Methamphetamine. Carl Dale Carter was arrested for possession of a control [sic] substance on 02-07-2000 in Barton County.

(State's Exhibit 2).

The court conducted a hearing on December 30, 2004, on Mr. Neher's motion to suppress the evidence seized during the search (Hr.Tr. 1, 4-18). Sheriff Griffitt testified that the information in his affidavit was from his informant's personal knowledge (Hr.Tr. 6-7). He said that the informant, whose identity he knew, told him that he smelled an odor coming from, and saw canisters of chemicals in Mr. Neher's trailer that were used to make methamphetamine (Hr.Tr. 8-9). He also told the sheriff that there was "a lot of traffic" in and out of the trailer, including a man named Dale Carter (Hr.Tr. 8).

During argument on the motion, the prosecutor conceded that the affidavit did not say whether the information came from the informant's personal knowledge; he disagreed that that meant that the confidential informant's information had to have itself been hearsay (Hr.Tr. 10). After taking the matter under advisement, the court issued an order denying the motion to suppress, in which it accepted "[Mr. Neher's] argument that the affidavit itself did not state that the informant's information had

been personally observed[,]" and concluded that it could not consider the hearing testimony, because it "was not the case" that the warrant application and supporting affidavits provided probable cause to search (Hr.Tr. 17; L.F. 20-21).

The court also found, however, that "it could be assumed that the confidential informant had personal knowledge as easily as it could be inferred that his information came from hearsay[,]" and therefore, under the good faith exception, the sheriff "could have believed the information came from the confidential informant's personal observation." (L.F. 21).

Mr. Neher filed a second motion to suppress, which was heard on the day of trial, July 21, 2005 (L.F. 22-25; Tr. 1, 5-35). He alleged that he had reason to believe that the confidential informant was Mr. Neher's father, Tony Neher, and that Tony Neher did not actually go in Mr. Neher's trailer and did not personally see the items that the sheriff mentioned in the warrant application and affidavit (L.F. 22-23). He argued that the affidavit was false or made with reckless disregard for the truth and the evidence seized pursuant to the warrant should be suppressed under ***Franks v. Delaware***, 438 U.S. 154 (1978) (L.F. 23).

Mr. Neher called his father to testify at the hearing, who said that he lives next door to Mr. Neher's trailer (Tr. 6). Tony said he had in fact called the sheriff "a few days" before his son was arrested and his home was searched (Tr. 7). Tony reported smelling a chemical odor that came into his home from his son's trailer (Tr. 7-8). The smell was like what he smelled before when Mr. Neher was "producing Meth" (Tr. 9). He did not go in the trailer, though he testified both that he could see the items in the

trailer through the open door, and that it was his wife who told what she had seen (Tr. 8-9, 11).

In interviews several months before, and again the day before and the day of the hearing, Tony told the public defender's investigator that he had not seen anything inside the trailer -- he repeated that he was never in it (Tr. 9-10). He also agreed that he told the investigator that the information he gave the sheriff was that he had not seen inside the trailer but that his wife had (Tr. 11-12). On cross-examination by the prosecutor, Tony reiterated that he could see into the trailer when Mr. Neher opened the door, though he did not know if what was in the canisters he saw was "consistent" with the manufacture of methamphetamine, because he did not know how it was made (Tr. 14-15). He said the defense investigator never asked if he could see into the trailer from where he stood outside (Tr. 15-16).

On redirect, Tony said that he told the sheriff that he had seen the items he associated with manufacturing methamphetamine (Tr. 20). He also agreed that he told the defense investigator that he had not seen it, but his wife had (Tr. 21). Tony finally testified that he did not tell the sheriff that Dale Carter had been at Mr. Neher's trailer on any particular day or date (Tr. 22).

Mr. Neher also called the defense investigator to testify; he said that Tony told him that "he had not been in the trailer and did not see anything." (Tr. 25, 28). The investigator asked if he had seen anything while talking to Mr. Neher; Tony told him, "No." (Tr. 28). Tony repeated this answer the day before the hearing (Tr. 28-29).. Tony said then that his wife told him that she "had seen Brian with something that she

thought was related to cooking Meth" (Tr. 29). Tony told the investigator that he relayed the conversation to the sheriff (Tr. 29). Immediately before the hearing, Tony told defense counsel and the investigator the same thing about what he and his wife had seen (Tr. 29-30).

At the conclusion of the hearing, the court again denied the motion; it did not address the defense request that the State disclose the identity of the confidential informant (Tr. 31-35).

Counsel then confirmed that Mr. Neher waived jury trial and the trial commenced (Tr. 35).

The State called a single witness, current Barton County Sheriff Shannon Higgins, who was a deputy at the time of the search in August, 2004 (Tr. 38-39). Higgins participated in that search as chief deputy, along with Sheriff Griffitt and three other officers (Tr. 39-40). Among Higgins's duties was to "conduct the search of the residence for precursors used in the manufacture of methamphetamine." (Tr. 40).

Photographs of the items Higgins seized from Mr. Neher's trailer (State's Exhibits 4 and 5), as well as the lab report indicating the findings as to those items it tested (Exhibit 6), and the inventory of the items seized (Exhibit 7), were admitted over Mr. Neher's objections based upon the issues raised in his motions to suppress—that the items were seized pursuant to an unlawful search (Tr. 41-49). The objections were made continuing (Tr. 45). Mr. Neher did not object to chain of custody as to the lab report (Tr. 44-45).

Sheriff Higgins testified that among the items he seized was red phosphorus; he was unsure whether there was sulfuric acid (Tr. 47). The prosecutor then asked, "And it is my understanding that red phosphorus is used in one of the processes of manufacturing?" (Tr. 47). Higgins answered, "Yes, sir, what is referred to as a 'red pee cook'." (Tr. 47). When asked if the coffee filters, glass containers, and tubing he found were set up in any particular manner, Higgins responded that, "there were several different locations where they were stored together." (Tr. 47). Higgins smelled a chemical odor in the trailer that he had noticed "during or after a Methamphetamine cook has taken place." (Tr. 48).

At the conclusion of trial, the court found Mr. Neher "guilty of Counts I, III, IV and V. I will find him not guilty as to Count II." (Tr. 51).[3] The prosecutor then asked, "Are you doing lesser included offense on two?" (Tr. 51). The court noted that it found no evidence of intent to deliver, after asking if the prosecutor wished to submit a lesser included offense under Count II (Tr. 51-52). The court overruled his request to do so, then asked "what lesser included offense?" (Tr. 52).

The prosecutor responded, "Class C felony possession of controlled substance," and the court asked defense counsel for comment, who said that he believed the court had the authority to find a defendant at a bench trial guilty of lesser included offenses (Tr. 52). The court then found Mr. Neher guilty under Count II of possession of methamphetamine (Tr. 52).

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[3] Count II was charged as possession of methamphetamine with intent to deliver (L.F. 14).

Following a waiver of the right to file a motion for new trial, the court sentenced Mr. Neher to concurrent terms of imprisonment of ten years for manufacturing, five years for possession of methamphetamine, and four years each for possession of a precursor drug, possession of a chemical with intent to create a controlled substance, and possession of drug paraphernalia with intent to use (L.F. 6, 26; Tr. 52-53, 55-56). Notice of appeal was filed July 27, 2005 (L.F. 29).

POINTS RELIED ON

I.

The trial court plainly erred in finding Mr. Neher guilty under Count II of possession of methamphetamine, and in sentencing him on that count, because these actions violated Mr. Neher's right to due process of law and to be free from double jeopardy, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 19 of the Missouri Constitution, in that the court had already announced that it found Mr. Neher "not guilty as to Count II"—possession of methamphetamine with intent to deliver—before considering the question of a lesser included offense as requested by the prosecutor; the court, having already found Mr. Neher not guilty without specifying the level of the offense, could not thereafter find him guilty of the lesser included offense of simple possession.

Tibbs v. Florida, 457 U.S. 31 (1982);

Barnes v. State, 9 S.W.3d 646 (Mo.App. E.D. 1999);

Hagan v. State, 836 S.W.2d 459 (Mo. banc 1992);

State v. Davison, 46 S.W.3d 68 (Mo.App. W.D. 2001);

U.S. Const., Amends. V and XIV;

Mo. Const., Art. I, Secs. 10 and 19; and

Rules 27.01 and 30.20.

II.

The trial court clearly erred in overruling Mr. Neher's first motion to suppress evidence, and in overruling his objections to all evidence concerning the methamphetamine and other items seized as a result of the search of his home, because this denied Mr. Neher his right to be free from unreasonable search and seizure, as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution, and Article I, Section 15 of the Missouri Constitution, in that the affidavit used to obtain the search warrant for Mr. Neher's home was based on hearsay and there was no substantial basis for judging the veracity and basis of knowledge of the source of the information and thus crediting that hearsay; further, there was no independent corroboration by law enforcement officers of any information received from the confidential informant, nor was there a prediction of future movements or activity by Mr. Neher. Because the affidavit was insufficient to provide probable cause, the property seized and the testimony concerning it was obtained as a direct result of an illegal search and should have been suppressed as the fruit of the poisonous tree.

Illinois v. Gates, 462 U.S. 213 (1983);

State v. Hammett, 784 S.W.2d 293 (Mo.App. E.D. 1989);

State v. Baker, 103 S.W.3d 711 (Mo. banc 2003);

State v. Williams, 9 S.W.3d 3 (Mo.App. W.D. 1999);

U.S. Const., Amends IV and XIV;

Mo. Const., Art. I, Secs. 10 and 15;

§ 542.296; and

Rule 29.11.

ARGUMENT

I.

The trial court plainly erred in finding Mr. Neher guilty under Count II of possession of methamphetamine, and in sentencing him on that count, because these actions violated Mr. Neher's right to due process of law and to be free from double jeopardy, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 19 of the Missouri Constitution, in that the court had already announced that it found Mr. Neher "not guilty as to Count II"—possession of methamphetamine with intent to deliver—before considering the question of a lesser included offense as requested by the prosecutor; the court, having already found Mr. Neher not guilty without specifying the level of the offense, could not thereafter find him guilty of the lesser included offense of simple possession.

At the conclusion of trial, the court found Mr. Neher guilty of all other counts, but specifically said, "I will find him not guilty as to Count II." (Tr. 51).[4] The following exchange then occurred:

> [The Prosecutor]: Are you doing lesser included offense on two?
>
> THE COURT: Do you wish to submit a lesser included offense under Count II?

[4] Charged as possession of methamphetamine with intent to deliver (L.F. 14).

The Court finds that there has not been sufficient evidence to find attempt to deliver.

[The Prosecutor]: I guess I am so requesting.

THE COURT: Overruled. As to what lesser included offense?

[The Prosecutor]: Class C felony possession of controlled substance, without the intent part of it.

(Tr. 51-52).

The court asked defense counsel for comment, who said that he believed the court had the authority to find a defendant at a bench trial guilty of lesser included offenses (Tr. 52). The court then found Mr. Neher guilty under Count II of simple possession of methamphetamine (Tr. 52). After Mr. Neher waived the opportunity to file a motion for new trial, the court sentenced him to five years imprisonment on Count II, to be served concurrently with the sentences on all other counts (L.F. 26; Tr. 52-53, 55-56).

Mr. Neher's counsel did not object to the court's statement that it could consider lesser included offenses; indeed, he agreed that such was possible (Tr. 52). Ordinarily, this would preserve nothing for appellate review. ***State v. Burnfin***, 771 S.W.2d 908, 912 (Mo.App. W.D. 1989). Plain error review is warranted where "the alleged error so substantially affects the rights of the accused that a manifest injustice or a miscarriage of justice inexorably results, if left uncorrected." ***State v. Hadley***, 815 S.W.2d 422, 423 (Mo. banc 1991); Rule 30.20. The right to be free from double jeopardy is such a fundamental right.

The Fifth Amendment to the United States Constitution declares: "[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb[.]" Article I, § 19 of the Missouri Constitution similarly states that no person shall "be put again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury[.]" Mr. Neher's acquittal of Count II by the court is entitled to these same protections: where, as here, there is a waiver of a jury trial, the court's "findings shall have the force and effect of the verdict of a jury." Rule 27.01(b).

Further, in ***Smith v. Massachusetts***, 543 U.S. 462, 467 (2005), the United States Supreme Court noted that it has "long held that the Double Jeopardy Clause of the Fifth Amendment prohibits reexamination of a court-decreed acquittal to the same extent it prohibits reexamination of an acquittal by jury verdict." This rule applies in both bench and jury trials. *Id*. The Court also noted that if there is a guilty verdict by a jury, and the judge thereafter enters a judgment of acquittal, "the Double Jeopardy Clause does not preclude a prosecution appeal to reinstate the jury verdict of guilty." [citation omitted] But if the prosecution has not yet obtained a conviction, further proceedings to secure one are impermissible: '[S]ubjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause.'" *Id*., quoting, ***Smalis v. Pennsylvania***, 476 U.S. 140, 145 (1986).

There is, as may be imagined, a paucity of caselaw on the issue of a court finding a defendant not guilty of an offense, then afterwards proceeding to either find him guilty or retry him on a lesser included offense. It is likely that this is because, "the Double Jeopardy Clause attaches special weight to judgments of acquittal. A

verdict of not guilty, whether rendered by a jury or directed by the trial judge, absolutely shields the defendant from retrial." ***Tibbs v. Florida***, 457 U.S. 31, 41 (1982). It just does not happen often that the State obtains a conviction for an offense after the defendant has been previously acquitted.

In ***Barnes v. State***, 9 S.W.3d 646, 647 (Mo.App. E.D. 1999), the trial court, in considering the defendant's motion for judgment of acquittal at the close of the State's evidence in a first degree murder trial, said "I will sustain the Motion for the defense in terms of Murder First Degree. I don't believe that any deliberation has been provided [sic] in the case, so I'm going to do that, sustain it as to the charge of Murder First Degree." The trial court also wrote "sustained" on the motion for judgment of acquittal, but reconsidered its ruling after the State provided it with additional case law, declaring that it was not its intent to make a ruling, but rather to simply indicate to the State that it was considering granting the motion; it ultimately submitted the charge to the jury as first degree murder. *Id*., at 648-50.

After the jury could not reach a verdict, the defendant was retried and convicted of first degree murder. *Id*., at 650. On appeal of that verdict, the Court of Appeals noted that, "[t]he parties have cited no authority, which would support the conclusion that the oral announcement and the written notation sustaining the motion for judgment of acquittal at the close of the state's case was subject to reconsideration." *Id*. Here, too, the trial court, without reservation, found Mr. Neher "not guilty as to Count II." (Tr. 51).

"Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '(a) verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting (a defendant) twice in jeopardy, and thereby violating the Constitution.'" ***United States v. Martin Linen Supply Co.***, 430 U.S. 564, 571 (1977); *quoting*, ***United States v. Ball***, 163 U.S. 662, 671 (1896). Further,

> it has long been settled under the Fifth Amendment that a verdict of acquittal is final, ending a defendant's jeopardy, and even when 'not followed by any judgment, is a bar to a subsequent prosecution for the same offence.' [*citing* ***Ball***]. Thus it is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous. [*citing* ***Ball***; ***Peters v. Hobby***, 349 U.S. 331, 344-45 (1955).]

Green v. United States, 355 U.S. 184, 188 (1957).

Therefore, the State could not challenge the verdict of not guilty. Once the court rendered that verdict, the State could not ask that the court consider lesser included offenses as to Count II, because the court had no further authority with respect to that offense. And the court did not at first merely find that the State had not proved that Mr. Neher had the intent to deliver methamphetamine. It simply said, without reservation, "not guilty as to Count II." (Tr. 51). This means that it had no authority to change that verdict after the fact, which was when the prosecutor asked the court to consider the lesser included offense of simple possession (Tr. 51-52). Thus, Mr. Neher's case is unlike ***Barnes*** insofar as the proper relief is concerned.

In ***Barnes***, the trial court in the beginning said, "I will sustain the Motion for the defense in terms of Murder First Degree. I don't believe that any deliberation has been provided [sic] in the case, so I'm going to do that, sustain it as to the charge of Murder First Degree." 9 S.W.3d at 647. Thus, it was not a judgment of acquittal as to the homicide *count* itself, only as to the highest degree of offense submitted under that count, similarly to what occurs when a multiple degree offense is submitted to a jury.

In such a case, the verdict forms reflect the various possibilities: guilty of the greater offense, under the particular count; guilty of any lesser offense(s) under that count; or not guilty *as to that count*, which is the precise the court used in finding Mr. Neher not guilty: "not guilty as to Count II." (Tr. 51). Had this been a jury verdict using such language, the State could not have asked the court to submit lesser offenses to the jury after it had found Mr. Neher not guilty as to that Count; his guilt, or lack of guilt, had been determined, and the trial would have been over at that point.

Here, however, the court found Mr. Neher not guilty *as to Count II*, period. Even though it responded to the prosecutor's question about a lesser included offense with the statement that there was not "sufficient evidence to find attempt [sic][5] to deliver[,]" that does not change the fact that it had already found Mr. Neher not guilty as to Count II. That genie could not be put back in the bottle.

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[5] The court presumably either said or meant to say "intent" rather than "attempt," since that was the nature of the charge (L.F. 14).

"[T]he constitutional guarantee against double jeopardy is 'significantly different' from the constitutional guarantees pertaining to procedural rights[;] . . . 'while this guarantee (double jeopardy), like the others, is a constitutional right of the criminal defendant, its practical result is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial.'" ***State v. Cody***, 525 S.W.2d 333, 335 (Mo. banc 1975), quoting ***Robinson v. Neil***, 409 U.S. 505, 509 (1973) (***Cody*** *overruled on other grounds,* ***State v. Heslop***, 842 S.W.2d 72, 75 (Mo. banc 1992). Further, in ***Hagan v. State***, 836 S.W.2d 459, 461 (Mo. banc 1992), this Court recognized that, because the right to be free from double jeopardy is a constitutional right which goes "to the very power of the state to bring the defendant in the court to answer the charge brought against him," claims of double jeopardy are not waived by a guilty plea and may be considered in any case in which this Court can determine from the face of the record that the trial court had no power to enter the conviction.

In ***State v. Davison***, 46 S.W.3d 68, 78, n.4 (Mo.App. W.D. 2001), the Western District of the Court of Appeals applied ***Hagan*** to the defendant's conviction, resulting not from a guilty plea but from a jury trial:

> The State suggests that the double jeopardy issue is not apparent on the face of the record and was waived because not raised below, *see* ***State v. Dunn***, 7 S.W.3d 427, 430 (Mo.App. W.D. 1999) (noting that "a claim of double jeopardy is a personal privilege that is waived if not raised at the proper time"). On remand, however, Mr. Davison would

> be able to raise this claim at any new trial. Moreover, here, *it was apparent from the face of the record that the seven counts failed to allege more than a single crime of retaining stolen property, and the record affirmatively shows the failure to prove an element of six of the counts submitted*. *See* ***State v. Elliott***, 987 S.W.2d 418, 420-21 (Mo.App. W.D. 1999), *citing*, ***Hagan v. State***, 836 S.W.2d 459, 461 (Mo. banc 1992) (recognizing that, because the right to be free from double jeopardy is a constitutional right which goes "to the very power of the state to bring the defendant in the court to answer the charge brought against him," even waived claims of double jeopardy may be considered in any case in which we can determine from the face of the record that the court had no power to enter the conviction). We have therefore addressed the issue on this appeal.

The face of the record in this case establishes that Mr. Neher was first acquitted before he was "found guilty" of the lesser included offense.

The State argued below that Mr. Neher waived this claim by failing to object when the prosecutor raised the subject or the court purported to find Mr. Neher guilty. But it never explained how such a waiver can occur after the fact of Mr. Neher's acquittal on Count II. Once acquitted, counsel's statement was irrelevant. Would the State argue that a jury verdict of acquittal, once signed and accepted could be ignored in a later trial for the same offense, and that the defendant would have no recourse on appeal if his attorney said he thought that was proper? There is no waiver issue here.

The State also did not explain how an "affirmative" waiver can occur where the subject is not even addressed, by counsel, the court, or even the prosecutor. No one in the courtroom mentioned, or apparently realized, that proceeding lesser included offenses on Count II after an acquittal would infringe Mr. Neher's "absolute shield" against retrial. ***Tibbs v. Florida***, 457 U.S. at 41. Further, the State did not address the concept that any waiver of a constitutional right must be an intentional relinquishment of a known right or privilege. ***Johnson v. Zerbst***, 304 U.S. 458, 464 (1938). There is nothing in the record in this case that would allow such a finding.

The ***Barnes*** Court, in discussing the fact that the State did not raise the issue of waiver, said:

> It may be that the state recognizes that any act or failure to act which may be construed as a waiver of an absolute legal defense on retrial on the charge of murder first degree would be ineffective assistance of counsel, per se, where the court both orally and in writing sustained defendant's motion for judgment of acquittal on that offense.

9 S.W.3d at 651. While the verdict of "not guilty" here was solely oral, it was no less incumbent on counsel to object to the court finding Mr. Neher guilty after it had acquitted him.

The trial court, without reservation, found Mr. Neher "not guilty as to Count II." At that point, it was too late to consider lesser included offenses. For that reason, the Court of Appeals' reliance on ***State v. O'Dell***, 684 S.W.2d 453 (Mo.App. S.D. 1984), missed the point. The ***O'Dell*** Court said, "the double jeopardy clause does not

bar a determination of guilt of a lesser included offense in the same trial." *Id*., at 465. Mr. Neher never took issue with that basic proposition. Nor did he dispute that the trial court expressed its reasoning, *after* finding Mr. Neher not guilty, that the State had failed to prove beyond a reasonable doubt that he intended to deliver the methamphetamine. Had the trial court initially said, "As to Count II, I find him guilty of simple possession," or "I find no evidence of intent to distribute," then Mr. Neher would have no argument. But that is not what happened. The court did *not* find Mr. Neher guilty of the lesser included offense until it had *already* found him *not* guilty of Count II as a unit of prosecution -- with no limitation or reservation as to the reason for its verdict. Again, had a jury returned a verdict of not guilty, it would have been too late for the State to ask to submit a lesser-included offense instruction. The same must hold here.

Once the trier of fact found Mr. Neher not guilty as to Count II, possession of methamphetamine with intent to deliver, it could no longer consider the State's request to find him guilty of the lesser included offense of simple possession, and manifest injustice will inexorably result from his being sentenced to five years in prison after he was acquitted on that Count. This Court must therefore reverse Mr. Neher's conviction and sentence on Count II and discharge him therefrom.

II.

The trial court clearly erred in overruling Mr. Neher's first motion to suppress evidence, and in overruling his objections to all evidence concerning the methamphetamine and other items seized as a result of the search of his home, because this denied Mr. Neher his right to be free from unreasonable search and seizure, as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution, and Article I, Section 15 of the Missouri Constitution, in that the affidavit used to obtain the search warrant for Mr. Neher's home was based on hearsay and there was no substantial basis for judging the veracity and basis of knowledge of the source of the information and thus crediting that hearsay; further, there was no independent corroboration by law enforcement officers of any information received from the confidential informant, nor was there a prediction of future movements or activity by Mr. Neher. Because the affidavit was insufficient to provide probable cause, the property seized and the testimony concerning it was obtained as a direct result of an illegal search and should have been suppressed as the fruit of the poisonous tree.

Then-Barton County Sheriff William Griffitt applied for a search warrant on August 30, 2004, to search Brian Neher's home (Tr. 4-5). The affidavit stated:

> Your affiant, being a duly sworn peace officer in the State of Missouri, received a phone call from a reliable confidential informant on today's date of 08-30-2004, about a Brian Neher who resides at 4 SE 95th Rd in

Barton County. Brian Neher lives in a white trailer house, which is approximately a 16x60 and lives on a dead end road in Barton County. It is better described as the first trailer house west of the railroad tracks, and it is the trailer house right next to his parents [sic] house on 95th rd. The confidential informant has previously given information to your affiant which has been corroborated and found to be reliable.

The confidential informant contacted your affiant, Sheriff William A Griffitt on today's date of 08-30-2004 and stated the Brian Neher was cooking meth late last night (8/29-30/04). The confidential informant also stated that Neher has all the chemicals used in the [sic] manufacturing methamphetamine. The confidential informant also stated that he also is in possession of paraphernalia for the manufacturing and use of methamphetamine.

Nehr [sic] is a known drug user, and manufacturer in Barton and Jasper Counties, and also has a criminal history for possession of controlled substance [sic]. One of his associates who was at the residence on 08-29-2004, was a Carl Dale Carter who also has an extensive criminal history involving dangerous drugs including Methamphetamine. Carl Dale Carter was arrested for possession of a control [sic] substance on 02-07-2000 in Barton County.

(State's Exhibit 2).

At a hearing on Mr. Neher's motion to suppress the evidence seized during the search, Sheriff Griffitt testified that the information in his affidavit was from his informant's personal knowledge (Hr.Tr. 6-7). He said that the informant, whose identity he knew, told him that he smelled an odor coming from, and saw canisters of chemicals in, Mr. Neher's trailer that were used to make methamphetamine (Hr.Tr. 8-9). He also told the sheriff that there was "a lot of traffic" in and out of the trailer, including a man named Dale Carter (Hr.Tr. 8).

During argument on the motion, the prosecutor conceded that the affidavit did not say whether the information came from the informant's personal knowledge; he disagreed that that meant that the confidential informant's information had to have itself been hearsay (Hr.Tr. 10). After taking the matter under advisement, the court issued an order denying the motion to suppress, in which it accepted "[Mr. Neher's] argument that the affidavit itself did not state that the informant's information had been personally observed[,]" and concluded that it could not consider the hearing testimony, because it "was not the case" that the warrant application and supporting affidavits provided probable cause to search (Hr.Tr. 17; L.F. 20-21).

The court also found, however, that "it could be assumed that the confidential informant had personal knowledge as easily as it could be inferred that his information came from hearsay[,]" and therefore, under the good faith exception, the sheriff "could have believed the information came from the confidential informant's personal observation." (L.F. 21).

At trial, Mr. Neher objected on the basis of his pretrial motions to suppress when photographs of the items seized (State's Exhibits 4 and 5), the lab report concerning testing of those items (Ex. 6), and the inventory of items seized (Ex. 7), were offered into evidence (Tr. 42-44, 49). The court also granted Mr. Neher a continuing objection as to all of his "search and seizure objections." (Tr. 45-46). Because this was a bench trial, no motion for new trial was required. *See* Rule 29.11(e).

Standard of review

In reviewing a motion to suppress based upon an insufficient warrant, the appellate court gives great deference to the initial judicial determination of probable cause made at the time of the issuance of the warrant. ***State v. Norman***, 133 S.W.3d 151, 160 (Mo.App. S.D. 2004). In reviewing whether the issuing judge was clearly erroneous, this Court looks to the four corners of the affidavit in support of the search warrant. ***State v. Laws***, 801 S.W.2d 68, 70 (Mo. banc 1990). It reviews the facts under a clearly erroneous standard, but the question whether the Fourth Amendment was violated is reviewed *de novo*. ***Norman***. In reviewing the propriety of the trial court's ruling on the motion to suppress, the facts, and reasonable inferences arising therefrom, are to be stated favorable to the order challenged on appeal. ***State v. Burkhardt***, 795 S.W.2d 399, 404 (Mo. banc 1990).

The State's burden of proof and risk of nonpersuasion

§ 542.296 provides that the State bears the burden of going forward with the evidence, as well as bearing the risk of nonpersuasion if it fails to establish by a

preponderance of the evidence that a motion to suppress should be overruled. § 542.296.6; ***State v. Franklin***, 841 S.W.2d 639, 644 (Mo. banc 1992).

Applicable Law

Both the United States and Missouri Constitutions protect citizens from unreasonable searches and seizures.

The Fourth Amendment states, "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The Fourteenth Amendment extends this protection to state prosecutions. ***Mapp v. Ohio***, 367 U.S. 643 (1961).

Likewise, the Missouri Constitution ensures "[t]hat the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing shall issue without describing the place to be searched, or the person or thing to be seized, as nearly as may be; nor without probable cause, supported by written oath or affirmation." Mo. Const., Art. I, Sec. 15. A search warrant is deemed invalid if it was issued without probable cause. § 542.296.10(3). Probable cause is "a fair probability that contraband or evidence of a crime will be found." ***Illinois v. Gates***, 462 U.S. 213, 238 (1983).

The neutral magistrate issuing a search warrant must determine probable cause from the totality of the circumstances and must make a "practical commonsense decision whether . . . there is a fair probability that contraband or evidence of a crime

will be found. ***Gates***, 462 U.S. at 238. That decision is to be made based upon all the circumstances set out in the affidavit including the "basis of knowledge" and "veracity" of persons providing the hearsay information. *Id*. While this Court must give the issuing judge's initial determination "great deference", the judge does not have unbridled discretion. As noted in ***State v. Hammett***, 784 S.W.2d 293 (Mo.App. E.D. 1989), an affidavit must provide the issuing judge with a *substantial* basis for determining the existence of probable cause. ***Hammett***, 784 S.W.2d at 293, *quoting* ***Gates***, 462 U.S. at 239.

That substantial basis must include the "veracity" and "basis of knowledge" of persons supplying hearsay information. ***Hammett***. In addition, that substantial basis must exist *before* the search warrant is issued, and not afterwards, with the benefit of 20-20 hindsight. *Id*. And, it must be contained within the application and/or supporting affidavits since the issuing judge may not consider oral testimony in determining whether there is probable cause to issue the search warrant. ***State v. Gordon***, 851 S.W.2d 607, 612 (Mo.App. S.D. 1993).

An affidavit that relies on hearsay is sufficient to support a finding of probable cause if there is a substantial basis for crediting the hearsay. ***State v. Baker***, 103 S.W.3d 711, 720 (Mo. banc 2003). Hearsay may be found reliable when it is based on personal observation and it is corroborated. ***State v. Williams***, 9 S.W.3d 3, 14 (Mo.App. W.D. 1999). "If the hearsay can be properly credited, there is no need to show the informant was reliable." *Id*. Also, "[w]hen an informant's information is at least partly corroborated, as it was in the instant case, 'attacks upon credibility and

reliability are not crucial to the finding of probable cause.'" ***State v. Mitchell***, 20 S.W.3d 546, 554 (Mo.App. W.D. 2000) (citation omitted).

Sheriff Griffitt's affidavit is insufficient and should not have been considered by the issuing judge because the basis of the veracity of the informant was not included, and there was no corroboration. "The issuing judge cannot accurately determine probable cause from the totality of the circumstances if he or she has no idea what the circumstances are." ***State v. Trenter***, 85 S.W.3d 662, 676 (Mo.App. W.D. 2002). Again, as in ***Mitchell***, "[t]he personal knowledge of a confidential informant that is corroborated through other sources is enough to establish probable cause." ***State v. Beatty***, 770 S.W.2d 387, 392 (Mo.App. S.D. 1989) (anonymous tip was corroborated by investigation revealing that physical description of robber matched defendant); *also see* ***State v. Ford***, 21 S.W.3d 31 (Mo.App. E.D. 2000) (informant's tip corroborated by officers' observations); ***United States v. Vinson***, 414 F.3d 924 (8th Cir. 2005) (informant's previous information led to numerous arrests and convictions, and information was independently corroborated); ***Laws***, 801 S.W.2d at 69 (affiant personally observed activities on defendant's property consistent with sale of controlled substance); ***State v. Davison***, 46 S.W.3d 68 (Mo.App. W.D. 2001) (informant's tip partially corroborated by officer's investigation).

An officer may rely on information received from an anonymous tip if that information is reasonably corroborated by matters within the officer's knowledge. ***Gates***, 462 U.S. at 242-46. In ***Gates***, the Court recognized that the honesty and reliability of an anonymous caller's information regarding alleged criminal activity

cannot ordinarily be proven prior to executing a search warrant. But an anonymous informant's ability to predict future events which are subsequently corroborated by an officer's observations lends particular support to the fair probability that the informant's predictions regarding criminal activity are likewise trustworthy. *Id.* at 245.

Here, there was no corroboration of any information provided by the confidential informant. There was no showing that the sheriff knew anything about Mr. Neher's residence, and no detail as to the allegedly reliable information the informant gave the sheriff in the past. And the affidavit did not say whether it was based on the informant's personal knowledge or hearsay, nor whether the informant's information led to arrests or convictions on previous occasions, nor how the informant knew that Mr. Neher had been "cooking meth" the night before or that he had all the necessary chemicals,[6] nor that the informant predicted Mr. Neher's future movements

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[6] Mr. Neher called his father Tony to testify at the hearing on his second motion to suppress, claiming the affidavit contained false statements (*see*, ***United States v. Leon***, 468 U.S. 897, 923 (1983) (suppression "remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth." *Citing* ***Franks v. Delaware***, 438 U.S. 154 (1978)). If Tony was the confidential informant, he did *not* say that Brian had "all the chemicals used in the [sic] manufacturing methamphetamine." (Ex. 2). In fact, he did not know *what*

or activities that the officer subsequently observed. There was simply no substantial basis for crediting the hearsay, ***Williams***, 9 S.W.3d at 14, nor any corroboration, if it was based on the informant's personal knowledge. ***Beatty***, 770 S.W.2d at 392.

It is important to recall that the court's order denying the motion to suppress accepted Mr. Neher's argument that "the affidavit itself did not state that the informant's information had been personally observed[,]" and concluded that it could not consider the hearing testimony, because it "was not the case" that the warrant application and supporting affidavits provided probable cause to search (Hr.Tr. 17; L.F. 20-21). Therefore, this Court must give

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chemicals were used in the process; he just saw "some cans of stuff there on the counter" but could not say what they were (Tr. 8-9). Nor did he testify to having seen Carl Carter in Brian's home the night before the search (Ex. 2); he testified that he had seen Carter there on some unspecified date (Tr. 22). And neither Tony nor the sheriff testified that he had given the sheriff reliable information on previous occasions (Ex. 2). And if Tony was *not* the informant, then the State gave *no* basis for the court to accept the informant's veracity, or the sheriff's affidavit. Mr. Neher notes in this regard that the court never ruled on his motion to disclose the informant's identity, contained in the second motion to dismiss as an alternate request for relief (L.F. 22-24; Tr. 31-32, 34-35). Had the informant's identity been disclosed, Mr. Neher could have filed a motion to suppress based on whether his account of events, unlike Tony's, matched that of the sheriff.

great deference to that determination of a *lack* of probable cause. ***Baker***, 103 S.W.3d at 720. The trial court denied the motion to suppress solely because "it could be assumed that the confidential informant had personal knowledge as easily as it could be inferred that his information came from hearsay[,]" and therefore, under the good faith exception, the sheriff "could have believed the information came from the confidential informant's personal observation." (L.F. 21).

This conclusion misapplies the burden of proof, which remained on the State. ***Franklin***, 841 S.W.2d at 644. If the sheriff failed to prove the basis for the informant's knowledge, or some facts corroborating his story, the State may not make use of the good faith exception to validate a warrant that was deficient because of the sheriff's own failure. The "***Leon***" good faith exception does not apply when the warrant is so facially deficient that the officers cannot reasonably presume it to be valid. ***Trenter***, 85 S.W.3d at 679, *citing*, ***Leon***, 468 U.S. at 923.

Because there was no basis for a finding of probable cause in the affidavit supplied to the issuing judge, the search and seizure of items in Mr. Neher's home violated his Fourth Amendment and Article I, § 15 rights. The evidence seized must be suppressed as the fruits of the poisonous tree. ***State v. Miller***, 894 S.W.2d 649, 656-57 (Mo. banc 1995); ***Wong Sun v. United States***, 371 U.S. 471 (1963). The trial court clearly erred in overruling Mr. Neher's motions to suppress and in permitting the state to introduce at trial the evidence obtained during the illegal search and seizure. Therefore, this Court should reverse Mr. Neher's convictions and remand for a new trial without that evidence.

CONCLUSION

For the reasons set forth in Point I, appellant Brian Neher respectfully requests that this Court reverse his convictions and sentence on Count II, possession of methamphetamine, and discharge him therefrom. For the reasons set forth in Point II, Mr. Neher respectfully requests that this Court reverse his conviction and sentence and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Kent Denzel, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word 2002, in 13 point Times New Roman font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 8,266 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disks filed with this brief and served on opposing counsel contain a complete copy of this brief, and have been scanned for viruses using McAfee VirusScan, updated in September, 2006. According to that program, these disks are virus-free.

On the _____ day of September, 2006, two true and correct copies of the foregoing brief and a floppy disk containing a copy thereof were mailed, postage prepaid, to the Office of the Attorney General, Criminal Appeals Division, 221 W. High Street, Jefferson City, MO 65102.

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Kent Denzel

APPENDIX

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