No. 87860

IN THE

Missouri Supreme Court

STATE OF MISSOURI,

Respondent,

v.

BRIAN EDWIN NEHER,

Appellant.

Appeal from the Circuit Court of Barton County, Missouri
28th Judicial Circuit
The Honorable James R. Bickel, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from convictions of manufacturing a controlled substance, § 195.211, RSMo 2000, possession of a controlled substance, § 195.202, RSMo 2000, possession of a methamphetamine precursor drug with intent to manufacture methamphetamine, § 195.246, RSMo 2000, possession of a chemical with intent to create a controlled substance, § 195.420, RSMo 2000, and possession of drug paraphernalia with intent to use, § 195.233, RSMo 2000. The convictions were obtained in the Circuit Court of Barton County, the Honorable James R. Bickel presiding. Appellant was sentenced to serve a ten-year term for manufacturing, a five-year term for possession of a controlled substance, and three four-year terms on the remaining convictions. The sentences were ordered to run concurrently. The Court of Appeals, Southern District, affirmed appellant's convictions and sentences, and this Court granted appellant's application for transfer. Thus, the Court has jurisdiction. MO. CONST., Art. V, § 10.

STATEMENT OF FACTS

On October 25, 2004, appellant, Brian Neher, was charged with manufacturing a controlled substance, § 195.211, RSMo 2000, possession of a controlled substance with intent to deliver, § 195.211, RSMo 2000, possession of a methamphetamine precursor drug with intent to manufacture methamphetamine, § 195.246, RSMo 2000, possession of a chemical with the intent to create a controlled substance, § 195.420, RSMo 2000, and possession of drug paraphernalia with intent to use, § 195.233, RSMo 2000 (L.F. 14-15). Viewed in the light most favorable to the verdict, the facts were as follows:

On August 30, 2004, pursuant to a search warrant, law enforcement officers searched appellant's residence, a trailer home located off Highway 71 in Barton County (Tr. 39). The search revealed the presence of methamphetamine and numerous drug-related items, many of which were associated with the manufacture of methamphetamine (Tr. 41-49). The items seized included: a plastic bag containing 33 grams of methamphetamine; two metal spoons, a piece of glass tubing, a plastic pen barrel, and three glass pipes with methamphetamine residue; a bottle of a liquid containing methamphetamine; coffee filters containing ephedrine or pseudo-ephedrine; a bottle of a liquid containing ephedrine or pseudoephedrine; a packet of twenty-four capsules of Sudafed; seven full blister packs of nasal decongestant antihistamine tablets; containers of iodine, starting fluid, camp fuel, muriatic acid, hydrogen peroxide, acetone, and red devil lye; plastic tubing and various plastic

bottles and glassware; a handwritten recipe; two tablets of acetaminophen; a set of electronic scales, and various amounts of marijuana, marijuana residue and marijuana-related paraphernalia (State's Exs. 6-7; Tr. 41-49).

At trial, on July 21, 2005, appellant did not testify or offer any evidence. The trial court found appellant guilty of manufacturing a controlled substance (count I), possession of a controlled substance (count II),[1] possession of a methamphetamine precursor drug with intent to manufacture methamphetamine (count III), possession of a chemical with the intent to create a controlled substance (count IV), and possession of drug paraphernalia with intent to use (count V) (Tr. 51-52). The court sentenced appellant as follows: manufacturing a controlled substance, ten years; possession of a controlled substance, five years; possession of a methamphetamine precursor, four years; possession of a chemical with intent to create, four years; and possession of drug paraphernalia, four years (Tr. 55-56). The court ordered the terms of imprisonment to run concurrently (Tr. 56).

The Court of Appeals, Southern District affirmed appellant's convictions and sentences. This Court granted appellant's application for transfer.

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[1] This was a lesser included offense of the charged offense of possession of a controlled substance with intent to deliver (Tr. 51-52).

ARGUMENT

I.

This Court should decline to review appellant's claim that he was subjected to double jeopardy on count II, because the claim was affirmatively waived. In any event, because it is apparent from the record that the trial court only acquitted appellant of having the requisite "intent to deliver" (the element of the greater offense that distinguished it from the lesser offense), the trial court did not plainly err, in purported violation of appellant's right to be free from double jeopardy, in convicting appellant of the lesser included offense of possession of a controlled substance.

Appellant claims that the trial court plainly erred in finding him guilty on count II of the lesser included offense of possession of a controlled substance (App.Sub.Br. 16). He argues that when the court found him "not guilty" of the charged offense (the greater offense) the court was thereafter precluded on double jeopardy grounds from then finding him guilty of the lesser included offense (App.Sub.Br. 16).

A. This Claim was Affirmatively Waived

At the conclusion of the evidence, the trial court found appellant guilty of each offense, as follows:

> THE COURT: At this time, the Court is going to find him guilty of Counts I, III, IV and V. I will find him not guilty as to Count II.
>
> [THE PROSECUTOR]: Are you doing lesser included offense on

two?

THE COURT: Do you wish to submit a lesser included offense under Count II?

The Court finds that there has not been sufficient evidence to find attempt[2] 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.

THE COURT: Mr. [defense counsel], any comments?

[DEFENSE COUNSEL]: Judge, actually it is my understanding that the Court is free to find the defendant guilty at a bench trial of lesser included offenses. So, as long as they are actually lesser included offenses, and obviously simple possession is one.

THE COURT: The Court does believe that there is sufficient evidence to find, under Count II, to enter a finding of guilty to a lesser

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[2] Count II charged that appellant had the "intent" to deliver (L.F. 14). Thus, it appears that the court reporter either misunderstood the court, or that the trial court misspoke.

included offense the Class C felony of possession of controlled substance, Methamphetamine.

(Tr. 51-52). On this record, appellant's claim was affirmatively waived.

"Constitutional claims are deemed to be waived if not presented to the trial court at the first opportunity." *State v. Mann*, 35 S.W.3d 913, 916 (Mo.App. S.D. 2001); *State v. Martin*, 940 S.W.2d 6, 9 (Mo.App. W.D. 1997). It has often been recognized that "double jeopardy is a personal right which, if not properly raised, is waived." *See State v. Markham*, 63 S.W.3d 701, 708 (Mo.App. S.D. 2002); *State v. Gaver*, 944 S.W.2d 273, 279 (Mo.App. S.D. 1997); *State v. Baker*, 850 S.W.2d 944, 947 (Mo.App. E.D. 1993); *State v. Miner*, 748 S.W.2d 692, 693 (Mo.App. E.D. 1988). In addition to this general principle, where "counsel has affirmatively acted in a manner precluding a finding that the failure to object was a product of inadvertence or negligence," even plain error review is waived. *State v. Mead*,105 S.W.3d 552, 556 (Mo.App. W.D. 2003).

Here, when asked if he had "any comments" (or, ostensibly, objection) to the trial court's consideration of the lesser-included offense, defense counsel stated that he thought the trial court could enter a conviction on the lesser included offense (Tr. 52). This was tantamount to stating that he had "no objection," and it was an affirmative waiver of this claim. Consequently, appellant should not now be heard to argue otherwise. *See State v. Markham*, 63 S.W.3d at 708 (declining to engage in plain error review because "appellant was remiss in raising his double jeopardy

claim at trial and in post-trial motions").

Appellant argues that "There is no waiver issue here" (App.Sub.Br. 23). He states that "[the State] never explained how such a waiver can occur after the fact of Mr. Neher's acquittal on Count II" (App.Sub.Br. 23). He asserts: "Once acquitted, counsel's statement was irrelevant" (App.Sub.Br. 23). But appellant is incorrect.

A waiver occurred *after* the trial court's acquittal on count II because that was the only time such a waiver could have occurred. Indeed, by the very nature of the claim appellant now asserts – a double jeopardy violation – a waiver can *only* occur after an acquittal, when a court then attempts to take action that might infringe upon the right to be free from double jeopardy. It would be a strange thing, for example, to suggest that any waiver (or objection) must occur *before* an acquittal. Indeed, should defense counsel – anticipating that the trial court might try to enter a conviction after an acquittal – lodge an anticipatory objection to such future actions? Of course not. Rather, counsel should make a contemporaneous objection to the alleged error at the time the allegedly erroneous action is contemplated by the trial court. And, if counsel does not make such an objection, or, as here, if counsel expressly consents to the court's action, it can be rightly said that counsel waived the claim. In short, counsel's waiver was not "irrelevant" as appellant claims – to the contrary, it was an affirmative waiver, made at the moment the now-alleged error was contemplated by the trial court.

Appellant also asserts that there could not have been an affirmative waiver

because "No one in the courtroom mentioned, or apparently realized, that proceeding [on] lesser included offenses on Count II after an acquittal would infringe Mr. Neher's 'absolute shield' against retrial" (App.Sub.Br. 24). But while it is true that no one specifically mentioned appellant's "absolute shield" against retrial, or appellant's constitutional right to be free from double jeopardy, it simply cannot be said that the trial court and the parties were wholly ignorant of appellant's constitutional right to be free from double jeopardy. Thus, when the trial court gave defense counsel an opportunity to lodge an objection (including any objection on double jeopardy grounds), defense counsel's failing to lodge any such objection, along with defense counsel's assent to the trial court's contemplated action constituted an affirmative waiver of this claim. Or, if not an affirmative waiver of the double jeopardy claim, then at least an affirmative waiver as to the *procedure* that was followed in submitting the lesser-included offense to the finder of fact; for, as will be discussed below, it is plainly apparent from the record that the trial court's acquittal on count II was directed specifically at the one element that distinguished the greater offense from the lesser offense. Thus, allowing the trial court to then consider a lesser offense was not unlike the procedure that juries follow in any case where lesser-included offenses are submitted to them.

Citing *Hagan v. State*, 836 S.W.2d 459 (Mo. banc 1992); *State v. Cody*, 525 S.W.2d 333 (Mo. banc 1975); and *State v. Davison*, 46 S.W.3d 68 (Mo.App. W.D. 2001), appellant argues that waiver should not be found when "this Court can

determine from the face of the record that the trial court had no power to enter the conviction" (App.Sub.Br. 22).[3] In *Hagan*, for example, the defendant pled guilty to three crimes (including the theft of some keys *and* the theft of the van that the keys went to), and he claimed on appeal that his two stealing offenses violated double jeopardy (on the theory that he was being twice punished for a "single larceny"). *Hagan*, 836 S.W.2d at 461.

[3] In each of these cases, the defendant argued that he was subjected to multiple punishments for the same offense. In the case at bar, appellant is arguing that he was subjected to a second prosecution.

Before rejecting the defendant's claim of double jeopardy on the merits, the Court first considered whether the defendant's guilty plea had waived the defendant's subsequent double-jeopardy claim. *Id.* The Court observed that "[t]he general rule in Missouri is 'that a plea of guilty voluntarily and understandably made waives all non-jurisdictional defects and defenses.'" *Id*. (citing *State v. Cody*, 525 S.W.2d 333, 335 (Mo. banc 1975)). The Court pointed out, however, that "[t]he right to be free from double jeopardy . . . is a constitutional right that goes 'to the very power of the State to bring the defendant in the court to answer the charge brought against him.'" *Id*. Thus, the Court concluded, based on its reading of *United States v. Broce*, 488 U.S. 563, 575 (1989), that double jeopardy claims are not necessarily waived "if it can be determined from the face of the record that the sentencing court had no power to enter the conviction or impose the sentence." *Hagan*, 836 S.W.2d at 461.[4] And, concluding that it had sufficient record to review the claim, the Court

[4] In *Broce*, the Court stated: "We do not hold that a double jeopardy claim may never be waived. We simply hold that a plea of guilty to a charge does not waive a claim that – judged on its face – the charge is one which the State may not constitutionally prosecute."

reviewed for plain error. *Id*.

In the present case, the Court of Appeals addressed *Hagan* and pointed out that this Court had "acknowledged the general waiver rule and carved out a narrow exception applicable to collateral attacks on judgments arising from guilty pleas." *State v. Neher*, No. SD27153, slip op. at 6 (Mo.App. S.D. June 27, 2006). Here, of course, appellant is not bringing a collateral attack against his judgment; rather, he is arguing – in the wake of counsel's affirmative waiver – that he should not have been subjected to conviction on a lesser-included offense. But the trial court plainly had subject matter jurisdiction over the charged offense, along with all lesser-included offenses; appellant was not punished multiple times for a single offense; and appellant was only tried once before he was convicted on the lesser-included offense. In short, it cannot be said from the face of the record that the trial court "had no power to enter the conviction or impose the sentence."

But even if appellant's waiver is overlooked, and this Court exercises its discretion to examine appellant's claim, appellant is not entitled to relief. For, as will be discussed below, the trial court did not violate appellant's right to be free from double jeopardy.

B. The Standard of Review

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488 U.S. at 575 (quoting *Menna v. New York*, 423 U.S. 61, 63 n.2 (1975)).

For relief under the plain error rule to be warranted, a defendant must demonstrate that the error so substantially affected his rights that a manifest injustice or a miscarriage of justice would inexorably result if the error were to be left uncorrected. *State v. Cummings*, 134 S.W.3d 94, 104 (Mo.App. S.D. 2004). Under this standard, a defendant is not entitled to a new trial unless the plain error was "outcome determinative." *Id*. (citing *Deck v. State*, 68 S.W.3d 418, 427 (Mo. banc 2002)). The defendant bears the burden of establishing manifest injustice. *State v. Mayes*, 63 S.W.3d 615, 624 (Mo. banc 2001).

C. Because the Trial Court Only Acquitted Appellant of Having the Intent to Deliver, the Trial Court Did Not Plainly Err in Convicting Appellant of the Lesser Included Offense of Possession of a Controlled Substance

The double jeopardy clause of Missouri's constitution applies in cases in which a defendant was "acquitted by a jury." *State v. Magalif*, 131 S.W.3d 431, 434 (Mo.App. W.D. 2004). It 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 . . . ." MO. CONST. Art. I, § 19. Thus, "Since appellant was never acquitted by a jury, the double jeopardy clause of the Missouri Constitution is without application to his case." *State v. McTush*, 827 S.W.2d 184, 186 (Mo. banc 1992). Nevertheless, the Fifth Amendment to the United States Constitution (which is applicable to the states) similarly provides that "No person . . . shall . . . be subject for the same offense to be twice put in jeopardy of life or limb[.]" Thus, the question is whether the trial court's

finding appellant guilty of a lesser-included offense violated appellant's Fifth Amendment right to be from double jeopardy.

"[T]he Double Jeopardy Clause provides three related protections: 'It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.'" *United States v. Wilson*, 420 U.S. 332, 343 (1975); *see Ashe v. Swenson*, 397 U.S. 436, 445-446 (1970) (the constitutional prohibition against double jeopardy "protects a man who has been acquitted from having to 'run the gantlet' a second time"). With regard to the second protection, it has been stated that "the Double Jeopardy Clause attaches special weight to judgments of acquittal." *Tibbs v. Florida*, 457 U.S. 31, 41 (1982). "A verdict of not guilty, whether rendered by the jury or directed by the trial judge, absolutely shields the defendant from retrial." *Id*; *see also Smith v. Massachusetts*, 543 U.S. 462, 467 (2005) (" '[S]ubjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause.' ").

The question here, therefore, is whether the trial court's initial finding of "not guilty as to Count II," constituted an acquittal of the charged offense *and* all lesser offenses, such that the trial court had no power to thereafter enter a conviction on the lesser included offense of possession of a controlled substance. Appellant, of course, argues that the court's ruling was an outright acquittal that barred subsequent prosecution on the same offense, and that the state could not challenge

that acquittal and ask for a conviction on the lesser offense (App.Sub.Br. 20-21). But this reading of the trial court's ruling exalts form over substance, and it extends the protections of the Double Jeopardy Clause beyond its proper bounds.

"In our determination of whether the outcome of this appeal might result in double jeopardy, we look at the substance of the trial court's ruling, and not its form." *State v. Smith*, 988 S.W.2d 71, 78 (Mo.App. W.D. 1999). "The label attached to a ruling by a trial judge is not determinative." *State v. Reed*, 770 S.W.2d 517, 520 (Mo.App. E.D. 1989) (citing *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977)). "We look to the substance of the trial court's ruling, and not its form, to determine its precise nature." *Id*.; *see also Tibbs v. Florida*, 457 U.S. at 41 ("the rule barring retrial would be 'confined to cases where the prosecution's failure is clear.'"); *Ashe v. Swenson*, 397 U.S. at 444 ("Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this [realistic and rational] approach [to the rule of collateral estoppel] requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'").

Here, it is apparent from the record that the "acquittal" in this case arose out of a factual finding by the court that the evidence was insufficient to conclude beyond a reasonable doubt that appellant had the requisite "intent to deliver" the controlled

substance, as was charged in count II (Tr. 51-52). The trial court plainly *did not* acquit appellant of merely possessing the controlled substance in question. Thus, because the substance of the court's ruling makes plain that appellant was simply not guilty of having the requisite "intent to deliver," the prohibition against double jeopardy did not preclude conviction on the lesser offense – an offense of which appellant had *never* been acquitted by any finder of fact. *See generally Tibbs v. Florida*, 457 U.S. at 41 (the rule barring retrial is confined to cases where the prosecution's failure is clear).

As stated above, one of the purposes of the Double Jeopardy Clause is to protect against retrial after acquittal. In other words, it precludes the state from forcing a defendant to run the gantlet a second time after there has been an acquittal. *See Ashe v. Swenson*, 397 U.S. at 445-446 (the constitutional prohibition against double jeopardy "protects a man who has been acquitted from having to 'run the gantlet' a second time"). Here, however, there was only one trial and one instance of fact finding. Thus, even though the trial court found insufficient evidence of "intent to deliver," the trial court did not have to reevaluate or reconsider the evidence to enter a conviction on the lesser offense. The fact finding had been done, no additional fact finder occurred, and the trial court never attempted to alter or reverse the earlier factual determination it had made in entering its initial "acquittal." Thus, there was no subsequent proceeding or prosecution that resulted in conviction. *Cf. Smith v. Massachusetts*, 543 U.S. at 467 ("Submission of the firearm

count to the jury plainly subjected petitioner to further 'factfinding proceedings going to guilt or innocence,' prohibited by *Smalis*[*v. Pennsylvania*, 476 U.S. 140, 145 (1986)] following an acquittal."); *Barnes v. State*, 9 S.W.3d 646, 647 (Mo.App. E.D. 1999).

For example, in *Barnes v. State*, which is cited in appellant's brief (App.Sub.Br. 21), the trial court acquitted the defendant of murder in the first degree, stating "I don't believe that any deliberation has been provided in the case, so I'm going to do that, sustain [the motion for judgment of acquittal at the close of the state's case] as to the charge of Murder First Degree." The trial court also wrote "sustained" on the motion for judgment of acquittal at the close of the state's case. *Id*. at 649. But then, after considering case law offered by the state, the trial court reconsidered its earlier factual determination and attempted to reverse its previous judgment of acquittal as to murder in the first degree, determining that, in fact, there was sufficient evidence of deliberation. *Id*. at 648.

On appeal, the Court held that the earlier acquittal could not be reconsidered, and that entering the subsequent conviction of murder in the first degree violated the defendant's right to be free from double jeopardy. *Id*. at 651. That result made sense, for as is readily apparent, the trial court had made a factual determination (even if erroneous) that the evidence was insufficient to show deliberation. In other words, the defendant in *Barnes* was, in fact, acquitted of having deliberated. And having been acquitted of that element, the prohibition against double jeopardy

precluded any further proceedings or factual findings on that element. But that acquittal did not bar retrial on the lesser included offense of murder in the second degree, as the Court also pointed out. *Id*.

Similarly, here, appellant was acquitted of having the requisite "intent to deliver," but he was *not* acquitted of possessing a controlled substance. There was simply no factual determination that the evidence was insufficient to support the lesser included offense. Thus, entering the lesser conviction did not subject appellant to a successive prosecution after acquittal; rather, like any other trial where lesser offenses are submitted to the finder of fact, appellant was not found guilty of the greater offense, but he was found guilty of the lesser included offense.

The state, it should be noted, can seek review of a judgment of acquittal under certain circumstances. When a trial court grants a motion for judgment of acquittal after a jury has found the defendant guilty, for example, the state can appeal and regain the conviction without violating the prohibition against double jeopardy. *See State v. Magalif*, 131 S.W.3d at 434. "Double jeopardy is not implicated when a court grants acquittal after the jury's guilty verdict because no additional trial or fact-finding proceedings are necessary. The jury's verdict is simply reinstated." *Id*.; *see State v. Smith*, 81 S.W.3d 657, 659 n.2 (Mo.App. S.D. 2002) ("The Double Jeopardy Clause does not prohibit an appeal by the prosecution unless a retrial or 'further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged' would be required in the event the prosecution is

successful in its appeal.").

Similarly, here, double jeopardy was not implicated because "no additional trial or fact-finding proceedings" were necessary. As set forth above, the trial court had already done its fact finding and determined that the evidence had failed only as to appellant's "intent to deliver" (Tr. 51-52). Accordingly, when the trial court entered the lesser conviction, it was simply entering the conviction that was supported by the factual determination it had made in a single proceeding.

Appellant argues that once the words "not guilty" emerged from the trial judge's mouth, "That genie could not be put back in the bottle" (App.Sub.Br. 21). But this proposition is not supported by any citation to authority, and such an inflexible rule runs contrary to the cases cited above. It is the *substance* of the trial court's ruling that should govern, not the mere words that come from the trial judge's mouth. Moreover, the United States Supreme Court has recognized that such words are not necessarily final. In *Smith v. Massachusetts*, in examining the finality of a mid-trial acquittal, the Court recognized that "Double-jeopardy principles have never been thought to bar the immediate repair of a genuine error in the announcement of an acquittal, even one rendered by a jury." 543 U.S. at 474. The court also pointed out that "a prosecutor can seek to persuade the court to correct its legal error before it rules, or at least before the proceedings move forward." *Id*.

Here, the prosecutor sought not to reverse the acquittal on the greater offense, but merely to obtain a conviction on a lesser-included offense. This did not

require the trial court to make any new factual findings, and the request was timely made before the case had proceeded beyond the court's delivery of its verdicts. Such a procedure did not offend any constitutional principle, and it did not twice subject appellant to jeopardy.

D. Conclusion

In sum, by agreeing that the trial court could enter the conviction on the lesser included offense, appellant affirmatively waived this claim. Additionally, there was neither plain error nor manifest injustice. The substance of the trial court's initial "acquittal" shows that appellant was merely acquitted of having the requisite "intent to deliver" that was part of the greater offense. And, consequently, when the trial court entered a conviction on the lesser included offense (without reconsidering its earlier acquittal or changing an earlier factual determination), double jeopardy was not implicated. As has been said in cases where the state seeks review of a judgment of acquittal after a guilty verdict: "To be sure, the defendant would prefer that the Government not be permitted to appeal or that the judgment of conviction not be entered, but this interest of the defendant is not one that the Double Jeopardy Clause was designed to protect." *State v. Magalif*, 131 S.W.3d at 434 (citing *United States v. Jenkins*, 420 U.S. 358, 365 (1975)). This point should be denied.

II.

The trial court did not abuse its discretion in admitting evidence seized during the search of appellant's residence, because the search warrant was supported by probable cause and, alternatively, even if the search warrant was deficient, the search should be upheld under the good faith exception to the warrant requirement.

Appellant contends that the trial court erred in admitting evidence seized during a search of his home (App.Sub.Br. 26). He argues that the search warrant was not supported by probable cause (App.Sub.Br. 26).

A. The Standard of Review

The trial court has broad discretion to admit or exclude evidence, and the appellate court will reverse only upon a showing of an abuse of discretion. *State v. Simmons*, 944 S.W.2d 165, 178 (Mo. banc 1997). A trial court abuses its discretion when a ruling is "clearly against the logic and circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration[.]" *State v. Brown*, 939 S.W.2d 882, 883 (Mo. banc 1997).

When reviewing the admission of evidence that was the subject of a motion to suppress, this Court must examine the trial court's ruling on the motion to suppress. Appellate review of a trial court's ruling on a motion to suppress is limited to a determination of whether the trial court's ruling is supported by sufficient evidence from the record as a whole. *State v. McFall*, 991 S.W.2d 671, 673 (Mo.App. W.D.

1999). In reviewing a trial court's order on a motion to suppress, the reviewing court considers all facts and reasonable inferences in the light most favorable to the challenged order. *Id*. The appellate court must defer to the trial court's determination as to the credibility of witnesses. *Id*. The fact that there is evidence from which the trial court could have arrived at a contrary conclusion is immaterial. *State v. Lytle*, 715 S.W.2d 910, 915-916 (Mo. banc 1986).

B. The Search Warrant was Support by Probable Cause

Probable cause is "determined from the four corners of the application for the search warrant and any supporting affidavits." *State v. Dowell*, 25 S.W.3d 594, 604 (Mo.App. W.D. 2000).[5] Whether probable cause has been established is determined by the "totality of the circumstances," and depends upon the specific facts and circumstances of each case. *Id*. at 604-605. Accordingly, whether or not probable cause exists in a particular case is a question of fact, and this Court's review is not *de novo*. *State v. Buchli*, 152 S.W.3d 289, 304 (Mo.App. W.D. 2004) (citing *State v. Berry*, 801 S.W.2d 64, 66 (Mo. banc 1990)); *see Illinois v. Gates*, 462 U.S. 213, 236 (1983) ("after-the-fact scrutiny by courts of the sufficiency of an affidavit should not

[5] Under this standard, there is no reason to consider the testimony of witnesses at a suppression hearing. Whether the magistrate's determination of probable cause was correct is determined by simply reviewing the application and affidavits, and, accordingly, the state carries its burden of proof by simply admitting the documents into evidence.

take the form of *de novo* review. A magistrate's 'determination of probable cause should be paid great deference by reviewing courts.'"). This Court will give great deference to the initial judicial determination of probable cause made at the time of the issuance of the warrant and reverse only if that determination is clearly erroneous. *State v. Buchli*, 152 S.W.3d at 304-305.

In deciding whether probable cause exists, the issuing magistrate must "make a practical common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. at 238. There must be an emphasis on common sense and practicality in determining whether there is probable cause to issue a warrant, because in dealing with probable cause, a magistrate must deal with probabilities that arise from factual and practical considerations of everyday life upon which reasonable and prudent people, not legal technicians, act. *Id*. at 241 ("Probable cause deals 'with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act[.]'"); *State v. Bowen*, 927 S.W.2d 463, 465-466 (Mo.App. W.D. 1996).

It is not required that the affidavit provide proof beyond a reasonable doubt or by a preponderance of the evidence, the rule being that only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause. *Illinois*

v. Gates, 462 U.S. at 235; *State v. Dowell*, 25 S.W.3d at 605. A grudging or negative attitude by reviewing courts toward affidavits supporting a search warrant is inconsistent with the Fourth Amendment's strong preference for searches to be conducted pursuant to a warrant. *Illinois v. Gates*, 462 U.S. at 236.

Here, the information in the application and attached affidavit supported a finding of probable cause. The affidavit stated:

> WILLIAM A GRIFFITT, hereby affirms on oath as follows:
>
> 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 Nehr [sic] who resides at 4 SE 95th Rd in Barton County. Brian Nehr [sic] 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 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 that Brian Nehr [sic] was cooking meth late last night (8/29-30/04). The confidential informant also stated that Nehr [sic] has all the chemicals used in the 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. 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 substance on 02-07-2000 in Barton County.

(State's Ex. 2).

On its face, this affidavit established the following: (1) that a confidential informant called Sheriff Griffitt on the day the application for search warrant was sought (August 30, 2004), (2) that the informant was an informant who had previously given law enforcement reliable information that had been corroborated, (3) that the informant told Griffitt that appellant had "cooked" methamphetamine late the night before (and apparently into the early hours of August 30, 2004), (4) that the confidential informant told Griffitt that appellant also had all the chemicals used in manufacturing methamphetamine, (5) that the confidential informant was also in possession of paraphernalia for the manufacturing and use of methamphetamine, (6) that appellant is a known drug user and has a criminal history of possessing a controlled substance, (7) that Carl Dale Carter was also at appellant's residence on

the day of the "cook," (8) that Carter has an extensive criminal history involving dangerous drugs including methamphetamine, and (9) that Carter had been arrested for possession of a controlled substance on February 7, 2000 (State's Ex. 2).

From these facts, a neutral magistrate could have reasonably concluded that it was probable that criminal activity was afoot at appellant's residence, or that evidence of the crime could be located at appellant's residence. The confidential informant expressly told Griffitt that the methamphetamine "cook" had taken place and that appellant still had the necessary chemicals in his home. Accordingly, if taken at face value, the contents of the affidavit plainly showed probable cause to support the search warrant.

The question, therefore, is whether the facts in the affidavit could have been reasonably credited by the reviewing magistrate. Appellant argues that the judge should not have issued the search warrant because "the basis of the veracity of the informant was not included, and there was no corroboration" of the informant's information by law enforcement officers (App.Sub.Br. 32).

"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). When evaluating the creditability of hearsay reports contained in a supporting affidavit, the issuing judge must consider the "veracity" and "basis of knowledge" of persons supplying hearsay information, whether the hearsay reports were based on personal knowledge, and whether the

reports have been corroborated. *Id*. Some hearsay reports, by virtue of the identity of the declarant and the nature of the circumstances under which the incriminating information became known, are viewed as inherently trustworthy. *Id*. For example, when the information upon which the warrant is based comes from one who claims to have witnessed a crime, the information carries with it indicia of reliability and is generally presumed to be reliable. *Id*.

Here, the affidavit did not specifically set forth the basis of the informant's knowledge; rather, it simply stated that the informant called the sheriff on the telephone and told the sheriff that appellant had cooked methamphetamine and that the necessary chemicals for a cook were still present in appellant's home. But even without an express statement of the basis of the informant's knowledge, the judge who issued the search warrant could have reasonably concluded that the informant was providing information based on his personal observations.[6]

When an informant provides information to law enforcement, the information has usually come to the informant in one of three ways: (1) by personal observation, (2) by hearing it from some other person, or (3) by personal fabrication. In this case,

[6] Griffitt made plain at the suppression hearing that the informant *was* providing information based on his personal observations (1st Tr. 5-7).

a reasonable, common sense reading of the affidavit reveals that the informant gained his information by the first of these methods.

As has often been observed, people speak in terms that are less technical than those of lawyers. Thus, when a person describes what he or she has seen, he or she will often simply state the observed event, e.g., "Brian Neher was cooking meth late last night." And that is precisely what Griffitt put in his affidavit: "The confidential informant . . . stated that Brian Nehr [sic] was cooking meth late last night" (State's Ex. 2). Had the informant been relaying something he had heard from someone else, he might have said that he had "heard" that Brian Neher was cooking meth last night. But the affidavit gives no indication that the informant was merely passing on a rumor that he had heard from someone else; and, consequently, the issuing judge could have reasonably concluded that the informant had simply relayed his personal observations to Griffitt. *See State v. Laws*, 801 S.W.2d 68, 69-70 (Mo. banc 1990) (where the affidavit stated that a previously reliable source had provided information that the defendant was presently possessing contraband, "implicit in the affidavit is an understanding that the informant learned his information through personal observation").[7] And if the information was obtained through

[7] The affidavit in *Laws* stated, in relevant part: "2. That [the officer] has reliable information from a previous reliable source that Clarence Law (sic) is presently in possession for sale and distribution certain controlled substances, to-wit: cocaine, cocaine derivatives

personal observation, it was presumably more reliable. *See State v. Baker*, 103 S.W.3d at 720 ("when the information upon which the warrant is based comes from one who claims to have witnessed a crime, the information carries with it indicia of reliability and is generally presumed to be reliable").

As outlined above, there is always the possibility that an informant is simply lying. But, here, the affidavit included the fact that Griffitt had previously received reliable information from the same informant, and that law enforcement had been able to corroborate that information in the past. "Hearsay can also suffice if the information is obtained from a reliable informant." *State v. Trenter*, 85 S.W.3d 662, 675 (Mo.App. W.D. 2002) (citing *State v. Hammett*, 784 S.W.2d 293, 296 (Mo.App. E.D. 1989)). Thus, here, the affidavit provided a basis to conclude that the informant was a reliable source. *See State v. Mitchell*, 20 S.W.3d 546, 553 (Mo.App. W.D. 2000) ("a general statement that the informant has been reliable in the past is sufficient, and that it is not necessary for the affidavit to set out more specifically what type of reliable information the informant has previously provided in order 'for the magistrate to gauge independently the reliability of the informer.'").

Another indicium of reliability was the informant's admission of criminal conduct. "It is established beyond cavil that when the informant's information

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and marihuana, together with weighing scales, at his home in Portageville, Missouri[.]"

amounts to an admission that the informant has committed a crime, the admission carries its own indicia of reliability . . . . 'Admission of crime, like admissions against proprietary interests, carry their own indicia of credibility — sufficient at least to support a finding of probable cause to search.'" *State v. Erwin*, 789 S.W.2d 509, 511 (Mo.App. S.D. 1990) (quoting *United States v. Harris*, 403 U.S. 573, 583 (1971)). Here, as set forth above, the informant admitted that he also possessed paraphernalia for the manufacturing and use of methamphetamine (a fact that also tended to show that the informant knew what he was talking about when he observed methamphetamine-related items at appellant's residence).

The affidavit also included information that the issuing judge would have recognized as coming from law enforcement sources: (1) that appellant was a known drug user and manufacturer who had a "criminal history" of possession of a controlled substance, (2) that Carl Carter (who was also present at appellant's residence on the day of the methamphetamine cook) also had an "extensive criminal history involving dangerous drugs, including methamphetamine," and (3) that Carter had been arrested previously for possession of a controlled substance (State's Ex. 2). Such information is "inherently reliable: 'courts have consistently held that another law enforcement officer is a reliable source and that consequently no special showing of reliability need be made as a part of the probable cause determination.'" *State v. Baker*, 103 S.W.3d at 720-721. And, of course, appellant's drug-related criminal history (and the presence of Carter) tended to corroborate the informant's

information about the methamphetamine cook. *See State v. Williams*, 9 S.W.3d 3, 16 (Mo.App. W.D. 1999) ("A suspect's past criminal behavior can be considered in determining whether probable cause exists to justify a search."); *State v. Hall*, 687 S.W.2d 924, 928-929 (Mo.App. W.D. 1985) (an officer stated that the informant, who had previously provided reliable information, reported witnessing a drug sale at the defendant's residence, and this information was bolstered by the officer's knowledge that the defendant had been previously associated with narcotics and arrested for felony possession of marijuana).

It is true, as appellant points out, that Sheriff Griffitt's affidavit did not include information concerning any steps he took to "corroborate" the information provided by the informant (App.Sub.Br. 32-33). But aside from corroborating that appellant lived at the particular place named by the informant (it appears this was a fact that Sheriff Griffitt personally knew), Sheriff Griffitt had no practical means of corroborating that appellant had manufactured methamphetamine at his home the night before, or that appellant had all the necessary chemicals. Sheriff Griffitt had no means of lawfully entering appellant's residence to view the chemicals, and any undue attention or probing investigation could have harmed his ability to obtain any incriminating evidence at all.

In sum, while certain aspects of the affidavit could have been drafted with greater specificity to make plain that the informant had personally observed the crime, and while Sheriff Griffitt perhaps might have been able to include additional

corroborating information, there was sufficient creditable information for the issuing judge to "have made a practical, common-sense decision that there existed a fair probability" that evidence of methamphetamine production would be found at appellant's home. This point should be denied.

C. The Search was Conducted in Good Faith

Finally, even if the affidavit was technically insufficient as appellant argues, the "good faith exception" should apply. In *United States v. Leon*, 468 U.S. 897, 922 (1984), the court stated that "'a warrant issued by a magistrate normally suffices to establish' that a law enforcement officer acted in good faith in conducting the search." (quoting *United States v. Ross*, 456 U.S. 698, 823 n.32 (1982)). The Court concluded that "the marginal or nonexistent benefits produced by suppressing evidence obtained in reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." *Id*. An officer manifests objective good faith in relying on a search warrant unless the warrant is based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Id*. at 923 (quoting *Brown v. Illinois*, 422 U.S. 590, 610-611 (1975)).

In the present case, there is no reason to believe that the sheriff did not act in good faith when he relied upon the search warrant. The affidavit was not so lacking in indicia of probable cause as to render belief in its existence unreasonable. To the contrary, for the reasons set forth above – if the affidavit did not in fact provide

probable cause – the affidavit on its face provided substantial information regarding probable cause.

Further, to the extent that the affidavit did not identify the basis of the informant's knowledge, Griffitt later testified that the informant was testifying from his personal observations (1st Tr. 5-7). In other words, to the extent that Griffitt failed to include that fact, the omission was not made to deceive or mislead the court. In fact, if Griffitt had included that fact, it would have given the affidavit an additional indicia of reliability. In any event, under the circumstances, there was simply no reason for the sheriff to doubt the existence of probable cause or the reliability of the warrant.

Appellant argues that the good faith exception should not apply, because "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" (App.Sub.Br. 35). But this argument misunderstands the good-faith exception, and effectively renders the good-faith exception meaningless.

The good-faith exception does not "validate" a warrant that is not supported by probable cause; rather, as indicated above, it merely operates to limit the application of the exclusionary rule, recognizing that when an officer relies in good faith upon a warrant issued by a neutral magistrate, there is little or no deterrent value in excluding the evidence obtained during the search. Appellant would apparently limit the good-faith exception to those instances where the "sheriff's own failure" was *not*

the cause of the insufficient affidavit. But, in most if not all cases, the lack of probable cause in an affidavit will be due to the law enforcement officer's mistakes or failures. Thus, even where something is missing from the affidavit due to the failure of the law enforcement officer, the good-faith exception should be applied – so long as the officer acted in good faith.

And, here, the record shows that Sheriff Griffitt relied on the warrant in good faith. In obtaining the warrant, he did not misstate material facts from his affidavit, he did not omit material facts that would have altered the evidentiary picture, and he did not seek to deceive the issuing judge in any fashion. Rather, according to appellant, Sheriff Griffitt simply failed to include *additional* facts that would have provided a stronger basis for determining the reliability of the information included in the affidavit. But inasmuch as the issuing judge found probable cause, Sheriff Griffitt can hardly be faulted for relying on the warrant that issued. This point should be denied.

CONCLUSION

In view of the foregoing, respondent submits that appellant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 8,528 words, excluding the cover, this certification, the signature block, and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this _____ day of March, 2005, to:

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