IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29205 and 29206

STATE OF SOUTH DAKOTA,

Plaintiff and Appellant,

v.

CARRIE LYNN OSTBY
DANA OLMSTED,

Defendants and Appellelles

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

THE HONORABLE ERIC J. STRAWN
Circuit Court Judge

APPELLANT'S BRIEF

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29205 and 29206

STATE OF SOUTH DAKOTA,

Plaintiff and Appellant,

v.

CARRIE LYNN OSTBY
DANA OLMSTED,

Defendants and Appellelles.

PRELIMINARY STATEMENT

In this brief, Plaintiff and Appellant, State of South Dakota, is referred to as "State." All other individuals are referred to by name. References to documents are designated as follows:

Settled Record (Lawrence Criminal File 19-258; Dana Olmsted) SR1

Settled Record (Lawrence Criminal File 19-268; Carrie Ostby) SR2

All document designations are followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

Dana Olmsted filed Defendant's Motion to Suppress Evidence and his co-defendant, Carrie Ostby, filed a Notice of Joinder to Suppress Evidence. SR1: 6-36; SR2: 24. An evidentiary hearing was held before the circuit court on September 10, 2019. SR1: 56; SR2: 46. The circuit

court issued a Memorandum Decision granting the suppression motion on November 25, 2019. SR1: 130-45; SR2: 112-26. Ostby's suppression order was filed on November 27, 2019 and the Notice of Entry was filed and served on December 11, 2019. SR2: 127-28. Olmsted's suppression order was filed on December 19, 2019 and the Notice of Entry was filed and served on December 20, 2019. SR1: 146-47.

On December 20, 2019, the State filed a Petition for Permission to Appeal Intermediate Order of Circuit Court regarding both Ostby and Olmsted. This Court granted the State's Petitions on January 30, 2020. SR1: 148-49; SR2: 131-32.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

WHETHER THE AFFIDAVIT IN SUPPORT OF REQUEST FOR SEARCH WARRANT IS SUFFICIENT TO SHOW PROBABLE CAUSE?

The circuit court found the search warrant affidavit did not contain sufficient evidence to support the issuance of the search warrant.

State v. Dubois, 2008 S.D. 15, 746 N.W.2d 197

State v. Gilmore, 2009 S.D. 11, 762 N.W.2d 637

State v. Helland, 2005 S.D. 121, 707 N.W.2d 262

State v. Raveydts, 2004 S.D. 134, 691 N.W.2d 290

STATEMENT OF THE CASE

Olmsted was arrested on March 21, 2019 for Possession of a Controlled Substance. SR1: 1. Ostby was arrested on March 25, 2019 for Unauthorized Ingestion of a Controlled Substance. SR2: 1. Olmsted filed a Motion to Suppress Evidence and Ostby filed a Notice of Joinder to Suppress Evidence. SR1: 6-36; SR2: 24. An evidentiary hearing was held before the circuit court on September 10, 2019. SR1: 56; SR2: 46. The circuit court issued a Memorandum Decision granting the suppression motion on November 25, 2019. SR1: 130-45; SR2: 112-26. Ostby's suppression order was filed on November 27, 2019, and the Notice of Entry was filed and served on December 11, 2019. SR2: 127-28. Olmsted's suppression order was filed on December 19, 2019, and no Notice of Entry has been filed. SR1: 46.

STATEMENT OF FACTS

On March 20, 2019, around 5:47 p.m., Deadwood Police Officer Erik Jandt responded to a report of methamphetamine found inside a community dryer at an apartment complex on Dunlap Avenue. SR1: 45; SR2: 34. Officer Jandt arrived and met with the reporting party, Ariel Roberts (Roberts). SR1: 46; SR2: 34. Roberts told Officer Jandt she needed to use the dryer, but Olmsted's clothes were still in it. SR1: 46; SR2: 34. She knocked on the door of Apartment 15 and asked Olmsted to remove his clothes. SR1: 46; SR2: 34. After Olmsted removed his clothes, Roberts found a baggie containing what she

believed was methamphetamine. SR1: 46; SR2: 34. This was not the first time Roberts found a baggie containing methamphetamine in the apartment complex. SR1: 46; SR2: 34. Roberts told Officer Jandt she found a baggie containing what she believed was methamphetamine in the hallway of the apartment complex on February 13, 2019. SR1: 46; SR2: 34. Officer Jandt field tested the substance from the dryer and it presumptively tested positive for methamphetamine. SR1: 46; SR2: 34.

Officer Jandt, along with Lieutenant Ken Mertens, attempted to speak with Olmsted at Apartment 15. SR1: 46; SR2: 34. Apartment 15 was rented by Ostby and it was the subject of an active drug investigation by Investigator James Olson. SR1: 46; SR2: 34. The officers knocked on the door of Apartment 15; Olmsted asked who was at the door. SR1: 46; SR2: 34. Officer Jandt informed Olmsted they were police officers. SR1: 46; SR2: 34. Olmsted did not respond, but Officer Jandt could hear movement inside the apartment. SR1: 46; SR2: 34. Fearing Olmsted was destroying evidence, Officer Jandt and Lieutenant Mertens entered the apartment to secure evidence and detain Olmsted. SR1: 46; SR2: 34.

Officer Jandt applied for a search warrant to search Apartment 15 and to obtain urine samples from Olmsted and Ostby. SR1: 40-41; SR2: 28-29. The Honorable Chad Callahan, Magistrate Court Judge, issued a search warrant for Apartment 15, Ostby's vehicle, and Olmsted's and Ostby's urine. SR1: 52-55; SR2: 40-43. While searching

the apartment law enforcement found several baggies containing a white crystal substance, which the Rapid City Laboratory confirmed was methamphetamine. SR1: 106. Additionally, both Olmsted's and Ostby's urine tested positive for methamphetamine. SR1: 106; SR2: 96.

In its Memorandum Opinion, the circuit court found law enforcement's affidavit did not contain "enough information to establish probable cause" for a search warrant. SR1: 143; SR2: 125. Its decision was based on the fact that Roberts does not have specialized "training or experience related to the identification or detection of methamphetamine use." SR1: 141; SR2: 123. Additionally, law enforcement did not "personally observe criminal activity traceable to Apartment 15." SR1: 141; SR2: 123. Nor was law enforcement present when Roberts "discovered the methamphetamine in the hallway or in the dryer." SR1: 141; SR2: 123.

ARGUMENT

THE AFFIDAVIT IN SUPPORT OF REQUEST FOR SEARCH WARRANT IS SUFFICIENT TO SHOW PROBABLE CAUSE.

Olmsted's Motion to Suppress claimed the Affidavit in Support of the Search Warrant "lacked sufficient information to justify issuance of a search warrant." SR1: 26. After an evidentiary hearing, the circuit court issued its Memorandum Decision finding the "evidence contained in the affidavit was insufficient to establish probable cause to search Defendant Ostby's apartment." SR1: 141. Because the circuit court

applied the wrong standard and the affidavit contained sufficient information to support the issuance of the search warrant, the circuit court's decision must be reversed.

A. Standard of Review.

When considering the sufficiency of evidence to support a search warrant, this Court looks "at the totality of the circumstances to decide if there was at least a 'substantial basis' for the issuing judge's finding of probable cause." *State v. Gilmore,* 2009 S.D. 11, ¶ 7, 762 N.W.2d 637, 641 (quoting *State v. Dubois*, 2008 S.D. 15, ¶ 10, 746 N.W.2d 197, 202). "It is not the duty of this Court to review the [magistrate] court's probable cause determination de novo, but rather to examine the court's decision with 'great deference.' " *Id.* This Court "reviews the issuing court's probable cause determination independently of any conclusion reached by the [circuit] judge in the suppression hearing." *Dubois,* 2008 S.D. 15, ¶ 10, 746 N.W.2d at 202 (quoting *State v. Helland,* 2005 S.D. 121, ¶ 12, 707 N.W.2d 262, 268).

B. The Affidavit in Support of the Search Warrant Contained Sufficient Probable Cause to Support the Issuance of the Warrant.

When reviewing the sufficiency of a search warrant, courts are limited to the four corners of the affidavit. *Helland*, 2005 S.D. 121, ¶ 17, 707 N.W.2d at 269 (citing *State v. Raveydts*, 2004 SD. 134, ¶ 9, 691 N.W.2d 290, 293). And probable cause for a search warrant rises or falls on the affidavit itself. *State v. Jackson*, 2000 S.D. 113, ¶ 11, 616

N.W.2d 412, 416. However, the affidavit will not be reviewed in a hyper-technical manner, but as a "whole, interpreted in a common-sense and realistic manner." *Dubois*, 2008 S.D. 15, ¶ 14, 746 N.W.2d at 203 (quoting *State v. Habbena*, 372 N.W.2d 450, 456 (S.D. 1985)). "All reasonable inferences that can be drawn will be construed 'in support of the issuing court's determination of probable cause to support the warrant.' " *State v. Wilkinson,* 2007 S.D. 79, ¶ 16, 739 N.W.2d 254, 259 (quoting *Helland*, 2005 S.D. 121, ¶ 17, 707 N.W.2d at 269).

There is no specific formula for determining the amount of evidence sufficient for probable cause. *Helland*, 2005 S.D. 121, ¶ 15, 707 N.W.2d at 268 (citing *Jackson,* 2000 S.D. 113, ¶ 22, 616 N.W.2d at 420). "The standard of probable cause for the issuance of a search warrant is a showing of probability of criminal activity." *Wilkinson*, 2007 S.D. 79, ¶ 20, 739 N.W.2d at 260 (quoting *Helland*, 2005 S.D. 121, ¶ 16, 707 N.W.2d at 269). Probable cause to issue a search warrant does not need to rise to the level of a prima facie case. *Id.* Instead, "probable cause lies somewhere between mere suspicion and the trial standard of beyond a reasonable doubt." *Helland*, 2005 S.D. 121, ¶ 15, 707 N.W.2d at 269 (quoting *Heib v. Lehrkamp*, 2005 S.D. 98, ¶ 21, 704 N.W.2d 875, 884). It is a "fluid concept — turning on the assessment of probabilities in particular factual contexts — not readily or even usefully, reduced to a neat set of legal rules." *Gilmore,* 2009

S.D. 11, ¶ 12, 762 N.W.2d at 642-43 (quoting *Illinois v. Gates*, 462 U.S. 213, 232, 103 S.Ct. 2317, 2329 (1983)).

Several factors can lead to a probable cause determination. In fact, "[i]nnocent behavior frequently will provide the basis for a showing of probable cause." *Gilmore*, 2009 S.D. 11, ¶ 18, 762 N.W.2d at 644 (quoting *State v. Belmontes*, 2000 S.D. 115, ¶ 31, 615 N.W.2d 634, 642 (Konenkamp, J., concurring in result)). Indeed, this Court recognizes that "combinations of lawful and suspicious circumstances may lead to a justifiable inference of criminal activity." *Id.*

Additionally, information provided by an informant can also support a probable cause finding to issue a search warrant. *See Gilmore,* 2009 S.D. 11, ¶ 10, 762 N.W.2d at 642. When assessing probable cause based upon information provided by a citizen, the question is whether the information is reliable. *United States. v. Williams,* 10 F.3d 590, 593 (8th Cir. 1993). An informant who identifies herself is considered more reliable than an anonymous tipster. *Dubois*, 2008 S.D. 15, ¶ 15, 746 N.W.2d at 203 (citing *State v. Thomas,* 267 Neb. 339, 673 N.W.2d 897, 908-09 (2004), *abrogated by State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009)). Also, corroboration of an informant's tip by independent police work can also strengthen the value of the information. *Gilmore*, 2009 S.D. 11, ¶ 16, 762 N.W.2d at 643 (citing *Gates*, 462 U.S. at 241, 103 S.Ct. at 2334). While corroboration of the information by law enforcement is important, not

every piece of information provided by an informant requires corroboration. *Gilmore,* 2009 S.D. 11, ¶ 16, 762 N.W.2d at 643. If "an informant is right about some things, he is more probably right about other facts." *Gilmore*, 2009 S.D. 11, ¶ 16, 762 N.W.2d at 643 (quoting *Gates*, 462 U.S. at 244, 103 S.Ct. at 2335). Plus, "an 'explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles the informant's tip greater weight than might otherwise be the case.' " *State v. Tenold,* 2019 S.D. 66, ¶ 34, 937 N.W.2d. 6, 16. In fact, an "informant 'whose identity is known, who personally observes the alleged criminal activity, and who openly risks liability by accusing another person of criminal activity-may not need further law enforcement corroboration.' " *Dubois*, 2008 S.D. 15, ¶ 15, 746 N.W.2d at 203 (quoting *State v. Griggs*, 306 Mont. 366, 34 P.3d 101, 104 (2001)).

Here, the four corners of the affidavit contained sufficient facts to establish probable cause to support the issuance of the search warrant. It was based, in part, on information provided by a known informant, Roberts. SR1: 46; SR2: 34. She lived in the same apartment building as Olmsted and Ostby, she was familiar with them, and she had previously reported heavy short-term traffic at their residence. SR1: 46; SR2: 34. Roberts found the baggie of what she believed was methamphetamine in the dryer immediately after Olmsted removed his clothes from it. SR1: 46; SR2: 34. The substance in that baggie

presumptively tested positive for methamphetamine. SR1: 46; SR2: 34. Roberts also reported heavy short-term traffic to Ostby's residence and finding a bag of what she thought was methamphetamine in the hallway of the apartment complex on February 13, 2019, approximately five weeks earlier. SR1: 46; SR2: 34.

Likewise, Investigator Olson's active investigation of Ostby's apartment corroborated Roberts' information. He received unconfirmed information that Ostby was distributing methamphetamine. SR1: 47; SR2: 35. He observed a male subject arrive at the residence and go inside with the vehicle still running and the driver's side door open. SR1: 46; SR2: 34. The male was inside for only two minutes. SR1: 46; SR2: 34. When that male was later stopped for a traffic violation, he was arrested for possession of methamphetamine. SR1: 46-47; SR2: 34-35. While corroboration of unusual traffic to an address under surveillance is not essential to determine probable cause, Investigator Olson's drug investigation corroborated Roberts' information. *Gilmore,* 2009 S.D. 11, ¶ 16, 762 at 637.

The present case is distinguishable from *Tenold,* 2019 S.D. 66, 937 N.W.2d 6. In *Tenold*, this Court suppressed evidence obtained through a search warrant, finding insufficient probable cause for the warrant. *Id.* ¶ 41. The affidavit essentially contained information that hotel security reported frequent foot traffic to Tenold's hotel room, accompanied with names of casino customers. *Id.* ¶ 34. There was also

a tip from an unidentified informant claiming to have been solicited for money in exchange for drugs or sex. *Id.* This Court found the information lacking for several reasons. First, there was no indication hotel security personally observed any illegal activity. *Id.* ¶ 35. Nor did the affidavit state any investigation or knowledge that Tenold's visitors were associated with illegal drug activity. *Id.* Second, the unknown tipster did not provide information regarding the date, time, or location of the alleged solicitation. *Id.* ¶ 36. This Court concluded the affidavit merely related a tip of "possible drug activity" communicated through three different people before being relayed to law enforcement. *Id.* The mere fact that people are coming and going is not alone sufficient to support the belief that criminal activity is occurring. *Id.* ¶ 17. Consequently, it is not enough to support the issuance of a search warrant. *Id.*

But here, law enforcement corroborated Roberts' tip, ensuring both her reliability and the veracity of the information she supplied. The substance in the bag found by Roberts presumptively testing positive for methamphetamine and she provided the specific date she found what she believed to be methamphetamine in the hallway on February 13, 2019. Law enforcement also observed an individual stopping at Ostby's apartment for approximately two minutes and was later apprehended for possession of a controlled substance. Roberts' information, along with law enforcement's investigative findings,

provided probable cause to support a search warrant for Apartment 15 and a urine sample from Olmsted and Ostby. The information, when considered as a whole, was sufficient to support law enforcement's belief that Olmsted and Ostby were involved in drug-related activities.

The present case is more akin to *Raveydts,* where two anonymous informants each provided details of heavy short-term traffic. 2004 S.D. 134, ¶¶ 2-3, 691 N.W.2d at 292. One informant observed an individual leave Raveydts' residence with a small plastic item in her hand. *Id.* ¶ 2. The second informant stated he was a former narcotics user and recognized the odor of burnt marijuana coming from Raveydts' residence. *Id.* ¶ 3. He also told law enforcement that one of the individuals he saw at the residence had previously sold him marijuana and the informant believed the individual still sold marijuana. *Id.* The informant also provided details on the date of his observations. *Id.* ¶ 10. In addition to two separate informants, law enforcement investigated the license plates provided by the informants and discovered two individuals with a history of illegal drug activity. *Id.* This Court found "the informants' explicit and detailed description of alleged wrongdoing," along with law enforcement's corroboration, and the tendency of the informants to corroborate each other, provided sufficient evidence to support the issuance of a search warrant. *Id.* ¶ 14.

Here, law enforcement received a tip from Roberts — a known informant — that she found what she believed was methamphetamine

in the dryer after Olmsted removed his clothes at her request. SR1: 45-46; SR2: 34-35. She was not an anonymous tipster. Roberts' information was confirmed with a presumptive test identifying the substance as methamphetamine. SR1: 45; SR2: 34. She also provided law enforcement information regarding the heavy short-term traffic to Apartment 15. SR1: 45; SR2: 34. This information was consistent with Investigator Olson's active drug investigation. SR1: 40-47; SR2: 28-35. And law enforcement was able to corroborate much of Roberts' information. All of this information was included in the Affidavit in Support of a Search Warrant. SR1: 40-47; SR2: 28-35.

While the circuit court cited some of the appropriate standards governing search warrant affidavits, it failed to properly apply those standards. SR1: 136-37; SR2: 118-19. The circuit court discredited the information supporting the probable cause determination by viewing each piece of evidence in isolation. SR1: 140-41; SR2: 122-23. But the United States Supreme Court and this Court have rejected piecemeal review of probable cause affidavits. *State v. Barry,* 2018 S.D. 29, ¶ 22, 910 N.W.2d 204, 212 (citing *District of Columbia v. Wesby,* 138 S.Ct. 577, 588, 199 L.Ed.2d 453 (2018)). Courts are required to consider "the whole picture" under the totality of the circumstances. *Id.* In fact, "precedents recognize that the whole is often greater than the sum of its parts – especially when the parts are viewed in isolation." *Id.*

Here, the court discounted Roberts' information because she did not have "special training or experience related to the identification or detection of methamphetamine use." SR1: 141; SR2: 123. The circuit court should have given more deference to Roberts' tip. She was a known informant and concerned citizen reporting what she found. She reported information that was corroborated by police surveillance and investigation. She was not required to have specialized training for the court to consider her information to determine probable cause. SDCL 19-19-701. Additionally, she did not provide a vague, uncorroborated tip. Rather, Roberts provided details on how she discovered the methamphetamine in the dryer immediately after Olmsted removed his clothes. The substance found presumptively tested positive for methamphetamine.

The circuit court also mistakenly relied on *State v. Sharpfish*, 2019 S.D. 49, 933 N.W.2d 1, for the standard regarding the use of an informant's tip. Reliance on *Sharpfish* is inapposite because the discussion of the anonymous tip was not dispositive of this Court's ultimate decision. *Sharpfish*, 2019 S.D. 49, ¶ 26, 933 N.W.2d at 10. Plus, *Sharpfish* is about consensual encounters and reasonable suspicion for a person's seizure. *Id.* The more appropriate authority for the use of informants on a search warrant affidavit is *Gilmore* and *Dubois,* discussed supra.

The circuit court also discounted law enforcement's information because they did not "personally observe[] criminal activity traceable to [A]partment 15." SR1: 141; SR2: 123. Unlike reasonable suspicion for a traffic stop, personal observation of criminal activity by law enforcement is not essential to a probable cause determination. *Gates,* 462 U.S. at 241-42, 103 S.Ct. at 2335. All that is required for probable cause is a showing of probability of criminal activity. *Dubois*, 2008 S.D. 15, ¶ 11, 746 N.W.2d at 202. While each piece of evidence provided in the affidavit did not alone amount to probable cause, when all of this information is combined the evidence is sufficient to uphold the magistrate's probable cause finding. *Barry*, 2018 S.D. 29, ¶ 22, 910 N.W.2d at 212. Much like evidence presented at trial, evidence in a probable cause affidavit is not reviewed in isolation.

Here, the circuit court failed to read the affidavit as a whole and interpret it in a common-sense and realistic manner. *See Dubois,* 2008 S.D. 15, ¶ 14, 746 N.W.2d at 203 (citing *Habbena*, 372 N.W.2d 450, 456 (S.D. 1985). But when the entire affidavit is viewed as a whole, there is sufficient evidence to support the issuance of the warrant.

Based on the foregoing, there was sufficient evidence in the Affidavit for Search Warrant to uphold the magistrate judge's probable cause determination.

C. *The Good Faith Exception Applies.*

But even if this Court determines the affidavit was deficient, law enforcement's search was conducted pursuant to a warrant and the good-faith exception to the exclusionary rule applies. The "good-faith exception is reviewed de novo." *State v. Running Shield*, 2015 S.D. 78, ¶¶ 6, 871 N.W.2d 503, 505.

The exclusionary rule was judicially created to "deter constitutional violations by government officials." *Running Shield*, 2015 S.D. 78, ¶ 7, 871 N.W.2d at 506 (quoting *State v. Sorensen,* 2004 S.D. 108, ¶ 8, 688 N.W.2d 193, 196). This Court recognizes:

> When the police exhibit "deliberate," "reckless," or "grossly negligent" disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. But when the police act with an objectively "reasonable good-faith belief" that their conduct is lawful, or when their conduct involves only simple, "isolated" negligence, the "deterrence rationale loses much of its force," and exclusion cannot "pay its way."

Running Shield, 2015 S.D. 78, ¶ 7, 871 N.W.2d at 506 (quoting *Davis v. United States*, 564 U.S. 229, 238, 131 S.Ct. 2419, 2427-28, (2011)).

"Under the good-faith exception, evidence may be admissible, even when a warrant is subsequently invalidated, if law enforcement's reliance on the warrant was objectively reasonable." *Running Shield*, 2015 S.D. 78, ¶ 6, 871 N.W.2d at 505 (citing *Sorensen,* 2004 S.D. 108,

¶ 9, 688 N.W.2d at 197). And suppression of evidence obtained by a search warrant is only appropriate if:

> (1) 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'; (2) 'the issuing magistrate wholly abandoned his judicial role'; (3) the affidavit is 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable'; and (4) the warrant is "so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.

Running Shield, 2015 S.D. 78, ¶ 7, 871 N.W.2d at 506 (quoting *United States v. Leon*, 468 U.S. 897, 923, 104 S.Ct. 3405, 3421 (1984)).

None of these situations are present in the pending case. Olmsted and Ostby do not claim the search warrant affidavit is misleading or that the magistrate abandoned its judicial role when finding probable cause existed. The record is also devoid of any omission by law enforcement that would have affected the magistrate court's finding of probable cause. Based on the showing of probable cause detailed above, and the lack of any misleading information in the affidavit, the investigating officers reasonably relied on the search warrant to obtain the now-suppressed evidence. Law enforcement relied on the search warrant in good faith to conduct its search.

Therefore, suppression is inappropriate because law enforcement, in good faith, relied on the search warrant.

CONCLUSION

The State respectfully requests that the circuit court's order suppressing evidence be reversed and the search conducted pursuant to the search warrant be upheld.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellant's Brief contains 3,651 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2016.

Dated this 13th day of March 2020.

/s/ Erin E. Handke
Erin E. Handke
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 13, 2020, a true and correct copy of Appellant's Brief in the matter of *State of South Dakota v. Carrie Lynn Ostby and Dana Olmsted* was served via electronic mail upon Michelle Potts, michelle@greyeisenbranlaw.com and Robert D. Pasqualucci, robert@rushmorelaw.com.

/s/ E.rin E. Handke
Erin E. Handke
Assistant Attorney General

Appendix

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COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	COURT FILE NO. CRI119-268
Plaintiff,	)	
v.	)	ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS
CARRLIE LYNN OSTBY,	)	
Defendant.	)	

The Honorable Eric Strawn, Circuit Court Judge, having reviewed the Defendant's Motion to Suppress, all briefs, and the arguments of counsel; it is hereby,

ORDERED that the Defendant's Motion to Suppress is granted.

Dated this ____ day of November 2019.

BY THE COURT:

Signed: 11/27/2019 1:31:47 PM

Honorable Eric Strawn
Circuit Court Judge

ATTEST:
CAROL LATUSECK
Clerk of Courts
By: TONISHA MUND
Deputy

11/25/2019 1:42 PM CST LAWRENCE COUNTY

STATE OF SOUTH DAKOTA)) SS. COUNTY OF LAWRENCE)	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff, vs. CARRIE LYNN OSTBY, Defendant.	40CRI19-000268 MEMORANDUM OF DECISION ON DEFENDANT'S MOTION TO SUPPRESS

MOTIONS SUMMARY

This matter having come for Motions Hearing on Defendant's Motion Suppress on September 10, 2019, the State having appeared represented by Lawrence County Deputy State's Attorney Brenda Harvey, Defendants appearing personally and with counsel, Michelle Potts of Grey & Eisenbraun Prof. LLC, the Court having heard arguments of Counsel the State and Defendant having been afforded time to submit her respective brief and this Court having considered the briefs from both parties, and good cause showing, this Court issues its Memorandum of Decision. This Memorandum of Decision is drafted pursuant to SDCL § 15-6-52(a). This Memorandum of Decision contains this Court's Findings of Fact and Conclusions of Law by reference and as if set out point by point. It is intended that any Finding of Fact may be considered a Conclusion of Law if the context so warrants and vice versa.

11/25/2019 1:42 PM CST LAWRENCE COUNTY

FACTUAL POSTURE

The following information was included in Officer Jandt's the probable cause affidavit:

> On March 20, 2019, Officer Erik Jandt of the Deadwood Police Department arrived at 53 Dunlap Avenue in Deadwood, South Dakota to respond to a report regarding a woman who found possible methamphetamine in a community dryer.
> The reporting party, later identified as Ariel Roberts, stated she watched a male from apartment 15 take his clothes from the dryer prior to discovering a substance in the machine.

Officer Jandt used a field test to confirm the substance was methamphetamine. Law enforcement knocked on the door of apartment 15. A male voice responded but did not answer the door. The front door was held shut with a knife. Police made entry into the apartment and located Dana Olmsted inside. The renter of the apartment, Defendant Carrie Ostby, was not present.

Police executed a search of the apartment to ensure no one else was present and then secured the apartment. Officers were only looking for people; therefore, there was no search for or mention of any illegal substances at the time.

Officer Jandt completed an Affidavit In Support of Request For Search Warrant (State's Exhibit 1), regarding Defendant Carrie Ostby and her residence at 53 Dunlap Avenue Apartment 15 in Deadwood, South Dakota. Judge Chad Callahan signed an Amended Search Warrant (State's Exhibit 3) on March 21, 2019, directing law enforcement to search 53 Dunlop Street Apartment 15 for illegal substances. The

11/25/2019 1:42 PM CST LAWRENCE COUNTY

Search Warrant also called for law enforcement to obtain a urine sample from Defendant Ostby and authorized a search of her vehicle.

Law enforcement officers executed the search warrant on apartment 15 and located numerous baggies containing a white crystal substance. This substance was sent to the Rapid City Laboratory and tested positive for methamphetamine. The search warrant was served on Defendant Ostby on March 22, 2029 and a urine sample was obtained from her. The urine sample tested presumptively positive for methamphetamine.

Defendant Ostby was placed under arrest for ingestion of methamphetamine. The urine sample was later sent to the South Dakota Public Health Laboratory in Pierre, South Dakota. The laboratory confirmed the sample tested positive for methamphetamine.

The probable cause affidavit expanded on law enforcement's history with apartment. It stated the following:

> Ariel Roberts informed Officer Jandt that she had discovered a bag of what she believed to be methamphetamine on February 13, 2019 in the hallway of the apartment complex.

Officer Jandt stated that he relied on "prior history possibly associated with the residence" to support his decision to gain entry into the apartment. His purpose was to "prevent[] the Defendant from destroying evidence." Officer Jandt knew that Investigator James Olson was actively working on a drug investigation on that residence.

Ms. Roberts had reported to the police heavy traffic in and out of apartment 15. On a previous occasion, Investigator Olson observed a male subject arrive at

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Defendant Ostby's residence and go inside while his vehicle was running. This individual left his car door open and was inside the residence for approximately 2 minutes. The individual was later stopped for a traffic violation and arrested for possession of methamphetamine. Investigator Olson had also received unconfirmed information that Ostby had been distributing methamphetamine.

ISSUES

1. Whether Officer Jandt's probable cause affidavit contained sufficient information to support a warrant authorizing the search of Defendant Ostby's apartment.

2. Whether the exigent circumstances exception to the warrant requirement authorized Officer Jandt to search the defendant's home even if the probable cause affidavit lacked sufficient information to support the warrant.

ANALYSIS

The Fourth Amendment of the United States Constitution and Article VI § 11 of the South Dakota Constitution protects individuals from unreasonable searches and seizures. U.S. CONST. AMEND IV and S.D. CONST. ART. VI §11. "These provisions guarantee an individual's right to personal security free from arbitrary law enforcement interference." *State v. Ramirez*, 535 N.W.2d 847, 849 (S.D. 1995) (citation omitted). "The ultimate touchstone of the Fourth Amendment is 'reasonableness'" *State v. Kaline*, 2018 S.D. 54, ¶ 10, 915 N.W.2d 854, 857 (citations omitted). "Reasonableness of a search depends on balancing the public's interest in preventing crime with the individual's right to be free from arbitrary and unwarranted governmental intrusions into personal privacy." *State v. Smith*, 2014 S.D. 50, ¶ 15, 851 N.W.2d 719, 724. "A reviewing court must look to the totality of the circumstances to determine whether the officer had a particularized and objective

basis for suspecting criminal activity.'" *Meyer*, 2015 S.D. 64, ¶ 9, 868 N.W.2d 561, 565 (quoting *Mohr*, ¶ 14, 841 N.W.2d at 444 (internal quotation omitted)).

i. Warrantless searches and the exigent circumstances exception

"Constitutional challenges to a warrantless law enforcement search require a two-step inquiry: first, factual questions on what the officers knew or believed at the time of the search and what action they took in response; second, legal questions on whether those actions were reasonable under the circumstances." *State v. Deneui*, 2009 S.D. 99, ¶ 14, 775 N.W.2d 221, 230. The second step requires an objective analysis of reasonableness. *Id.* "A reviewing court must look to the totality of the circumstances to determine whether the officer had a particularized and objective basis for suspecting criminal activity.'" *Meyer*, 2015 S.D. ¶ 9, 868 N.W.2d at 565 (quoting *Mohr*, ¶ 14, 841 N.W.2d at 444 (internal quotation omitted)). "It is well settled that law enforcement 'officers may draw on their own experience and specialized training to make interferences from and deductions about the cumulative information available to them that might well elude an untrained person.'" *Chase*, 2018 S.D. 70, ¶ 7 (quoting *Mohr*, ¶ 16, 841 N.W.2d at 445 (internal quotation omitted)).

"The Fourth Amendment demonstrates a 'strong preference for searches conducted pursuant to a warrant [.]'" *State v. Walter*, 2015 S.D. 37, ¶ 6, 864 N.W.2d 779, 781 (citations omitted). "Searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment." U.S. CONST. AMEND. IV; *State v. Kaline*, 2018 S.D. 54, ¶ 10,

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"The exigent circumstances exception is one of the well-delineated exceptions to the warrant requirement." *Fischer*, 2016 S.D. 12, ¶ 13, 875 N.W.2d at 45 (quoting *Fierro*, 2014 S.D. 62, ¶ 17, 853 N.W.2d at 240). "Exigent circumstances exist when a situation demands immediate attention with no time to obtain a warrant." *State v. Bowker*, 2008 S.D. 61, ¶ 19, 754 N.W.2d 56, 63 (quoting *State v. Dillon*, 2007 S.D. 77, ¶ 18, 738 N.W.2d 57, 60). "The need to protect or preserve life or avoid serious injury presents that kind of situation." *Id.* "In determining whether exigent circumstances exist[, Courts] ask, '[w]hether police officers, under the facts as they knew them at the time, would reasonably have believed that delay in procuring a search warrant would gravely endanger life, risk destruction of evidence, or greatly enhance the likelihood of a suspect's escape.'" *Dillon*, 2007 S.D. 77, ¶ 18, 738 N.W.2d at 60–61 (quoting *State v. Hess*, 2004 S.D. 60, ¶ 25, 680 N.W.2d 314, 325). Courts consider "the facts as perceived by the police at the time of entry, not as subsequently uncovered." *State v. Meyer*, 1998 S.D. 122, ¶ 23, 587 N.W.2d 719, 724.

"For this exception to apply, law enforcement officers must possess probable cause that the premises to be searched contains the sought-after evidence or suspects." *State v. Deneui*, 2009 S.D. 99, ¶ 15, 775 N.W.2d 221, 230.

ii. Sufficiency of evidence necessary in a probable cause affidavit to obtain a search warrant

When used to obtain a warrant, a probable cause affidavit "must provide the issuing judge with sufficient information to make "a 'common sense' decision that there was a 'fair probability' the evidence would be found on the persons or at the place to be searched." *Guthrie v. Weber*, 2009 S.D. 42, ¶ 11, 767 N.W.2d 539, 543 (citations and quotations omitted). "What amount of evidence is required to form probable cause is not a question susceptible to formulaic solutions. Probable cause 'is a fluid concept—turning on the assessment of probabilities in particular contexts—not readily, or even usefully, reduced to a neat set of legal rules.'" *State v. Running Shield*, 2015 S.D. 78, ¶ 9, 871 N.W.2d 503, 506. "In a claim that an affidavit for a search warrant lacked probable cause, [the South Dakota Supreme Court] review[s] the totality of the circumstances to determine 'if there was at least a 'substantial basis' for the issuing judge to find probable cause." *Guthrie v. Weber*, 2009 S.D. 42, ¶ 11, 767 N.W.2d 539, 543 (citing *State v. Jackson*, 2000 SD 118, ¶ 8, 616 N.W.2d 412, 416 (citation omitted).

"The Fourth Amendment requires that there be a nexus between the item to be seized and the alleged criminal activity." *Id.* "On review, [the South Dakota Supreme Court is] limited to an examination of the facts as contained within the four corners of the affidavit. Furthermore, [the Supreme Court] review[s] the issuing

court's probable cause determination independently of any conclusion reached by the judge in the suppression hearing." *State v. Dubois*, 2008 S.D. 15, ¶ 10, 746 N.W.2d 197, 202. "Reasonable inferences may be drawn from the information in the affidavit." *State v. Raveydts*, 2004 S.D. 134, ¶ 9, 691 N.W.2d 290, 293. "Furthermore, [the South Dakota Supreme Court] will draw every reasonable inference possible in support of the issuing court's determination of probable cause to support the warrant." *State v. Helland*, 2005 S.D. 121, ¶ 17, 707 N.W.2d 262, 269 (citations omitted).

Officers may rely on tips from informants when conducting investigations. However, "[t]ips must provide sufficient information to allow officers to develop a reasonable suspicion that criminal activity is afoot." *State v. Sharpfish*, 2019 S.D. 49, ¶ 26, 933 N.W.2d 1, 10. "When an officer is not given an 'explicit and detailed description of alleged wrongdoing,' the officer must have some other reason to believe the informant's conclusion is correct." *Id. (citing State v. Stanage*, ¶ 11, 893 N.W.2d at 526 (quoting *Navarette*, 572 U.S. at 399, 134 S. Ct. at 1689))). The officer must confirm the tip through personal observations of criminal activity, or in the alternative, be aware that the tipster "has special training or experience relating to the conclusion at issue." *Id.* (*Stanage*, ¶ 11, 893 N.W.2d at 527).

In *State v. Sharpfish*, an officer received a tip concerning an intoxicated driver. The officer was informed that the individual was a Native American male, about six feet tall, 180 pounds, wearing jeans and a t-shirt. He was informed that this individual was driving a blue minivan northbound in the Baken Park parking lot towards the Corner Pantry gas station in Rapid City. 2019 S.D. 49, ¶ 2, 933 N.W.2d

1, 5. The officer was not told the reporting party's identity or provided information regarding why the reporting party believed the driver to be intoxicated. *Id.* The officer witnessed the blue minivan driving through the parking lot and watched it come to a stop at a gas station pump. The officer did not witness any erratic driving or traffic violations. The officer conducted a field sobriety test and concluded that the driver was intoxicated. The defendant moved to suppress the evidence obtained as a result of his encounter with the officer, stating that "he was not contacted and detained based on reasonable suspicion" and therefore the stop was a violation of his Fourth Amendment rights. 2019 S.D. 49, ¶ 7, 933 N.W.2d 1, 5.

The South Dakota Supreme Court held that the officer had developed reasonable suspicion prior to engaging with the defendant. However, it concluded that the officer "did not have a reasonable suspicion of criminal activity just from the tip alone." 2019 S.D. 49, ¶ 28, 933 N.W.2d 1, 11. In support of this determination, the Supreme Court stated that the officer "did not receive a detailed and explicit description of the wrongdoing to support the basis of the informant's conclusion that Sharpfish was driving while intoxicated. Nor did he receive any information regarding the identity of the informant or any specialized training or experience the informant had regarding his or her conclusion that Sharpfish was intoxicated." *Sharpfish*, 2019 S.D. 49, ¶ 28, 933 N.W.2d 1, 10–11. Finally, the officer "did not independently observe Sharpfish driving erratically though the parking lot or committing any traffic violations." *Id.*

STANDARD OF REVIEW

The South Dakota Supreme Court "review[s] the [trial] court's grant or denial of a motion to suppress involving an alleged violation of a constitutionally protected right under the de novo standard of review." *State v. Sharpfish*, 2019 S.D. 49, ¶ 23, 933 N.W.2d 1, 9 (citing *State v. Fierro*, 2014 S.D. 62, ¶ 12, 853 N.W.2d 235, 239 (citations omitted)). "[F]indings of fact are reviewed under the clearly erroneous standard[.]" *Id.* at 2019 S.D. ¶ 23, 933 N.W.2d at 10 (citations omitted). However, the application of the facts to the law is subject to de novo review. *Id.*

OPINION

1. Officer Jandt did not have enough information to establish probable cause based on the facts contained within the four corners of the affidavit in support of the search warrant.

The State argues that Officer Jandt's affidavit contained sufficient information to support the warrant to search the Defendant Ostby's apartment. Specifically, it contends that several tips from an informant, Ariel Roberts, coupled with information gathered by law enforcement pursuant to an on-going investigation of apartment 15 established probable cause.

An examination of the facts as contained within the affidavit must be confined to the four corners of the affidavit." *State v. Dubois*, 2008 S.D. 15, ¶ 10, 746 N.W.2d 197, 202. "Reasonable inferences may be drawn from the information in the affidavit." *State v. Raveydts*, 2004 S.D. 134, ¶ 9, 691 N.W.2d 290, 293. The South Dakota Supreme Court "will draw every reasonable inference possible in support of the issuing court's determination of probable cause to support the warrant." *State v. Helland*, 2005 S.D. 121, ¶ 17, 707 N.W.2d 262, 269 (citations omitted).

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Officer Jandt's probable cause affidavit stated that Ms. Roberts watched a male from apartment 15 take his clothes from a community dryer. Afterwards, she discovered a substance that field tested positive for methamphetamine. On a previous occasion, Ms. Roberts reported that she discovered a bag of a substance she believed to be methamphetamine in the hallway of the apartment complex. Ms. Roberts also reported heavy traffic in and out of apartment 15.

Officers may rely on tips from informants when conducting investigations. However, "[t]ips must provide sufficient information to allow officers to develop a reasonable suspicion that criminal activity is afoot." *State v. Sharpfish*, 2019 S.D. 49, ¶ 26, 933 N.W.2d 1, 10. "*When an officer is not given an 'explicit and detailed description of alleged wrongdoing,' the officer must have some other reason to believe the informant's conclusion is correct.*" *Id. (citing State v. Stanage*, ¶ 11, 893 N.W.2d at 526 (quoting *Navarette*, 572 U.S. at 399, 134 S. Ct. at 1689) (emphasis added)). The officer must confirm the tip through personal observations of criminal activity, or in the alternative, be aware that the tipster "has special training or experience relating to the conclusion at issue." *Id.* (*Stanage*, ¶ 11, 893 N.W.2d at 527).

The affidavit described Investigator James Olson's observations of apartment 15 provided that the investigator witnessed a male subject arrive at the residence and go inside while his vehicle was running. This individual left his car door open and remained in the apartment for approximately two minutes. He was later stopped for a traffic violation and arrested for possession of methamphetamine. In addition,

Investigator Olson had received unconfirmed information that Defendant Ostby had been distributing methamphetamine.

The State does not allege that Ms. Roberts has special training or experience related to the identification or detection of methamphetamine use. Therefore, to rely on her tip to establish probable cause, law enforcement must confirm the information through personal observations of criminal activity. In the present case, neither Officer Jandt or Investigator Olson personally observed criminal activity traceable to apartment 15. The fact that investigator observed an individual entering the apartment who was later arrested with methamphetamine is insufficient to connect the drug possession to the apartment. Further, law enforcement was not present when Ms. Roberts discovered the methamphetamine in the hallway or in the dryer. Based on these facts, this Court holds that the evidence contained in the affidavit was insufficient to establish probable cause to search Defendant Ostby's apartment.

2. The State failed to establish by a preponderance of the evidence that Officer Jandt had sufficient information to circumvent the warrant requirement under the extrinsic evidence exception.

The State argues that Officer Jandt was entitled to search the defendant's apartment regardless of the sufficiency of his probable cause affidavit. To support of this assertion, it cites to the exigent circumstances exception to the warrant requirement. This exception allows for warrantless searches and seizures when "a situation demands immediate attention with no time to obtain a warrant." *State v. Bowker*, 2008 S.D. 61, ¶ 19, 754 N.W.2d 56, 63 (quoting *State v. Dillon*, 2007 S.D. 77, ¶ 18, 738 N.W.2d 57, 60). "In determining whether exigent circumstances exist[, Courts] ask, '[w]hether police officers, under the facts as they knew them at the time,

would reasonably have believed that delay in procuring a search warrant would gravely endanger life, risk destruction of evidence, or greatly enhance the likelihood of a suspect's escape." *Dillon*, 2007 S.D. 77, ¶ 18, 738 N.W.2d at 60–61 (quoting *State v. Hess*, 2004 S.D. 60, ¶ 25, 680 N.W.2d 314, 325). Courts consider "the facts as perceived by the police at the time of entry, not as subsequently uncovered." *State v. Meyer*, 1998 S.D. 122, ¶ 23, 587 N.W.2d 719, 724.

The State argues that Officer Jandt "had concerns that the male, later identified as Defendant Olmsted, may try to leave the area" and/or destroy evidence if law enforcement did not immediately act on the Ms. Robert's tip. *State's Brief in Opposition to Defendant's Motion to Suppress* at 2. However, it is important to note that the exigent circumstances exception to the warrant requirement requires that "law enforcement officers [] possess probable cause that the premises to be searched contains the sought-after evidence or suspects." *State v. Deneui*, 2009 S.D. 99, ¶ 15, 775 N.W.2d 221, 230. Here, Officer Jandt's affidavit demonstrates that law enforcement did not have the information it needed to establish probable cause to search the defendant's home. Based on the South Dakota Supreme Court's holding *Deneui* and this Court's holding on issue one, the State has failed to establish by a preponderance of the evidence the requirements of the exigent circumstances exception. *See State v. Rogers*, 2016 S.D. 83, ¶ 11, 887 N.W.2d 720, 723 (stating that the burden of proof required to establish the existence of a warrant exception is a preponderance of the evidence). The State does not cite any other exception to the

warrant requirement that would render permissible Officer Jandt's warrantless search of the defendant's apartment.

CONCLUSION

After considering all briefs and arguments of counsel, this Court concludes that the State has not met its burden in demonstrating that Officer Jandt had sufficient information to circumvent the warrant requirement under the extrinsic evidence exception. This Court further concludes that Officer Jandt did not have enough information to establish probable cause based on the facts contained within the four corners of the affidavit in support of the search warrant. Therefore, the Defendant's Motion to Suppress is hereby GRANTED. The Defendant shall prepare a proposed order.

Dated this 25th day of November, 2019.

BY THE COURT:

Judge Eric J. Strawn
Circuit Court Judge

ATTEST:
Carol Latuseck
Clerk of Courts

BY: Deputy Clerk of Courts

STATE OF SOUTH DAKOTA))SS. COUNTY OF LAWRENCE)	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT FILE NO. 40CRI 19-258
STATE OF SOUTH DAKOTA, Plaintiff, vs. DANA OLMSTED, Defendant.	**ORDER ON DEFENDANT'S MOTION TO SUPPRESS EVIDENCE**

THIS MATTER having come before this Court for hearing on the 10th day of September, 2019 on the Defendant's Motion to Suppress Evidence; the State appearing by and through Lawrence County Deputy State's Attorney, Brenda Harvey; the Defendant appearing personally and by and through his legal counsel, Rena M. Hymans; being fully apprised in the premises and good cause appearing, it is hereby

FOUND that all factual findings referenced in this Court's November 25, 2019, Memorandum Decision are hereby adopted and incorporated; and it is further

CONCLUDED that all legal conclusions referenced in this Court's November 25, 2019, Memorandum Decision are hereby adopted and incorporated by this reference; and it is hereby

ORDERED that the Defendant's Motion to Suppress Evidence is hereby granted.

BY THE COURT:

Attest: CAROL LATUSECK,CLERK
Mund, Tonisha
Clerk/Deputy

Signed: 12/19/2019 11:00:46 AM

Honorable Eric Strawn
Circuit Court Judge

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STATE OF SOUTH DAKOTA)) SS. COUNTY OF LAWRENCE)	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff, vs. DANA OLMSTED, Defendant.	40CRI19-000268 MEMORANDUM OF DECISION ON DEFENDANT'S MOTION TO SUPPRESS

MOTIONS SUMMARY

This matter having come for Motions Hearing on Defendant's Motion Suppress on September 10, 2019, the State having appeared represented by Lawrence County Deputy State's Attorney Brenda Harvey, Defendant appearing personally and with counsel, Rena Hymans, the Court having heard arguments of Counsel the State and Defendant having been afforded time to submit her respective brief and this Court having considered the briefs from both parties, and good cause showing, this Court issues its Memorandum of Decision. This Memorandum of Decision is drafted pursuant to SDCL § 15-6-52(a). This Memorandum of Decision contains this Court's Findings of Fact and Conclusions of Law by reference and as if set out point by point. It is intended that any Finding of Fact may be considered a Conclusion of Law if the context so warrants and vice versa.

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FACTUAL POSTURE

The following information was included in Officer Jandt's the probable cause affidavit:

> On March 20, 2019, Officer Erik Jandt of the Deadwood Police Department arrived at 53 Dunlap Avenue in Deadwood, South Dakota to respond to a report regarding a woman who found possible methamphetamine in a community dryer.

The reporting party, later identified as Ariel Roberts, stated she watched a male from apartment 15 take his clothes from the dryer prior to discovering a substance in the machine.

Officer Jandt used a field test to confirm the substance was methamphetamine. Law enforcement knocked on the door of apartment 15. A male voice responded but did not answer the door. The front door was held shut with a knife. Police made entry into the apartment and located Dana Olmsted inside. The renter of the apartment, Defendant Carrie Ostby, was not present. Law enforcement didn't request a warrant before making contact or entering the apartment.

After entering the apartment and securing Olmsted, law enforcement executed a search of the apartment to ensure no one else was present and then secured the apartment. Officers were only looking for people; therefore, there was no search for or mention of any illegal substances at the time.

Officer Jandt completed an Affidavit In Support of Request For Search Warrant (State's Exhibit 1), regarding Defendant Carrie Ostby and her residence at 53 Dunlap Avenue Apartment 15 in Deadwood, South Dakota. Judge Chad Callahan signed an Amended Search Warrant (State's Exhibit 3) on March 21, 2019, directing

law enforcement to search 53 Dunlop Street Apartment 15 for illegal substances. The Search Warrant also called for law enforcement to obtain a urine sample from Defendant Ostby and authorized a search of her vehicle. Defendant Olmsted was previously detained and booked for possession of a controlled substance.

Law enforcement officers executed the search warrant on apartment 15 and located numerous baggies containing a white crystal substance. This substance was sent to the Rapid City Laboratory and tested positive for methamphetamine. The search warrant was served on Defendant Ostby on March 22, 2029 and a urine sample was obtained from her. The urine sample tested presumptively positive for methamphetamine.

Defendant Ostby was placed under arrest for ingestion of methamphetamine. The urine sample was later sent to the South Dakota Public Health Laboratory in Pierre, South Dakota. The laboratory confirmed the sample tested positive for methamphetamine.

The probable cause affidavit expanded on law enforcement's history with apartment. It stated the following:

> Ariel Roberts informed Officer Jandt that she had discovered a bag of what she believed to be methamphetamine on February 13, 2019 in the hallway of the apartment complex.

Officer Jandt stated that he relied on "prior history possibly associated with the residence" to support his decision to gain entry into the apartment. His purpose was to "prevent the Defendant from destroying evidence." Officer Jandt knew that

Investigator James Olson was actively working on a drug investigation on that residence.

Ms. Roberts had reported to the police heavy traffic in and out of apartment 15. On a previous occasion, Investigator Olson observed a male subject arrive at Defendant Ostby's residence and go inside while his vehicle was running. This individual left his car door open and was inside the residence for approximately 2 minutes. The individual was later stopped for a traffic violation and arrested for possession of methamphetamine. Investigator Olson had also received unconfirmed information that Ostby had been distributing methamphetamine.

ISSUES

1. Whether Officer Jandt's probable cause affidavit contained sufficient information to support a warrant authorizing the search of Defendant Ostby's apartment.
2. Whether the exigent circumstances exception to the warrant requirement authorized Officer Jandt to search the defendant's home even if the probable cause affidavit lacked sufficient information to support the warrant.

ANALYSIS

The analysis provided in the Memorandum of Opinion relating to Ostby is hereby incorporated as the identification and subsequent apprehension of Olmsted was premised upon the entry of Ostby's apartment which Olmsted was a guest.

The Fourth Amendment of the United States Constitution and Article VI § 11 of the South Dakota Constitution protects individuals from unreasonable searches and seizures. U.S. CONST. AMEND IV and S.D. CONST. ART. VI §11. "These provisions

guarantee an individual's right to personal security free from arbitrary law enforcement interference." *State v. Ramirez*, 535 N.W.2d 847, 849 (S.D. 1995) (citation omitted). "The ultimate touchstone of the Fourth Amendment is 'reasonableness'" *State v. Kaline*, 2018 S.D. 54, ¶ 10, 915 N.W.2d 854, 857 (citations omitted). "Reasonableness of a search depends on balancing the public's interest in preventing crime with the individual's right to be free from arbitrary and unwarranted governmental intrusions into personal privacy." *State v. Smith*, 2014 S.D. 50, ¶ 15, 851 N.W.2d 719, 724. "A reviewing court must look to the totality of the circumstances to determine whether the officer had a particularized and objective basis for suspecting criminal activity.'" *Meyer*, 2015 S.D. 64, ¶ 9, 868 N.W.2d 561, 565 (quoting *Mohr*, ¶ 14, 841 N.W.2d at 444 (internal quotation omitted)).

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Dillon, 2007 S.D. 77, ¶ 18, 738 N.W.2d 57, 60). "The need to protect or preserve life or avoid serious injury presents that kind of situation." *Id.* "In determining whether exigent circumstances exist[, Courts] ask, '[w]hether police officers, under the facts as they knew them at the time, would reasonably have believed that delay in procuring a search warrant would gravely endanger life, risk destruction of evidence, or greatly enhance the likelihood of a suspect's escape.'" *Dillon*, 2007 S.D. 77, ¶ 18, 738 N.W.2d at 60–61 (quoting *State v. Hess*, 2004 S.D. 60, ¶ 25, 680 N.W.2d 314, 325). Courts consider "the facts as perceived by the police at the time of entry, not as subsequently uncovered." *State v. Meyer*, 1998 S.D. 122, ¶ 23, 587 N.W.2d 719, 724. "For this exception to apply, law enforcement officers must possess probable cause that the premises to be searched contains the sought-after evidence or suspects." *State v. Deneui*, 2009 S.D. 99, ¶ 15, 775 N.W.2d 221, 230.

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Officers may rely on tips from informants when conducting investigations. However, "[t]ips must provide sufficient information to allow officers to develop a reasonable suspicion that criminal activity is afoot." *State v. Sharpfish*, 2019 S.D. 49, ¶ 26, 933 N.W.2d 1, 10. "When an officer is not given an 'explicit and detailed description of alleged wrongdoing,' the officer must have some other reason to believe the informant's conclusion is correct." *Id. (citing State v. Stanage*, ¶ 11, 893

N.W.2d at 526 (quoting *Navarette*, 572 U.S. at 399, 134 S. Ct. at 1689))). The officer must confirm the tip through personal observations of criminal activity, or in the alternative, be aware that the tipster "has special training or experience relating to the conclusion at issue." *Id.* (*Stanage*, ¶ 11, 893 N.W.2d at 527).

In *State v. Sharpfish*, an officer received a tip concerning an intoxicated driver. The officer was informed that the individual was a Native American male, about six feet tall, 180 pounds, wearing jeans and a t-shirt. He was informed that this individual was driving a blue minivan northbound in the Baken Park parking lot towards the Corner Pantry gas station in Rapid City. 2019 S.D. 49, ¶ 2, 933 N.W.2d 1, 5. The officer was not told the reporting party's identity or provided information regarding why the reporting party believed the driver to be intoxicated. *Id.* The officer witnessed the blue minivan driving through the parking lot and watched it come to a stop at a gas station pump. The officer did not witness any erratic driving or traffic violations. The officer conducted a field sobriety test and concluded that the driver was intoxicated. The defendant moved to suppress the evidence obtained as a result of his encounter with the officer, stating that "he was not contacted and detained based on reasonable suspicion" and therefore the stop was a violation of his Fourth Amendment rights. 2019 S.D. 49, ¶ 7, 933 N.W.2d 1, 5.

The South Dakota Supreme Court held that the officer had developed reasonable suspicion prior to engaging with the defendant. However, it concluded that the officer "did not have a reasonable suspicion of criminal activity just from the tip alone." 2019 S.D. 49, ¶ 28, 933 N.W.2d 1, 11. In support of this determination, the

Supreme Court stated that the officer "did not receive a detailed and explicit description of the wrongdoing to support the basis of the informant's conclusion that Sharpfish was driving while intoxicated. Nor did he receive any information regarding the identity of the informant or any specialized training or experience the informant had regarding his or her conclusion that Sharpfish was intoxicated." *Sharpfish*, 2019 S.D. 49, ¶ 28, 933 N.W.2d 1, 10–11. Finally, the officer "did not independently observe Sharpfish driving erratically though the parking lot or committing any traffic violations." *Id.*

STANDARD OF REVIEW

The South Dakota Supreme Court "review[s] the [trial] court's grant or denial of a motion to suppress involving an alleged violation of a constitutionally protected right under the de novo standard of review." *State v. Sharpfish*, 2019 S.D. 49, ¶ 23, 933 N.W.2d 1, 9 (citing *State v. Fierro*, 2014 S.D. 62, ¶ 12, 853 N.W.2d 235, 239 (citations omitted)). "[F]indings of fact are reviewed under the clearly erroneous standard[.]" *Id.* at 2019 S.D. ¶ 28, 933 N.W.2d at 10 (citations omitted). However, the application of the facts to the law is subject to de novo review. *Id.*

OPINION

1. Officer Jandt did not have enough information to establish probable cause based on the facts contained within the four corners of the affidavit in support of the search warrant.

The State argues that Officer Jandt's affidavit contained sufficient information to support the warrant to search the Defendant Ostby's apartment. Specifically, it contends that several tips from an informant, Ariel Roberts, coupled with information

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gathered by law enforcement pursuant to an on-going investigation of apartment 15 established probable cause.

An examination of the facts as contained within the affidavit must be confined to the four corners of the affidavit." *State v. Dubois*, 2008 S.D. 15, ¶ 10, 746 N.W.2d 197, 202. "Reasonable inferences may be drawn from the information in the affidavit." *State v. Raveydts*, 2004 S.D. 134, ¶ 9, 691 N.W.2d 290, 293. The South Dakota Supreme Court "will draw every reasonable inference possible in support of the issuing court's determination of probable cause to support the warrant." *State v. Helland*, 2005 S.D. 121, ¶ 17, 707 N.W.2d 262, 269 (citations omitted).

Officer Jandt's probable cause affidavit stated that Ms. Roberts watched a male from apartment 15 take his clothes from a community dryer. Afterwards, she discovered a substance that field tested positive for methamphetamine. On a previous occasion, Ms. Roberts reported that she discovered a bag of a substance she believed to be methamphetamine in the hallway of the apartment complex. Ms. Roberts also reported heavy traffic in and out of apartment 15.

Officers may rely on tips from informants when conducting investigations. However, "[t]ips must provide sufficient information to allow officers to develop a reasonable suspicion that criminal activity is afoot." *State v. Sharpfish*, 2019 S.D. 49, ¶ 26, 933 N.W.2d 1, 10. "*When an officer is not given an 'explicit and detailed description of alleged wrongdoing,' the officer must have some other reason to believe the informant's conclusion is correct.*" *Id. (citing State v. Stanage*, ¶ 11, 893 N.W.2d at 526 (quoting *Navarette*, 572 U.S. at 399, 134 S. Ct. at 1689) (emphasis

added)). The officer must confirm the tip through personal observations of criminal activity, or in the alternative, be aware that the tipster "has special training or experience relating to the conclusion at issue." *Id.* (*Stanage*, ¶ 11, 893 N.W.2d at 527).

The affidavit described Investigator James Olson's observations of apartment 15 provided that the investigator witnessed a male subject arrive at the residence and go inside while his vehicle was running. This individual left his car door open and remained in the apartment for approximately two minutes. He was later stopped for a traffic violation and arrested for possession of methamphetamine. In addition, Investigator Olson had received unconfirmed information that Defendant Ostby had been distributing methamphetamine.

The State does not allege that Ms. Roberts has special training or experience related to the identification or detection of methamphetamine use. Therefore, to rely on her tip to establish probable cause, law enforcement must confirm the information through personal observations of criminal activity. In the present case, neither Officer Jandt or Investigator Olson personally observed criminal activity traceable to apartment 15. The fact that investigator observed an individual entering the apartment who was later arrested with methamphetamine is insufficient to connect the drug possession to the apartment. Further, law enforcement was not present when Ms. Roberts discovered the methamphetamine in the hallway or in the dryer. Based on these facts, this Court holds that the evidence contained in the affidavit was insufficient to establish probable cause to search Defendant Ostby's apartment.

2. The State failed to establish by a preponderance of the evidence that Officer Jandt had sufficient information to circumvent the warrant requirement under the extrinsic evidence exception.

The State argues that Officer Jandt was entitled to search the defendant's apartment regardless of the sufficiency of his probable cause affidavit. To support of this assertion, it cites to the exigent circumstances exception to the warrant requirement. This exception allows for warrantless searches and seizures when "a situation demands immediate attention with no time to obtain a warrant." *State v. Bowker*, 2008 S.D. 61, ¶ 19, 754 N.W.2d 56, 63 (quoting *State v. Dillon*, 2007 S.D. 77, ¶ 18, 738 N.W.2d 57, 60). "In determining whether exigent circumstances exist[, Courts] ask, '[w]hether police officers, under the facts as they knew them at the time, would reasonably have believed that delay in procuring a search warrant would gravely endanger life, risk destruction of evidence, or greatly enhance the likelihood of a suspect's escape." *Dillon*, 2007 S.D. 77, ¶ 18, 738 N.W.2d at 60–61 (quoting *State v. Hess*, 2004 S.D. 60, ¶ 25, 680 N.W.2d 314, 325). Courts consider "the facts as perceived by the police at the time of entry, not as subsequently uncovered." *State v. Meyer*, 1998 S.D. 122, ¶ 23, 587 N.W.2d 719, 724.

The State argues that Officer Jandt "had concerns that the male, later identified as Defendant Olmsted, may try to leave the area" and/or destroy evidence if law enforcement did not immediately act on the Ms. Robert's tip. *State's Brief in Opposition to Defendant's Motion to Suppress* at 2. However, it is important to note that the exigent circumstances exception to the warrant requirement requires that "law enforcement officers [] possess probable cause that the premises to be searched contains the sought-after evidence or suspects." *State v. Deneui*, 2009 S.D. 99, ¶ 15,

775 N.W.2d 221, 230. Here, Officer Jandt's affidavit demonstrates that law enforcement did not have the information it needed to establish probable cause to search the defendant's home. Based on the South Dakota Supreme Court's holding *Deneui* and this Court's holding on issue one, the State has failed to establish by a preponderance of the evidence the requirements of the exigent circumstances exception. *See State v. Rogers*, 2016 S.D. 83, ¶ 11, 887 N.W.2d 720, 723 (stating that the burden of proof required to establish the existence of a warrant exception is a preponderance of the evidence). The State does not cite any other exception to the warrant requirement that would render permissible Officer Jandt's warrantless search of the defendant's apartment. Due to this Court concluding that law enforcement lacked the requisite warrant before entering Ostby's apartment, the seizure of Olmsted was also illegal.

CONCLUSION

After considering all briefs and arguments of counsel, this Court concludes that the State has not met its burden in demonstrating that Officer Jandt had sufficient information to circumvent the warrant requirement under the extrinsic evidence exception. This Court further concludes that Officer Jandt did not have enough information to establish probable cause based on the facts contained within the four corners of the affidavit in support of the search warrant. Therefore, the Defendant's Motion to Suppress is hereby **GRANTED**. The Defendant shall prepare a proposed order.

Dated this 25th day of November, 2019.

BY THE COURT:

Judge Eric J. Strawn
Circuit Court Judge

ATTEST:
Carol Latuseck
Clerk of Courts

BY:
Deputy Clerk of Courts

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL No. 29205 and 29206

STATE OF SOUTH DAKOTA,

Plaintiff and Appellant,

v.

CARRIE LYNN OSTBY and
DANA OLMSTED,

Defendants and Appellees.

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

THE HONORABLE ERIC J. STRAWN

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NOTICE OF APPEAL WAS FILED December 20, 2019

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THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL No. 29205 and 29206

STATE OF SOUTH DAKOTA,

Plaintiff and Appellant,

v.

CARRIE LYNN OSTBY and
DANA OLMSTED,

Defendants and Appellees.

PRELIMINARY STATEMENT

The Appellees hereby incorporate the same Preliminary Statement as contained in the Appellant's Brief and this brief will utilize the same citing references as the Appellant. Specifically, Plaintiff and Appellant, State of South Dakota, shall be referred to as "State." All other individuals shall be referred to by name. Citations to the State's Appellant's Brief will be designated by the initials "SB" followed by the applicable page number. Citations to other documents will be designated as follows:

Settled Record (Lawrence Criminal File 19-258; Dana Olmsted). . . . . .SRl

Settled Record (Lawrence Criminal File 19-268; Carrie Ostby). SR2

Transcript (Evidentiary Motions Hearing, Lawrence County Criminal Files 19-258 & 19-268 held on September 10, 2018). . . . . .TR

All document designations will be followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

The Appellees, Dana Olmsted and Carrie Lynn Ostby agree that this Court has jurisdiction to hear this appeal. Further, the Appellees adopt and agree with the Jurisdictional Statement as contained in the State's Appellant's Brief. In circuit court below, Dana Olmsted filed the Defendant's Motion to Suppress Evidence and Carrie Ostby, filed a Notice of Joinder to Suppress Evidence. SRl: 6-36; SR2: 24. An evidentiary hearing was held before the circuit court on September 10, 2019. SRl: 56; SR2: 46. After considering the parties' written briefs, the circuit court granted the Motion to Suppress Evidence and issued its Memorandum of Decision on Defendant's Motion to Suppress on November 25, 2019. SRl: 130-45; SR2: 112-26. The circuit court's order granting Ms. Ostby's suppression motion was filed on November 27, 2019 and the Notice of Entry of the order was filed and served on December 11, 2019. SR2: 127, 128. The circuit court's order granting Mr. Olmsted's motion to suppress was filed on December 19, 2019 and the Notice of Entry was filed and served on December 20, 2019. SRl: 146- 47.

On December 20, 2019, the State filed a Petition for Permission to Appeal Intermediate Order of Circuit Court regarding both Ms. Ostby and Mr. Olmsted. This Court granted the State's petitions on January 30, 2020. SRl: 148-49; SR2: 131-32.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

THE CIRCUIT COURT PROPERLY DETERMINED THAT THE EVIDENCE SEIZED IN THIS CASE SHOULD BE SUPPRESSED.

The circuit court found the search warrant affidavit did not contain sufficient evidence to support the issuance of the search warrant. The Circuit Court found that the exigent circumstances exception to the warrant requirement did not apply. Additionally, the circuit court did not address the issue of the *Leon* good faith exception to the search warrant. See, Memorandum of Decision on Defendant's Motion to Suppress at SRl: 130-45; SR2: 112-26.

State v. Running Shield, 2015 S.D. 78, 871 N.W.2d 503.
Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639(1980).
State v. Snapfish, 2019 S.D. 49, 933 N.W.2d 1.

STATEMENT OF THE CASE

At the circuit level, Mr. Olmsted filed a Motion to Suppress Evidence and Ms. Ostby filed a Notice of Joinder to Suppress Evidence. SRl: 6-36; SR2: 24. The circuit court held an evidentiary hearing on this matter on September 10, 2019. SRl: 56; SR2: 46. After briefing by the parties, the circuit court issued a written decision granting the motion to suppress as to each party. SRl: 130-45; SR2: 112-26. The circuit court's order granting the suppression motion as to Ms. Ostby's was filed on November 27, 2019. The Notice of Entry was filed and served on December 11, 2019. SR2: 127-28. Mr. Olmsted's suppression order was filed on December 19, 2019. SR1: 146. Notice of Entry for Mr. Olmsted was filed on December 20, 2019. SR1: 147.

STATEMENT OF FACTS

For purposes of this appeal, the facts do not appear to be in dispute. The circuit court entered its Memorandum of Decision on Defendant's Motion to Suppress and outlined the relevant facts within its decision. The circuit court found that on March 20, 2019, at approximately 17:47 hours, Officer Erik Jandt responded to 53 Dunlap Avenue, Deadwood, South Dakota to meet Ariel Roberts. Ms. Roberts had reported to law enforcement that she had found a suspected baggy of methamphetamine while doing her laundry in the common area of the apartment building. SR 46. Ms. Roberts reported that she had observed a male from apartment 15 take clothing from the community dryer before she found the suspected baggie of methamphetamine. The record does not contain any additional findings related to whom the articles of clothing belonged to or what type of

clothing the male had removed from the dryer. For example, Ms. Roberts apparently did not describe if the articles of clothing were men's, women's or mixed.

Ms. Roberts did indicate that she looked into the dryer as she was moving her clothing from the washer into the dryer and that she noticed a baggy with a substance she believed to be methamphetamine. SR 46. However, Officer Jandt did not ask Ms. Roberts why she believed the baggy held methamphetamine. TR 36, 8-19. Officer Jandt performed a field-test on the substance in the baggy and the substance gave a presumptive positive test for methamphetamine. SR 46. Ms. Roberts also advised Officer Jandt that this was not the first time she had found a baggy with what she suspected was methamphetamine. She stated that she had found a similar baggy on February 13, 2019 in the apartment building hallway. SR 46. However, Ms. Roberts did not indicate if the suspected baggie was found near the doorway or anywhere close to apartment 15. Ms. Robert's also reported that she observed heavy traffic in and out of apartment 15. SR 46; TR 44, 21-24.

After Officer Jandt was joined by Lieutenant Ken Mertens, they decided they were going to seek a search warrant for apartment 15. TR 7, 16-19. The record is not clear if Officer Jandt initially knew that apartment 15 had been leased to Ms. Ostby or if she the subject of an active drug investigation by Investigator James Olson. TR 12, 3-13; SR 46. Additionally, the testimony from the hearing does not indicate that either Lt. Mertens or Office Jandt knew for sure that the apartment had been part of a drug investigation. Apparently, the officers only believed that it was possible that a drug investigation was ongoing as they approached apartment 15 in order to contact the then unknown male inside the apartment. SR 46.

When the officers knocked on the door of apartment 15, the unknown male inside asked who was at the door. SRl 46. Officer Jandt informed the unknown male, who was later found to be Mr. Olmsted, that they were police officers. SRl:46. Mr. Olmsted did not respond, but Officer Jandt could hear movement inside the apartment. SRl:46. Despite no indication that Mr. Olmsted previously knew that law enforcement was in the area, the officers claimed that they feared that Mr. Olmstead was destroying evidence. Officer Jandt and Lt. Mertens forced entry into the apartment without a search warrant to detain Mr. Olmsted. SRl:46.

Officer Jandt subsequently applied for a search warrant to search apartment 15 and to obtain urine samples from Mr. Olmsted and Ms. Ostby. SRl: 40-41. The Honorable Chad Callahan, Magistrate Court Judge, issued a search warrant for apartment 15, Ms. Ostby's vehicle, and Mr. Olmsted's and Ms. Ostby's urine. SRl: 52-55. After receiving the search warrant for apartment 15, law enforcement found several baggies containing a white crystal substance, which the Rapid City Laboratory later confirmed was methamphetamine. SRl: 106. Mr. Olmsted was later found to have a positive urinalysis from his urine seized as a result of the issued search warrant. SR1: 106. Ms. Ostby was subsequently arrested and after her urine was seized, it also tested positive of the presence of methamphetamine. TR 15, 19-25.

ARGUMENT

THE CIRCUIT COURT PROPERLY DETERMINED THAT THE EVIDENCE SEIZED IN THIS CASE SHOULD BE SUPPRESSED.

A. Standard of Review.

The standard of review that this Court utilizes when reviewing a legal challenge to a search warrant is well established,

> [O]ur inquiry is limited to determining whether the information provided to the issuing court in the warrant application was sufficient for the judge to make a "'common sense' determination that there was a 'fair probability' that the evidence would be found on the person or at the place to be searched." On review, we are limited to an examination of the facts as contained within the four corners of the affidavit. Furthermore, we review the issuing court's probable cause determination independently of any conclusion reached by the judge in the suppression hearing. *State v. Dubois,* 2008 S.D. 15, ¶ 10, 746 N.W.2d 197, 202 (quoting *State v. Helland,* 2005 S.D. 121, ¶ 12, 707 N.W.2d 262, 268) (internal citations omitted).
>
> It is not the duty of this Court to review the lower court's probable cause determination de novo, but rather to examine the court's decision with "great deference." *Id.* ¶ 11, 746 N.W.2d at 202-03 (citing *Helland,* 2005 S.D. 121, ¶ 17, 707 N.W.2d at 269); *see also State v. Raveydts,* 2004 S.D. 134, ¶ 8, 691 N.W.2d 290, 293; *State v. Jackson,* 2000 S.D. 113, ¶ 9, 616 N.W.2d 412, 416. This Court must " 'draw every reasonable inference possible in support of the issuing court's determination of probable cause to support the warrant.' " *Dubois,* 2008 S.D. 15, ¶ 11, 746 N.W.2d at 203 (quoting *Helland,* 2005 S.D. 121, ¶ 17, 707 N.W.2d at 269).

State v. Gilmore, 2009 S.D. 11, ¶ 7, 762 N.W.2d 637, 641.

Additionally, this Court "review[s] the [circuit] court's grant or denial of a motion to suppress involving an alleged violation of a constitutionally protected right under the de novo standard of review." *State v. Fierro*, 2014 S.D. 62, ¶ 12, 853 N.W.2d 235, 239 (quoting *State v. Smith*, 2014 S.D. 50, ¶ 14, 851 N.W.2d 719, 723). "[F]indings of fact are reviewed under the clearly erroneous standard[.]" *Id.* (*quoting Smith*, 2014 S.D. 50, ¶ 14, 851 N.W.2d at 723). However, the application of the facts to the law is subject to de novo review. *Id.*

B. The circuit court correctly held that the State failed to establish exigent circumstances to justify the entry into apartment 15.

The State argued extensively below in Mr. Olmsted's file that the exigent circumstances exception to the search warrant applied to justify the search. See, State's Brief in Opposition to Defendant's Motion to Suppress at SR 107-108. The circuit court found that that exigent circumstances exception did not apply in either Ms. Ostby's case or

Mr. Olmsted's. See, Memorandum of Decision on Defendant's Motion to Suppress at SRl: 130-45; SR2: 112-26. Although the State appears to have declined to rely on this issue on appeal, for the sake of completeness, the issue is presented here.

The Fourth Amendment to the Constitution of the United States and the Constitution of the State of South Dakota Article VI, Section 11 protect people from unreasonable search and seizure. Any seizure of personal property without a warrant is considered per se unreasonable. Accordingly, it is well established that "searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639, 651 (1980).

The Fourth Amendment protects the individual's privacy in a variety of settings but none of those settings are more clearly defined than an individual's home—

> "a zone that finds its roots in clear and specific constitutional terms: 'The right of the people to be secure in their . . . houses . . . shall not be violated.' That language unequivocally establishes the proposition that '[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' (*quoting Silverman v. United States*, 365 U. S. 505, 511)." *Id.*

As the Supreme Court of the United States has distinctly pointed out, "In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Id.*

In the case of claimed exigent circumstances, the State has the burden of proving that a specific non-warrant search falls into a well-delineated and limited exception to the warrant requirement of the constitution. *See, State v. Hess*, 2004 S.D. 60, 680 N.W.2d 314; *State v. Heumiller*, 317 N.W.2d 126, 128 (S.D. 1982); *State v. Max*, 263 N.W.2d 685, 687 (S.D. 1978). Legal analysis is limited to "the facts perceived by the police at the time

of the entry, not as subsequently uncovered." *State v. Hess*, 2004 S.D. 60, 680 N.W.2d 314; *see also*, *State v. Lamont*, 2001 S.D. 92, ¶50, 631 N.W.2d at 617 (citing *State v. Meyer*, 1998 S.D. 122, ¶23, 587 N.W.2d 719, 724).

In the present case, Officer Jandt sought to circumvent the requirement to get a search warrant prior to entering the home of Ms. Ostby and Mr. Olmsted under his purported claim that he was concerned the then unidentified male would destroy evidence in the home. SR1:46. However, at this point, other than hearing some noise inside, law enforcement had no indication that the unidentified male even knew police were on site before the officer's knocked at the door. TR 28, 17 to TR 29, 15. In fact, Officer Jandt and Lt. Mertens had decided they were going to apply for a search warrant before even initiating contact with the occupant of apartment 15. TR: 7, 16-19. Officer Jandt further testified that he felt he had a sufficient basis to get a search warrant for apartment 15. TR: 29, 22-24. Instead of applying for a search warrant, the officers decided to make contact with the male in apartment 15 and their intent was to detain him prior to getting a search warrant. TR: 28, 4-16.

In order to carry out their plan, the officers proceed to apartment 15 and then knocked on the front door. SR1: 46; TR: 28, 12-13. An individual inside the apartment responded, "Who is it." SR1: 46. No other vocal response is given but the officers did hear someone moving around inside the apartment as if someone was walking around SR1: 46. There is no sworn testimony or statement that the officers heard any noises to indicate someone was destroying evidence inside the apartment. In short, the officers were trying to create exigent circumstances where none existed at the time the officers forced entry into Mr. Olmsted's home.

Exigent circumstances will justify a warrantless entry into a home for the purpose of either arrest or search. *Payton v. New York*, 445 U.S. 573, 590, 100 S.Ct. 1371, 1382. Such circumstances exist when there is an emergency: a situation demanding immediate attention with no time to obtain a warrant. *Heumiller*, 317 N.W.2d at 129 (citations omitted). "A gauge for determining whether exigent circumstances existed is to ask whether police officers, under the facts as they knew them at the time, would reasonably have believed that a delay in procuring a search warrant would gravely endanger life, risk destruction of evidence, or greatly enhance the likelihood of a suspect's escape." *Max*, 263 N.W.2d at 687; *Meyer*, 1998 S.D. 12 at ¶23-24, 587 N.W.2d at 724.

In the facts of this case, the evidence does not indicate the necessity for a warrantless search. The State did not provide sufficient evidence that had the officers sought a search warrant prior to their forced entry into the Defendant's home, that there had otherwise existed any grave danger to life, danger of destruction of evidence or that the suspect inside the home would have fled. As such, the officer's forced entry was unreasonable. "If the officer is not executing a valid search warrant, a warrantless search and seizure is unreasonable absent probable cause and exigent circumstances." *Swedlund v. Foster*, 2013 S.D. 8, ¶ 42, 657 N.W.2d 39, 56. While the officers claimed probable cause existed for a search, there certainly were not any exigent circumstances, and as such the circuit court correctly declined to find that the exigent circumstances exception applied and accordingly suppressed the evidence.

C. The Circuit Court correctly found Officer Jandt's affidavit in support of search warrant lacked probable cause.

Contrary to the State's assertion in its brief (SB at 5), the circuit court correctly cited and applied the correct legal standards when it reviewed the magistrate court's finding of

probable cause. The circuit correctly applied this Court's holding from *Guthrie v. Weber*, 2009 S.D. 42, ¶ 11, 767 N.W.2d 539, 543 that requires that a probable cause affidavit "must provide the issuing judge with a sufficient information to make a 'common sense' decision that there was a 'fair probability' the evidence would be found on the person or at the place to be searched." The circuit court also correctly quoted *State v. Running Shield*, 2015 S.D. 78, ¶ 9, 871 N.W.2d 503, 506 for the legal proposition that, "[w]hat amount of evidence is required to form probable cause is not a question susceptible to formulaic solutions. Probable cause 'is a fluid concept-turning on the assessment of probabilities in particular contexts-not readily, or even usefully, reduced to a neat set of legal rules.'" Perhaps more importantly, the circuit court also properly considered and applied this Court's holding from *Guthrie v. Weber*, 2009 S.D. 42, ¶ 11, 767 N.W.2d 539, 543 where this Court wrote, "In a claim that an affidavit for a search warrant lacked probable cause [the Supreme Court of South Dakota] review[s] the totality of the circumstances to determine 'if there was at least a 'substantial basis' for the issuing judge to find probable cause." See, circuit court's Memorandum of Decision on Defendant's Motion to Suppress at SR2: 118.

Additionally, the circuit court was careful to contain is review of the magistrate's decision regarding probable cause to the "four corners of the affidavit," and cited *State v. Dubois*, 2008 S.D. 15, ¶ 10, 746 N.W.2d 197, 202. The circuit court also gave "every reasonable inference possible in support the [magistrate court's] determination of probable cause to support the warrant." The circuit court granted this deference pursuant to this Court's holding in *State v. Helland*, 2005 S.D. 121, ¶ 17, 707 N.W.2d 262, 269. See, circuit court's Memorandum of Decision on Defendant's Motion to Suppress at SR2: 121.

If the circuit court announced or applied "the wrong standard" as the State contends, the State has failed to cite any authority contrary to that provided by the circuit court.

Turning to the circuit court's analysis on this issue, the circuit court focused on the Fourth Amendment's requirement that "there be nexus between the item to be seized and the alleged criminal activity."[1] The circuit court noted that the information that Ms. Ostby had been distributing methamphetamine was unconfirmed. The circuit court also found that the baggy that tested presumptively positive for methamphetamine was found in the common area of the apartment building and was therefore not tied of linked directly to apartment 15. Additionally, the tip that Ms. Roberts provided about previously seeing methamphetamine in the hallway was not confirmed by any scientific testing. Rather this tip was merely something that Ms. Roberts suspected. The State did not provide any evidence that Ms. Roberts had any form of training in the ability to confirm if a substance is methamphetamine. The circuit court also found that the prior report of a person being stopped with methamphetamine after being at apartment 15 was not directly linked enough or traceable to apartment 15. Id. 123.

The State recognizes that the circuit court "cited some of the appropriate standards..." however, the State maintains that the "circuit court discredited the information supporting the probable cause determination by viewing each piece in isolation." SB 13. To the contrary, the circuit court obviously considered all of the evidence presented in Officer Jandt's affidavit together as the circuit court reviewed this evidence to determine if the necessary nexus was present. Even though the circuit court reviewed each piece of

[1] *Guthrie v. Weber*, 2009 S.D. 42 ¶ 11, 767 N.W.2d 539, 543

evidence, this does not mean that the circuit court reviewed each piece of evidence in isolation.

The circuit court noted that the evidence that was contained in the affidavit was not "traceable" or lacked a nexus to apartment 15. The circuit court noted that no law enforcement officer had personally observed criminal activity traceable to apartment 15. Perhaps if law enforcement had, the necessary link or nexus would have been established. However, after a review of all of the information in the four corners of the affidavit, the circuit court found that the necessary nexus to apartment 15 was lacking.

The circuit court also properly relied on this Court's decision in *State v. Snapfish*, 2019 S.D. 49, ¶ 26-27, 933 N.W.2d 1, 10 (internal citations omitted), where this Court wrote,

> [t]he requirement that an officer have reasonable suspicion prior to a stop is not abrogated simply because a third-party informant is convinced a crime occurred. Tips must provide sufficient information to allow officers to develop a reasonable suspicion that criminal activity is afoot. The stop may be legal if the tip contains more than conclusory allegations and offers specific and detailed allegations of criminal conduct, even if the officer does not corroborate the criminal conduct before the seizure.
>
> When an officer is not given an explicit and detailed description of alleged wrongdoing, the officer must have some other reason to believe the informant's conclusion is correct. The officer must confirm the tip through personal observations of criminal activity, or in the alternative, be aware that the tipster "has special training or experience relating to the conclusion at issue.

In this case, Ms. Roberts' tip that she had previously seen methamphetamine in the apartment hallway was not something that law enforcement was able to observe firsthand. She also did not have "special training or experience relating to the conclusion at issue." Perhaps more importantly, Ms. Roberts was not able to give information that was "explicit and detained" as to connecting the suspected methamphetamine to apartment 15.

Although she claimed to have seen people coming and going from apartment 15, on its own, this information is also not enough to support a belief that criminal activity is occurring. *State v. Tenold*, 2019 S.D. 66, ¶ 17, 937 N.W.2d 6 (Court discussing reasonable suspicion in the context of suspected drug activity at a hotel room).

D. The Exclusionary Rule should be applied to suppress the evidence.

The State in its brief argues that the search warrant issued by the magistrate court was not deficient, but even if it was, law enforcement's search was conducted pursuant to the officer's good faith reliance on the search warrant. (SB 16).

The exclusionary rule was judicially created to "deter constitutional violations by government officials." *State v. Running Shield*, 2015 S.D. 78, ¶ 7, 871N.W.2d 503 (quoting *State v. Sorensen*, 2004 S.D. 108, ¶8, 688 N.W.2d 193, 196). This Court recognizes: When the police exhibit "deliberate," "reckless," or "grossly negligent" disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. But when the police act with an objectively "reasonable good-faith belief' that their conduct is lawful, or when their conduct involves only simple, "isolated" negligence, the "deterrence rationale loses much of its force," and exclusion cannot "pay its way." *Running Shield*, 2015 S.D. 78, ¶7, 871 N.W.2d at 506 (quoting *Davis v. United States*, 564 U.S. 229, 238, 131 S.Ct. 2419, 2427-28, (2011)).

The State should not be able to seek a good faith exception when Officer Jandt is the one who created the need for the exception. Officer Jandt is the party who knew he needed a search warrant to search the house; knew he was going to seek a search warrant and had already determined he was going to apply for the search warrant prior to forcing entry into the Defendants' home. TR: 28, 4-16; TR:29, 22-24. Such behavior was reckless

and as such, the evidence seized should be suppression and no good faith exception considered.

The circuit court did not enter any findings or legal conclusions on this point. Apparently, the State did not propose any specific findings of fact or conclusions of law related to the good faith exception. Therefore, if this Court is considering reversing on this issue, the matter should be remanded to the circuit court with instructions to enter further findings. The circuit court will be in a better position to review the evidence and to take further testimony, if necessary, to determine if Officer Jandt was acting recklessly when he initially entered the apartment without a warrant.

Moreover, at least in the context of the expanded independent source doctrine, this Court has noted that suppression of the evidence is still warranted when law enforcement officers are prompted to obtain a search warrant by what they "observe during the initial [illegal] entry." *State v. Boll*, 2002 S.D. 114, ¶ 36, 651 N.W.2d 719. If the circuit court were to find as a matter of fact that the officer's sought to obtain the search warrant based upon what they observed during their initial illegal entry, such findings could well have an impact on the application of the good faith exception.

CONCLUSION

The Appellees respectfully requests that the circuit court's order suppressing the evidence be upheld. Alternatively, if this Court is considering the application of the good faith exception, the appellees request that this Court remand this matter to the circuit court so that it can enter further findings related to this issue.

Dated this _____day of _____2020.

GREY &
EISENBRAUN LAW

_____
Ellery Grey
Attorney for Appellee Ostby
909 St. Joseph Street, 10th Floor
Rapid City, SD 57701
(605) 791-5454

And

Dated this _____day of _____2020.

PASQUALUCCI LAW

_____
Robert Pasqualucci
Attorney for Appelle Olmstead
1506 Mountain View Rd., STE 101
Rapid City, SD 57702
(605)-721-8821

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL No. 29205 and 29206

STATE OF SOUTH DAKOTA,

Plaintiff and Appellant,

v. CERTIFICATE OF COMPLIANCE

CARRIE LYNN OSTBY and
DANA OLMSTED,

Defendants and Appellees.

Pursuant to SDCL 15-26A-66, counsel for Defendants/Appellees, do submit the following:

The Appellee's Brief is 15 pages in length. It is typed in proportionally spaced typeface Baskerville 12 point. The word processor used to prepare this brief indicates that there are a total of 4,382 words in the body of the brief.

Dated this _____day of April 2020.

GREY & EISENBRAUN LAW

/s/ *Ellery Grey*
Ellery Grey
909 St. Joseph Street, 10th Fl.
Rapid City, SD 57701
(605) 791-5454

PASQUALUCCI LAW

/s/*Robert Pasqualucci*
Robert Pasqualucci
1506 Mountain View Rd., Ste.101
Rapid City, SD 57702
(605)-721-8821

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL No. 29205 and 29206

STATE OF SOUTH DAKOTA,

Plaintiff and Appellant,

v. CERTIFICATE OF SERVICE

CARRIE LYNN OSTBY and
DANA OLMSTED,

Defendants and Appellees.

The undersigned attorneys hereby certify that they served two true and correct copies of the Brief of the Appellees, Carrie Ostby and Dana Olmsted, upon the persons herein next designated all on the date shown by email, and mailing said copies in the United States Mail, first-class postage prepaid, in envelopes addressed to said addresses; to wit:

Supreme Court of South Dakota
Office of the Clerk
500 East Capitol Avenue
Pierre, SD 57501

The undersigned attorneys further certify that they served a true and correct copy of the Brief of Appellees, Carrie Ostby and Dana Olmsted, upon the persons herein next designated all on the date shown, by e-mailing said copies to said addresses; to wit:

Mr. Jason Ravnsborg
Office of the Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501
Atgservice@state.sd.us

Brenda Harvey
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Supreme Court of South Dakota
Office of the Clerk
scclerkbriefs@ujs.state.sd.us

Which addresses are the last known addresses of the addressees known to the subscribers.

Dated this _____day of _____2020.

GREY &
EISENBRAUN LAW

_____
Ellery Grey
Attorney for Appellee Ostby
909 St. Joseph Street, 10th Floor
Rapid City, SD 57701
(605) 791-5454

And

Dated this _____day of _____2020.

PASQUALUCCI LAW

_____
Robert Pasqualucci
Attorney for Appellee Olmsted
1506 Mountain View Rd., Ste. 101
Rapid City, SD 57702
(605)-721-8821

APPENDIX

Appendix **Page**

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	COURT FILE NO. CRI119-268
Plaintiff,	)	ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS
v.	)	
CARRLIE LYNN OSTBY,	)	
Defendant.	)	

The Honorable Eric Strawn, Circuit Court Judge, having reviewed the Defendant's Motion to Suppress, all briefs, and the arguments of counsel; it is hereby,

ORDERED that the Defendant's Motion to Suppress is granted.

Dated this ____ day of November 2019.

BY THE COURT:

Signed: 11/27/2019 1:31:47 PM

Honorable Eric Strawn
Circuit Court Judge

ATTEST:
CAROL LATUSECK
Clerk of Courts
By: TONISHA MUND
Deputy

SEAL

11/25/2019 1:42 PM CST LAWRENCE COUNTY

STATE OF SOUTH DAKOTA)) SS. COUNTY OF LAWRENCE)	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff, vs. CARRIE LYNN OSTBY, Defendant.	40CRI19-000268 MEMORANDUM OF DECISION ON DEFENDANT'S MOTION TO SUPPRESS

MOTIONS SUMMARY

This matter having come for Motions Hearing on Defendant's Motion Suppress on September 10, 2019, the State having appeared represented by Lawrence County Deputy State's Attorney Brenda Harvey, Defendants appearing personally and with counsel, Michelle Potts of Grey & Eisenbraun Prof. LLC, the Court having heard arguments of Counsel the State and Defendant having been afforded time to submit her respective brief and this Court having considered the briefs from both parties, and good cause showing, this Court issues its Memorandum of Decision. This Memorandum of Decision is drafted pursuant to SDCL § 15-6-52(a). This Memorandum of Decision contains this Court's Findings of Fact and Conclusions of Law by reference and as if set out point by point. It is intended that any Finding of Fact may be considered a Conclusion of Law if the context so warrants and vice versa.

11/25/2019 1:42 PM CST LAWRENCE COUNTY

FACTUAL POSTURE

The following information was included in Officer Jandt's the probable cause affidavit:

> On March 20, 2019, Officer Erik Jandt of the Deadwood Police Department arrived at 53 Dunlap Avenue in Deadwood, South Dakota to respond to a report regarding a woman who found possible methamphetamine in a community dryer.
> The reporting party, later identified as Ariel Roberts, stated she watched a male from apartment 15 take his clothes from the dryer prior to discovering a substance in the machine.

Officer Jandt used a field test to confirm the substance was methamphetamine. Law enforcement knocked on the door of apartment 15. A male voice responded but did not answer the door. The front door was held shut with a knife. Police made entry into the apartment and located Dana Olmsted inside. The renter of the apartment, Defendant Carrie Ostby, was not present.

Police executed a search of the apartment to ensure no one else was present and then secured the apartment. Officers were only looking for people; therefore, there was no search for or mention of any illegal substances at the time.

Officer Jandt completed an Affidavit In Support of Request For Search Warrant (State's Exhibit 1), regarding Defendant Carrie Ostby and her residence at 53 Dunlap Avenue Apartment 15 in Deadwood, South Dakota. Judge Chad Callahan signed an Amended Search Warrant (State's Exhibit 3) on March 21, 2019, directing law enforcement to search 53 Dunlop Street Apartment 15 for illegal substances. The

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Search Warrant also called for law enforcement to obtain a urine sample from Defendant Ostby and authorized a search of her vehicle.

Law enforcement officers executed the search warrant on apartment 15 and located numerous baggies containing a white crystal substance. This substance was sent to the Rapid City Laboratory and tested positive for methamphetamine. The search warrant was served on Defendant Ostby on March 22, 2029 and a urine sample was obtained from her. The urine sample tested presumptively positive for methamphetamine.

Defendant Ostby was placed under arrest for ingestion of methamphetamine. The urine sample was later sent to the South Dakota Public Health Laboratory in Pierre, South Dakota. The laboratory confirmed the sample tested positive for methamphetamine.

The probable cause affidavit expanded on law enforcement's history with apartment. It stated the following:

> Ariel Roberts informed Officer Jandt that she had discovered a bag of what she believed to be methamphetamine on February 13, 2019 in the hallway of the apartment complex.

Officer Jandt stated that he relied on "prior history possibly associated with the residence" to support his decision to gain entry into the apartment. His purpose was to "prevent[] the Defendant from destroying evidence." Officer Jandt knew that Investigator James Olson was actively working on a drug investigation on that residence.

Ms. Roberts had reported to the police heavy traffic in and out of apartment 15. On a previous occasion, Investigator Olson observed a male subject arrive at

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Defendant Ostby's residence and go inside while his vehicle was running. This individual left his car door open and was inside the residence for approximately 2 minutes. The individual was later stopped for a traffic violation and arrested for possession of methamphetamine. Investigator Olson had also received unconfirmed information that Ostby had been distributing methamphetamine.

ISSUES

1. Whether Officer Jandt's probable cause affidavit contained sufficient information to support a warrant authorizing the search of Defendant Ostby's apartment.

2. Whether the exigent circumstances exception to the warrant requirement authorized Officer Jandt to search the defendant's home even if the probable cause affidavit lacked sufficient information to support the warrant.

ANALYSIS

The Fourth Amendment of the United States Constitution and Article VI § 11 of the South Dakota Constitution protects individuals from unreasonable searches and seizures. U.S. CONST. AMEND IV and S.D. CONST. ART. VI §11. "These provisions guarantee an individual's right to personal security free from arbitrary law enforcement interference." *State v. Ramirez*, 535 N.W.2d 847, 849 (S.D. 1995) (citation omitted). "The ultimate touchstone of the Fourth Amendment is 'reasonableness'" *State v. Kaline*, 2018 S.D. 54, ¶ 10, 915 N.W.2d 854, 857 (citations omitted). "Reasonableness of a search depends on balancing the public's interest in preventing crime with the individual's right to be free from arbitrary and unwarranted governmental intrusions into personal privacy." *State v. Smith*, 2014 S.D. 50, ¶ 15, 851 N.W.2d 719, 724. "A reviewing court must look to the totality of the circumstances to determine whether the officer had a particularized and objective

basis for suspecting criminal activity.'" *Meyer*, 2015 S.D. 64, ¶ 9, 868 N.W.2d 561, 565 (quoting *Mohr*, ¶ 14, 841 N.W.2d at 444 (internal quotation omitted)).

i. Warrantless searches and the exigent circumstances exception

"Constitutional challenges to a warrantless law enforcement search require a two-step inquiry: first, factual questions on what the officers knew or believed at the time of the search and what action they took in response; second, legal questions on whether those actions were reasonable under the circumstances." *State v. Deneui*, 2009 S.D. 99, ¶ 14, 775 N.W.2d 221, 230. The second step requires an objective analysis of reasonableness. *Id.* "A reviewing court must look to the totality of the circumstances to determine whether the officer had a particularized and objective basis for suspecting criminal activity.'" *Meyer*, 2015 S.D. ¶ 9, 868 N.W.2d at 565 (quoting *Mohr*, ¶ 14, 841 N.W.2d at 444 (internal quotation omitted)). "It is well settled that law enforcement 'officers may draw on their own experience and specialized training to make interferences from and deductions about the cumulative information available to them that might well elude an untrained person.'" *Chase*, 2018 S.D. 70, ¶ 7 (quoting *Mohr*, ¶ 16, 841 N.W.2d at 445 (internal quotation omitted)).

"The Fourth Amendment demonstrates a 'strong preference for searches conducted pursuant to a warrant [.]'" *State v. Walter*, 2015 S.D. 37, ¶ 6, 864 N.W.2d 779, 781 (citations omitted). "Searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment." U.S. CONST. AMEND. IV; *State v. Kaline*, 2018 S.D. 54, ¶ 10,

915 N.W.2d 854, 857. "In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement." *State v. Kaline*, 2018 S.D. 54, ¶ 10, 915 N.W.2d 854, 857. Unless one of these exceptions applies, "a search is unreasonable when the government trespasses into an area protected by the Fourth Amendment without a warrant." *State v. Stanley*, 2017 S.D. 32, ¶ 11, 896 N.W.2d 669, 674. "The State must prove by a preponderance of the evidence that the warrantless search satisfied an exception." *State v. Rogers*, 2016 S.D. 83, ¶ 11, 887 N.W.2d 720, 723.

"The exigent circumstances exception is one of the well-delineated exceptions to the warrant requirement." *Fischer*, 2016 S.D. 12, ¶ 13, 875 N.W.2d at 45 (quoting *Fierro*, 2014 S.D. 62, ¶ 17, 853 N.W.2d at 240). "Exigent circumstances exist when a situation demands immediate attention with no time to obtain a warrant." *State v. Bowker*, 2008 S.D. 61, ¶ 19, 754 N.W.2d 56, 63 (quoting *State v. Dillon*, 2007 S.D. 77, ¶ 18, 738 N.W.2d 57, 60). "The need to protect or preserve life or avoid serious injury presents that kind of situation." *Id.* "In determining whether exigent circumstances exist[, Courts] ask, '[w]hether police officers, under the facts as they knew them at the time, would reasonably have believed that delay in procuring a search warrant would gravely endanger life, risk destruction of evidence, or greatly enhance the likelihood of a suspect's escape.'" *Dillon*, 2007 S.D. 77, ¶ 18, 738 N.W.2d at 60–61 (quoting *State v. Hess*, 2004 S.D. 60, ¶ 25, 680 N.W.2d 314, 325). Courts consider "the facts as perceived by the police at the time of entry, not as subsequently uncovered." *State v. Meyer*, 1998 S.D. 122, ¶ 23, 587 N.W.2d 719, 724.

"For this exception to apply, law enforcement officers must possess probable cause that the premises to be searched contains the sought-after evidence or suspects." *State v. Deneui*, 2009 S.D. 99, ¶ 15, 775 N.W.2d 221, 230.

ii. Sufficiency of evidence necessary in a probable cause affidavit to obtain a search warrant

When used to obtain a warrant, a probable cause affidavit "must provide the issuing judge with sufficient information to make "a 'common sense' decision that there was a 'fair probability' the evidence would be found on the persons or at the place to be searched." *Guthrie v. Weber*, 2009 S.D. 42, ¶ 11, 767 N.W.2d 539, 543 (citations and quotations omitted). "What amount of evidence is required to form probable cause is not a question susceptible to formulaic solutions. Probable cause 'is a fluid concept—turning on the assessment of probabilities in particular contexts—not readily, or even usefully, reduced to a neat set of legal rules.'" *State v. Running Shield*, 2015 S.D. 78, ¶ 9, 871 N.W.2d 503, 506. "In a claim that an affidavit for a search warrant lacked probable cause, [the South Dakota Supreme Court] review[s] the totality of the circumstances to determine 'if there was at least a 'substantial basis' for the issuing judge to find probable cause." *Guthrie v. Weber*, 2009 S.D. 42, ¶ 11, 767 N.W.2d 539, 543 (citing *State v. Jackson*, 2000 SD 118, ¶ 8, 616 N.W.2d 412, 416 (citation omitted).

"The Fourth Amendment requires that there be a nexus between the item to be seized and the alleged criminal activity." *Id.* "On review, [the South Dakota Supreme Court is] limited to an examination of the facts as contained within the four corners of the affidavit. Furthermore, [the Supreme Court] review[s] the issuing

court's probable cause determination independently of any conclusion reached by the judge in the suppression hearing." *State v. Dubois*, 2008 S.D. 15, ¶ 10, 746 N.W.2d 197, 202. "Reasonable inferences may be drawn from the information in the affidavit." *State v. Raveydts*, 2004 S.D. 134, ¶ 9, 691 N.W.2d 290, 293. "Furthermore, [the South Dakota Supreme Court] will draw every reasonable inference possible in support of the issuing court's determination of probable cause to support the warrant." *State v. Helland*, 2005 S.D. 121, ¶ 17, 707 N.W.2d 262, 269 (citations omitted).

Officers may rely on tips from informants when conducting investigations. However, "[t]ips must provide sufficient information to allow officers to develop a reasonable suspicion that criminal activity is afoot." *State v. Sharpfish*, 2019 S.D. 49, ¶ 26, 933 N.W.2d 1, 10. "When an officer is not given an 'explicit and detailed description of alleged wrongdoing,' the officer must have some other reason to believe the informant's conclusion is correct." *Id. (citing State v. Stanage*, ¶ 11, 893 N.W.2d at 526 (quoting *Navarette*, 572 U.S. at 399, 134 S. Ct. at 1689))). The officer must confirm the tip through personal observations of criminal activity, or in the alternative, be aware that the tipster "has special training or experience relating to the conclusion at issue." *Id.* (*Stanage*, ¶ 11, 893 N.W.2d at 527).

In *State v. Sharpfish*, an officer received a tip concerning an intoxicated driver. The officer was informed that the individual was a Native American male, about six feet tall, 180 pounds, wearing jeans and a t-shirt. He was informed that this individual was driving a blue minivan northbound in the Baken Park parking lot towards the Corner Pantry gas station in Rapid City. 2019 S.D. 49, ¶ 2, 933 N.W.2d

1, 5. The officer was not told the reporting party's identity or provided information regarding why the reporting party believed the driver to be intoxicated. *Id.* The officer witnessed the blue minivan driving through the parking lot and watched it come to a stop at a gas station pump. The officer did not witness any erratic driving or traffic violations. The officer conducted a field sobriety test and concluded that the driver was intoxicated. The defendant moved to suppress the evidence obtained as a result of his encounter with the officer, stating that "he was not contacted and detained based on reasonable suspicion" and therefore the stop was a violation of his Fourth Amendment rights. 2019 S.D. 49, ¶ 7, 933 N.W.2d 1, 5.

The South Dakota Supreme Court held that the officer had developed reasonable suspicion prior to engaging with the defendant. However, it concluded that the officer "did not have a reasonable suspicion of criminal activity just from the tip alone." 2019 S.D. 49, ¶ 28, 933 N.W.2d 1, 11. In support of this determination, the Supreme Court stated that the officer "did not receive a detailed and explicit description of the wrongdoing to support the basis of the informant's conclusion that Sharpfish was driving while intoxicated. Nor did he receive any information regarding the identity of the informant or any specialized training or experience the informant had regarding his or her conclusion that Sharpfish was intoxicated." *Sharpfish*, 2019 S.D. 49, ¶ 28, 933 N.W.2d 1, 10–11. Finally, the officer "did not independently observe Sharpfish driving erratically though the parking lot or committing any traffic violations." *Id.*

STANDARD OF REVIEW

The South Dakota Supreme Court "review[s] the [trial] court's grant or denial of a motion to suppress involving an alleged violation of a constitutionally protected right under the de novo standard of review." *State v. Sharpfish*, 2019 S.D. 49, ¶ 23, 933 N.W.2d 1, 9 (citing *State v. Fierro*, 2014 S.D. 62, ¶ 12, 853 N.W.2d 235, 239 (citations omitted)). "[F]indings of fact are reviewed under the clearly erroneous standard[.]" *Id.* at 2019 S.D. ¶ 23, 933 N.W.2d at 10 (citations omitted). However, the application of the facts to the law is subject to de novo review. *Id.*

OPINION

1. Officer Jandt did not have enough information to establish probable cause based on the facts contained within the four corners of the affidavit in support of the search warrant.

The State argues that Officer Jandt's affidavit contained sufficient information to support the warrant to search the Defendant Ostby's apartment. Specifically, it contends that several tips from an informant, Ariel Roberts, coupled with information gathered by law enforcement pursuant to an on-going investigation of apartment 15 established probable cause.

An examination of the facts as contained within the affidavit must be confined to the four corners of the affidavit." *State v. Dubois*, 2008 S.D. 15, ¶ 10, 746 N.W.2d 197, 202. "Reasonable inferences may be drawn from the information in the affidavit." *State v. Raveydts*, 2004 S.D. 134, ¶ 9, 691 N.W.2d 290, 293. The South Dakota Supreme Court "will draw every reasonable inference possible in support of the issuing court's determination of probable cause to support the warrant." *State v. Helland*, 2005 S.D. 121, ¶ 17, 707 N.W.2d 262, 269 (citations omitted).

Officer Jandt's probable cause affidavit stated that Ms. Roberts watched a male from apartment 15 take his clothes from a community dryer. Afterwards, she discovered a substance that field tested positive for methamphetamine. On a previous occasion, Ms. Roberts reported that she discovered a bag of a substance she believed to be methamphetamine in the hallway of the apartment complex. Ms. Roberts also reported heavy traffic in and out of apartment 15.

Officers may rely on tips from informants when conducting investigations. However, "[t]ips must provide sufficient information to allow officers to develop a reasonable suspicion that criminal activity is afoot." *State v. Sharpfish*, 2019 S.D. 49, ¶ 26, 933 N.W.2d 1, 10. "*When an officer is not given an 'explicit and detailed description of alleged wrongdoing,' the officer must have some other reason to believe the informant's conclusion is correct.*" *Id. (citing State v. Stanage*, ¶ 11, 893 N.W.2d at 526 (quoting *Navarette*, 572 U.S. at 399, 134 S. Ct. at 1689) (emphasis added)). The officer must confirm the tip through personal observations of criminal activity, or in the alternative, be aware that the tipster "has special training or experience relating to the conclusion at issue." *Id.* (*Stanage*, ¶ 11, 893 N.W.2d at 527).

The affidavit described Investigator James Olson's observations of apartment 15 provided that the investigator witnessed a male subject arrive at the residence and go inside while his vehicle was running. This individual left his car door open and remained in the apartment for approximately two minutes. He was later stopped for a traffic violation and arrested for possession of methamphetamine. In addition,

Investigator Olson had received unconfirmed information that Defendant Ostby had been distributing methamphetamine.

The State does not allege that Ms. Roberts has special training or experience related to the identification or detection of methamphetamine use. Therefore, to rely on her tip to establish probable cause, law enforcement must confirm the information through personal observations of criminal activity. In the present case, neither Officer Jandt or Investigator Olson personally observed criminal activity traceable to apartment 15. The fact that investigator observed an individual entering the apartment who was later arrested with methamphetamine is insufficient to connect the drug possession to the apartment. Further, law enforcement was not present when Ms. Roberts discovered the methamphetamine in the hallway or in the dryer. Based on these facts, this Court holds that the evidence contained in the affidavit was insufficient to establish probable cause to search Defendant Ostby's apartment.

2. The State failed to establish by a preponderance of the evidence that Officer Jandt had sufficient information to circumvent the warrant requirement under the extrinsic evidence exception.

The State argues that Officer Jandt was entitled to search the defendant's apartment regardless of the sufficiency of his probable cause affidavit. To support of this assertion, it cites to the exigent circumstances exception to the warrant requirement. This exception allows for warrantless searches and seizures when "a situation demands immediate attention with no time to obtain a warrant." *State v. Bowker*, 2008 S.D. 61, ¶ 19, 754 N.W.2d 56, 63 (quoting *State v. Dillon*, 2007 S.D. 77, ¶ 18, 738 N.W.2d 57, 60). "In determining whether exigent circumstances exist[, Courts] ask, '[w]hether police officers, under the facts as they knew them at the time,

would reasonably have believed that delay in procuring a search warrant would gravely endanger life, risk destruction of evidence, or greatly enhance the likelihood of a suspect's escape." *Dillon*, 2007 S.D. 77, ¶ 18, 738 N.W.2d at 60–61 (quoting *State v. Hess*, 2004 S.D. 60, ¶ 25, 680 N.W.2d 314, 325). Courts consider "the facts as perceived by the police at the time of entry, not as subsequently uncovered." *State v. Meyer*, 1998 S.D. 122, ¶ 23, 587 N.W.2d 719, 724.

The State argues that Officer Jandt "had concerns that the male, later identified as Defendant Olmsted, may try to leave the area" and/or destroy evidence if law enforcement did not immediately act on the Ms. Robert's tip. *State's Brief in Opposition to Defendant's Motion to Suppress* at 2. However, it is important to note that the exigent circumstances exception to the warrant requirement requires that "law enforcement officers [] possess probable cause that the premises to be searched contains the sought-after evidence or suspects." *State v. Deneui*, 2009 S.D. 99, ¶ 15, 775 N.W.2d 221, 230. Here, Officer Jandt's affidavit demonstrates that law enforcement did not have the information it needed to establish probable cause to search the defendant's home. Based on the South Dakota Supreme Court's holding *Deneui* and this Court's holding on issue one, the State has failed to establish by a preponderance of the evidence the requirements of the exigent circumstances exception. *See State v. Rogers*, 2016 S.D. 83, ¶ 11, 887 N.W.2d 720, 723 (stating that the burden of proof required to establish the existence of a warrant exception is a preponderance of the evidence). The State does not cite any other exception to the

warrant requirement that would render permissible Officer Jandt's warrantless search of the defendant's apartment.

CONCLUSION

After considering all briefs and arguments of counsel, this Court concludes that the State has not met its burden in demonstrating that Officer Jandt had sufficient information to circumvent the warrant requirement under the extrinsic evidence exception. This Court further concludes that Officer Jandt did not have enough information to establish probable cause based on the facts contained within the four corners of the affidavit in support of the search warrant. Therefore, the Defendant's Motion to Suppress is hereby GRANTED. The Defendant shall prepare a proposed order.

Dated this 25th day of November, 2019.

BY THE COURT:

Judge Eric J. Strawn
Circuit Court Judge

ATTEST:
Carol Latuseck
Clerk of Courts

BY: Deputy Clerk of Courts

14

STATE OF SOUTH DAKOTA))SS. COUNTY OF LAWRENCE)	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT FILE NO. 40CRI 19-258
STATE OF SOUTH DAKOTA, Plaintiff, vs. DANA OLMSTED, Defendant.	**ORDER ON DEFENDANT'S MOTION TO SUPPRESS EVIDENCE**

THIS MATTER having come before this Court for hearing on the 10th day of September, 2019 on the Defendant's Motion to Suppress Evidence; the State appearing by and through Lawrence County Deputy State's Attorney, Brenda Harvey; the Defendant appearing personally and by and through his legal counsel, Rena M. Hymans; being fully apprised in the premises and good cause appearing, it is hereby

FOUND that all factual findings referenced in this Court's November 25, 2019, Memorandum Decision are hereby adopted and incorporated; and it is further

CONCLUDED that all legal conclusions referenced in this Court's November 25, 2019, Memorandum Decision are hereby adopted and incorporated by this reference; and it is hereby

ORDERED that the Defendant's Motion to Suppress Evidence is hereby granted.

BY THE COURT:

Attest: CAROL LATUSECK,CLERK
Mund, Tonisha
Clerk/Deputy

Signed: 12/19/2019 11:00:46 AM

Honorable Eric Strawn
Circuit Court Judge

Filed on: 12/19/2019 LAWRENCE County, South Dakota 40CRI19-000258

11/25/2019 1:38 PM CST LAWRENCE COUNTY

STATE OF SOUTH DAKOTA)) SS. COUNTY OF LAWRENCE)	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff, vs. DANA OLMSTED, Defendant.	40CRI19-000268 MEMORANDUM OF DECISION ON DEFENDANT'S MOTION TO SUPPRESS

MOTIONS SUMMARY

This matter having come for Motions Hearing on Defendant's Motion Suppress on September 10, 2019, the State having appeared represented by Lawrence County Deputy State's Attorney Brenda Harvey, Defendant appearing personally and with counsel, Rena Hymans, the Court having heard arguments of Counsel the State and Defendant having been afforded time to submit her respective brief and this Court having considered the briefs from both parties, and good cause showing, this Court issues its Memorandum of Decision. This Memorandum of Decision is drafted pursuant to SDCL § 15-6-52(a). This Memorandum of Decision contains this Court's Findings of Fact and Conclusions of Law by reference and as if set out point by point. It is intended that any Finding of Fact may be considered a Conclusion of Law if the context so warrants and vice versa.

FACTUAL POSTURE

The following information was included in Officer Jandt's the probable cause affidavit:

> On March 20, 2019, Officer Erik Jandt of the Deadwood Police Department arrived at 53 Dunlap Avenue in Deadwood, South Dakota to respond to a report regarding a woman who found possible methamphetamine in a community dryer.

The reporting party, later identified as Ariel Roberts, stated she watched a male from apartment 15 take his clothes from the dryer prior to discovering a substance in the machine.

Officer Jandt used a field test to confirm the substance was methamphetamine. Law enforcement knocked on the door of apartment 15. A male voice responded but did not answer the door. The front door was held shut with a knife. Police made entry into the apartment and located Dana Olmsted inside. The renter of the apartment, Defendant Carrie Ostby, was not present. Law enforcement didn't request a warrant before making contact or entering the apartment.

After entering the apartment and securing Olmsted, law enforcement executed a search of the apartment to ensure no one else was present and then secured the apartment. Officers were only looking for people; therefore, there was no search for or mention of any illegal substances at the time.

Officer Jandt completed an Affidavit In Support of Request For Search Warrant (State's Exhibit 1), regarding Defendant Carrie Ostby and her residence at 53 Dunlap Avenue Apartment 15 in Deadwood, South Dakota. Judge Chad Callahan signed an Amended Search Warrant (State's Exhibit 3) on March 21, 2019, directing

law enforcement to search 53 Dunlop Street Apartment 15 for illegal substances. The Search Warrant also called for law enforcement to obtain a urine sample from Defendant Ostby and authorized a search of her vehicle. Defendant Olmsted was previously detained and booked for possession of a controlled substance.

Law enforcement officers executed the search warrant on apartment 15 and located numerous baggies containing a white crystal substance. This substance was sent to the Rapid City Laboratory and tested positive for methamphetamine. The search warrant was served on Defendant Ostby on March 22, 2029 and a urine sample was obtained from her. The urine sample tested presumptively positive for methamphetamine.

Defendant Ostby was placed under arrest for ingestion of methamphetamine. The urine sample was later sent to the South Dakota Public Health Laboratory in Pierre, South Dakota. The laboratory confirmed the sample tested positive for methamphetamine.

The probable cause affidavit expanded on law enforcement's history with apartment. It stated the following:

> Ariel Roberts informed Officer Jandt that she had discovered a bag of what she believed to be methamphetamine on February 13, 2019 in the hallway of the apartment complex.

Officer Jandt stated that he relied on "prior history possibly associated with the residence" to support his decision to gain entry into the apartment. His purpose was to "prevent the Defendant from destroying evidence." Officer Jandt knew that

Investigator James Olson was actively working on a drug investigation on that residence.

Ms. Roberts had reported to the police heavy traffic in and out of apartment 15. On a previous occasion, Investigator Olson observed a male subject arrive at Defendant Ostby's residence and go inside while his vehicle was running. This individual left his car door open and was inside the residence for approximately 2 minutes. The individual was later stopped for a traffic violation and arrested for possession of methamphetamine. Investigator Olson had also received unconfirmed information that Ostby had been distributing methamphetamine.

ISSUES

1. Whether Officer Jandt's probable cause affidavit contained sufficient information to support a warrant authorizing the search of Defendant Ostby's apartment.
2. Whether the exigent circumstances exception to the warrant requirement authorized Officer Jandt to search the defendant's home even if the probable cause affidavit lacked sufficient information to support the warrant.

ANALYSIS

The analysis provided in the Memorandum of Opinion relating to Ostby is hereby incorporated as the identification and subsequent apprehension of Olmsted was premised upon the entry of Ostby's apartment which Olmsted was a guest.

The Fourth Amendment of the United States Constitution and Article VI § 11 of the South Dakota Constitution protects individuals from unreasonable searches and seizures. U.S. CONST. AMEND IV and S.D. CONST. ART. VI §11. "These provisions

guarantee an individual's right to personal security free from arbitrary law enforcement interference." *State v. Ramirez*, 535 N.W.2d 847, 849 (S.D. 1995) (citation omitted). "The ultimate touchstone of the Fourth Amendment is 'reasonableness'" *State v. Kaline*, 2018 S.D. 54, ¶ 10, 915 N.W.2d 854, 857 (citations omitted). "Reasonableness of a search depends on balancing the public's interest in preventing crime with the individual's right to be free from arbitrary and unwarranted governmental intrusions into personal privacy." *State v. Smith*, 2014 S.D. 50, ¶ 15, 851 N.W.2d 719, 724. "A reviewing court must look to the totality of the circumstances to determine whether the officer had a particularized and objective basis for suspecting criminal activity.'" *Meyer*, 2015 S.D. 64, ¶ 9, 868 N.W.2d 561, 565 (quoting *Mohr*, ¶ 14, 841 N.W.2d at 444 (internal quotation omitted)).

i. Warrantless searches and the exigent circumstances exception

"Constitutional challenges to a warrantless law enforcement search require a two-step inquiry: first, factual questions on what the officers knew or believed at the time of the search and what action they took in response; second, legal questions on whether those actions were reasonable under the circumstances." *State v. Deneui*, 2009 S.D. 99, ¶ 14, 775 N.W.2d 221, 230. The second step requires an objective analysis of reasonableness. *Id.* "A reviewing court must look to the totality of the circumstances to determine whether the officer had a particularized and objective basis for suspecting criminal activity.'" *Meyer*, 2015 S.D. ¶ 9, 868 N.W.2d at 565 (quoting *Mohr*, ¶ 14, 841 N.W.2d at 444 (internal quotation omitted)). "It is well settled that law enforcement 'officers may draw on their own experience and

specialized training to make interferences from and deductions about the cumulative information available to them that might well elude an untrained person.'" *Chase*, 2018 S.D. 70, ¶ 7 (quoting *Mohr*, ¶ 16, 841 N.W.2d at 445 (internal quotation omitted)).

"The Fourth Amendment demonstrates a 'strong preference for searches conducted pursuant to a warrant [.]'" *State v. Walter*, 2015 S.D. 37, ¶ 6, 864 N.W.2d 779, 781 (citations omitted). "Searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment." U.S. CONST. AMEND. IV; *State v. Kaline*, 2018 S.D. 54, ¶ 10, 915 N.W.2d 854, 857. "In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement." *State v. Kaline*, 2018 S.D. 54, ¶ 10, 915 N.W.2d 854, 857. Unless one of these exceptions applies, "a search is unreasonable when the government trespasses into an area protected by the Fourth Amendment without a warrant." *State v. Stanley*, 2017 S.D. 32, ¶ 11, 896 N.W.2d 669, 674. "The State must prove by a preponderance of the evidence that the warrantless search satisfied an exception." *State v. Rogers*, 2016 S.D. 88, ¶ 11, 887 N.W.2d 720, 723..

"The exigent circumstances exception is one of the well-delineated exceptions to the warrant requirement." *Fischer*, 2016 S.D. 12, ¶ 13, 875 N.W.2d at 45 (quoting *Fierro*, 2014 S.D. 62, ¶ 17, 853 N.W.2d at 240). "Exigent circumstances exist when a situation demands immediate attention with no time to obtain a warrant." *State v. Bowker*, 2008 S.D. 61, ¶ 19, 754 N.W.2d 56, 63 (quoting *State v.*

Dillon, 2007 S.D. 77, ¶ 18, 738 N.W.2d 57, 60). "The need to protect or preserve life or avoid serious injury presents that kind of situation." *Id.* "In determining whether exigent circumstances exist[, Courts] ask, '[w]hether police officers, under the facts as they knew them at the time, would reasonably have believed that delay in procuring a search warrant would gravely endanger life, risk destruction of evidence, or greatly enhance the likelihood of a suspect's escape.'" *Dillon*, 2007 S.D. 77, ¶ 18, 738 N.W.2d at 60–61 (quoting *State v. Hess*, 2004 S.D. 60, ¶ 25, 680 N.W.2d 314, 325). Courts consider "the facts as perceived by the police at the time of entry, not as subsequently uncovered." *State v. Meyer*, 1998 S.D. 122, ¶ 23, 587 N.W.2d 719, 724. "For this exception to apply, law enforcement officers must possess probable cause that the premises to be searched contains the sought-after evidence or suspects." *State v. Deneui*, 2009 S.D. 99, ¶ 15, 775 N.W.2d 221, 230.

ii. Sufficiency of evidence necessary in a probable cause affidavit to obtain a search warrant

When used to obtain a warrant, a probable cause affidavit "must provide the issuing judge with sufficient information to make "a 'common sense' decision that there was a 'fair probability' the evidence would be found on the persons or at the place to be searched." *Guthrie v. Weber*, 2009 S.D. 42, ¶ 11, 767 N.W.2d 539, 543 (citations and quotations omitted). "What amount of evidence is required to form probable cause is not a question susceptible to formulaic solutions. Probable cause 'is a fluid concept—turning on the assessment of probabilities in particular contexts—not readily, or even usefully, reduced to a neat set of legal rules.'" *State v. Running Shield*, 2015 S.D. 78, ¶ 9, 871 N.W.2d 503, 506. "In a claim that an affidavit for a

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search warrant lacked probable cause, [the South Dakota Supreme Court] review[s] the totality of the circumstances to determine 'if there was at least a 'substantial basis' for the issuing judge to find probable cause." *Guthrie v. Weber*, 2009 S.D. 42, ¶ 11, 767 N.W.2d 539, 543 (citing *State v. Jackson*, 2000 SD 113, ¶ 8, 616 N.W.2d 412, 416 (citation omitted).

"The Fourth Amendment requires that there be a nexus between the item to be seized and the alleged criminal activity." *Id.* "On review, [the South Dakota Supreme Court is] limited to an examination of the facts as contained within the four corners of the affidavit. Furthermore, [the Supreme Court] review[s] the issuing court's probable cause determination independently of any conclusion reached by the judge in the suppression hearing." *State v. Dubois*, 2008 S.D. 15, ¶ 10, 746 N.W.2d 197, 202. "Reasonable inferences may be drawn from the information in the affidavit." *State v. Raveydts*, 2004 S.D. 134, ¶ 9, 691 N.W.2d 290, 293. "Furthermore, [the South Dakota Supreme Court] will draw every reasonable inference possible in support of the issuing court's determination of probable cause to support the warrant." *State v. Helland*, 2005 S.D. 121, ¶ 17, 707 N.W.2d 262, 269 (citations omitted).

Officers may rely on tips from informants when conducting investigations. However, "[t]ips must provide sufficient information to allow officers to develop a reasonable suspicion that criminal activity is afoot." *State v. Sharpfish*, 2019 S.D. 49, ¶ 26, 933 N.W.2d 1, 10. "When an officer is not given an 'explicit and detailed description of alleged wrongdoing,' the officer must have some other reason to believe the informant's conclusion is correct." *Id. (citing State v. Stanage*, ¶ 11, 893

N.W.2d at 526 (quoting *Navarette*, 572 U.S. at 399, 134 S. Ct. at 1689))). The officer must confirm the tip through personal observations of criminal activity, or in the alternative, be aware that the tipster "has special training or experience relating to the conclusion at issue." *Id.* (*Stanage*, ¶ 11, 893 N.W.2d at 527).

In *State v. Sharpfish*, an officer received a tip concerning an intoxicated driver. The officer was informed that the individual was a Native American male, about six feet tall, 180 pounds, wearing jeans and a t-shirt. He was informed that this individual was driving a blue minivan northbound in the Baken Park parking lot towards the Corner Pantry gas station in Rapid City. 2019 S.D. 49, ¶ 2, 933 N.W.2d 1, 5. The officer was not told the reporting party's identity or provided information regarding why the reporting party believed the driver to be intoxicated. *Id.* The officer witnessed the blue minivan driving through the parking lot and watched it come to a stop at a gas station pump. The officer did not witness any erratic driving or traffic violations. The officer conducted a field sobriety test and concluded that the driver was intoxicated. The defendant moved to suppress the evidence obtained as a result of his encounter with the officer, stating that "he was not contacted and detained based on reasonable suspicion" and therefore the stop was a violation of his Fourth Amendment rights. 2019 S.D. 49, ¶ 7, 933 N.W.2d 1, 5.

The South Dakota Supreme Court held that the officer had developed reasonable suspicion prior to engaging with the defendant. However, it concluded that the officer "did not have a reasonable suspicion of criminal activity just from the tip alone." 2019 S.D. 49, ¶ 28, 933 N.W.2d 1, 11. In support of this determination, the

Supreme Court stated that the officer "did not receive a detailed and explicit description of the wrongdoing to support the basis of the informant's conclusion that Sharpfish was driving while intoxicated. Nor did he receive any information regarding the identity of the informant or any specialized training or experience the informant had regarding his or her conclusion that Sharpfish was intoxicated." *Sharpfish*, 2019 S.D. 49, ¶ 28, 933 N.W.2d 1, 10–11. Finally, the officer "did not independently observe Sharpfish driving erratically though the parking lot or committing any traffic violations." *Id.*

STANDARD OF REVIEW

The South Dakota Supreme Court "review[s] the [trial] court's grant or denial of a motion to suppress involving an alleged violation of a constitutionally protected right under the de novo standard of review." *State v. Sharpfish*, 2019 S.D. 49, ¶ 23, 933 N.W.2d 1, 9 (citing *State v. Fierro*, 2014 S.D. 62, ¶ 12, 853 N.W.2d 235, 239 (citations omitted)). "[F]indings of fact are reviewed under the clearly erroneous standard[.]" *Id.* at 2019 S.D. ¶ 28, 933 N.W.2d at 10 (citations omitted). However, the application of the facts to the law is subject to de novo review. *Id.*

OPINION

1. Officer Jandt did not have enough information to establish probable cause based on the facts contained within the four corners of the affidavit in support of the search warrant.

The State argues that Officer Jandt's affidavit contained sufficient information to support the warrant to search the Defendant Ostby's apartment. Specifically, it contends that several tips from an informant, Ariel Roberts, coupled with information

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gathered by law enforcement pursuant to an on-going investigation of apartment 15 established probable cause.

An examination of the facts as contained within the affidavit must be confined to the four corners of the affidavit." *State v. Dubois*, 2008 S.D. 15, ¶ 10, 746 N.W.2d 197, 202. "Reasonable inferences may be drawn from the information in the affidavit." *State v. Raveydts*, 2004 S.D. 134, ¶ 9, 691 N.W.2d 290, 293. The South Dakota Supreme Court "will draw every reasonable inference possible in support of the issuing court's determination of probable cause to support the warrant." *State v. Helland*, 2005 S.D. 121, ¶ 17, 707 N.W.2d 262, 269 (citations omitted).

Officer Jandt's probable cause affidavit stated that Ms. Roberts watched a male from apartment 15 take his clothes from a community dryer. Afterwards, she discovered a substance that field tested positive for methamphetamine. On a previous occasion, Ms. Roberts reported that she discovered a bag of a substance she believed to be methamphetamine in the hallway of the apartment complex. Ms. Roberts also reported heavy traffic in and out of apartment 15.

Officers may rely on tips from informants when conducting investigations. However, "[t]ips must provide sufficient information to allow officers to develop a reasonable suspicion that criminal activity is afoot." *State v. Sharpfish*, 2019 S.D. 49, ¶ 26, 933 N.W.2d 1, 10. "*When an officer is not given an 'explicit and detailed description of alleged wrongdoing,' the officer must have some other reason to believe the informant's conclusion is correct.*" *Id. (citing State v. Stanage*, ¶ 11, 893 N.W.2d at 526 (quoting *Navarette*, 572 U.S. at 399, 134 S. Ct. at 1689) (emphasis

added)). The officer must confirm the tip through personal observations of criminal activity, or in the alternative, be aware that the tipster "has special training or experience relating to the conclusion at issue." *Id.* (*Stanage*, ¶ 11, 893 N.W.2d at 527).

The affidavit described Investigator James Olson's observations of apartment 15 provided that the investigator witnessed a male subject arrive at the residence and go inside while his vehicle was running. This individual left his car door open and remained in the apartment for approximately two minutes. He was later stopped for a traffic violation and arrested for possession of methamphetamine. In addition, Investigator Olson had received unconfirmed information that Defendant Ostby had been distributing methamphetamine.

The State does not allege that Ms. Roberts has special training or experience related to the identification or detection of methamphetamine use. Therefore, to rely on her tip to establish probable cause, law enforcement must confirm the information through personal observations of criminal activity. In the present case, neither Officer Jandt or Investigator Olson personally observed criminal activity traceable to apartment 15. The fact that investigator observed an individual entering the apartment who was later arrested with methamphetamine is insufficient to connect the drug possession to the apartment. Further, law enforcement was not present when Ms. Roberts discovered the methamphetamine in the hallway or in the dryer. Based on these facts, this Court holds that the evidence contained in the affidavit was insufficient to establish probable cause to search Defendant Ostby's apartment.

2. The State failed to establish by a preponderance of the evidence that Officer Jandt had sufficient information to circumvent the warrant requirement under the extrinsic evidence exception.

The State argues that Officer Jandt was entitled to search the defendant's apartment regardless of the sufficiency of his probable cause affidavit. To support of this assertion, it cites to the exigent circumstances exception to the warrant requirement. This exception allows for warrantless searches and seizures when "a situation demands immediate attention with no time to obtain a warrant." *State v. Bowker*, 2008 S.D. 61, ¶ 19, 754 N.W.2d 56, 63 (quoting *State v. Dillon*, 2007 S.D. 77, ¶ 18, 738 N.W.2d 57, 60). "In determining whether exigent circumstances exist[, Courts] ask, '[w]hether police officers, under the facts as they knew them at the time, would reasonably have believed that delay in procuring a search warrant would gravely endanger life, risk destruction of evidence, or greatly enhance the likelihood of a suspect's escape." *Dillon*, 2007 S.D. 77, ¶ 18, 738 N.W.2d at 60–61 (quoting *State v. Hess*, 2004 S.D. 60, ¶ 25, 680 N.W.2d 314, 325). Courts consider "the facts as perceived by the police at the time of entry, not as subsequently uncovered." *State v. Meyer*, 1998 S.D. 122, ¶ 23, 587 N.W.2d 719, 724.

The State argues that Officer Jandt "had concerns that the male, later identified as Defendant Olmsted, may try to leave the area" and/or destroy evidence if law enforcement did not immediately act on the Ms. Robert's tip. *State's Brief in Opposition to Defendant's Motion to Suppress* at 2. However, it is important to note that the exigent circumstances exception to the warrant requirement requires that "law enforcement officers [] possess probable cause that the premises to be searched contains the sought-after evidence or suspects." *State v. Deneui*, 2009 S.D. 99, ¶ 15,

775 N.W.2d 221, 230. Here, Officer Jandt's affidavit demonstrates that law enforcement did not have the information it needed to establish probable cause to search the defendant's home. Based on the South Dakota Supreme Court's holding *Deneui* and this Court's holding on issue one, the State has failed to establish by a preponderance of the evidence the requirements of the exigent circumstances exception. *See State v. Rogers*, 2016 S.D. 83, ¶ 11, 887 N.W.2d 720, 723 (stating that the burden of proof required to establish the existence of a warrant exception is a preponderance of the evidence). The State does not cite any other exception to the warrant requirement that would render permissible Officer Jandt's warrantless search of the defendant's apartment. Due to this Court concluding that law enforcement lacked the requisite warrant before entering Ostby's apartment, the seizure of Olmsted was also illegal.

CONCLUSION

After considering all briefs and arguments of counsel, this Court concludes that the State has not met its burden in demonstrating that Officer Jandt had sufficient information to circumvent the warrant requirement under the extrinsic evidence exception. This Court further concludes that Officer Jandt did not have enough information to establish probable cause based on the facts contained within the four corners of the affidavit in support of the search warrant. Therefore, the Defendant's Motion to Suppress is hereby **GRANTED**. The Defendant shall prepare a proposed order.

Dated this 25th day of November, 2019.

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BY THE COURT:

Judge Eric J. Strawn
Circuit Court Judge

ATTEST:
Carol Latuseck
Clerk of Courts

BY:
Deputy Clerk of Courts

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29205 and 29206

STATE OF SOUTH DAKOTA,

Plaintiff and Appellant,

v.

CARRIE LYNN OSTBY
DANA OLMSTED,

Defendants and Appellees

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

THE HONORABLE ERIC J. STRAWN
Circuit Court Judge

APPELLANT'S REPLY BRIEF

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Order Granting Petition for Allowance of Appeal from Intermediate Order filed
January 30, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED:

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29205 and 29206

STATE OF SOUTH DAKOTA,

Plaintiff and Appellant,

v.

CARRIE LYNN OSTBY
DANA OLMSTED,

Defendants and Appellees

PRELIMINARY STATEMENT

In this brief, Plaintiff and Appellant, State of South Dakota, is referred to as "State." Defendants and Appellees, Dana Olmsted and Carrie Ostby are referred to as "Defendants" or by name. Citations to specific parts of the State's Appellant's Brief and Defendants' Appellee Brief will be referred to as "SB" and "DB" respectively, followed by the appropriate page references. All other individuals are referred to by name. References to documents are designated as follows:

Settled Record (Lawrence Criminal File 19-258; Dana Olmsted) SR1

Settled Record (Lawrence Criminal File 19-268; Carrie Ostby) SR2

All document designations are followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

The State incorporates herein the Jurisdictional Statement provided in its Appellant's Brief at SB 1-2.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

The State incorporates the Statement of Legal Issues presented in its Appellant's Brief at SB 2.

STATEMENT OF THE CASE

The Statement of the Case provided in the State's Appellant's Brief, at SB 3, is incorporated herein by reference.

STATEMENT OF FACTS

The State relies upon the Statement of Facts in the Appellant's Brief at SB 3-5.

ARGUMENT

THE AFFIDAVIT IN SUPPORT OF REQUEST FOR SEARCH WARRANT WAS SUFFICIENT TO SHOW PROBABLE CAUSE.

A. The Affidavit in Support of Request for a Search Warrant is Sufficient to Show Probable Cause.

The State generally relies on the arguments presented in the original Appellant's Brief, at SB 5-16. However, Defendants insist that the circuit court properly applied the appropriate standard and that the warrant was supported by an insufficient affidavit. The State believes a response to each argument is necessary.

Defendants, like the circuit court, continue to view each piece of evidence in the affidavit in isolation. DB 11. They do not consider how the separate pieces of information work together to form the probable cause necessary for the magistrate judge to issue the search warrant. But the appropriate standard requires reviewing courts to look "at the totality of the circumstances to decide if there was at least a 'substantial basis' for the issuing judge's finding of probable cause." *State v. Gilmore,* 2009 S.D. 11, ¶ 7, 762 N.W.2d 637, 641 (quoting *State v. Dubois*, 2008 S.D. 15, ¶ 10, 746 N.W.2d 197, 202). And while this standard is concededly cited by both the circuit court and Defendants, it is not the standard the circuit court applied. Both the circuit court and the Defendant's mistakenly pick apart each piece of evidence contained in the search warrant affidavit to support the conclusion that the evidence relied upon in the affidavit is insufficient to support the issuance of a search warrant. But when all of the information presented in the affidavit is viewed together, there is more than sufficient evidence to support the issuance of the search warrant.

Ariel Roberts called law enforcement after she watched Olmsted remove *his* clothing from the dryer just prior to Roberts finding what she believed to be methamphetamine. SR1 45-46; SR2 34-35. Law enforcement field tested that substance, which tested presumptively positive for methamphetamine. SR1 46; SR2 34. Roberts also told law enforcement that in February she found what she thought was

methamphetamine in the hallway. SR1 46; SR2 34. She reported heavy short-term traffic to and from Apartment 15. SR1 46; SR2 34. Ostby was the subject of an active drug investigation by Investigator Olson. SR1 46; SR2 34. Additionally, an individual was seen leaving Defendants' apartment and later found with methamphetamine. SR1 46-47; SR2 34-35. All this information was contained in the affidavit submitted to the magistrate court. When viewed together, the evidence was sufficient to establish probable cause for issuance of the search warrant.

Defendants next argue the "evidence that was contained in the affidavit was not 'traceable' or lacked a nexus to Apartment 15." DB 12. This is directly contrary to the evidence contained in the affidavit. Roberts watched Olmsted remove *his* clothes from the dryer immediately before she found the substance that tested presumptively positive as methamphetamine. SR1 46; SR2 34. Ostby, who resides in Apartment 15 was under investigation for drug-related activity. SR1 46; SR2 34. And a person was found with methamphetamine after visiting Apartment 15. SR1 46; SR2 34. To claim the affidavit contains no evidence to tie drugs to Apartment 15 is without merit and not supported by the record.

Defendants, like the circuit court, mistakenly rely on *State v. Sharpfish*, 2019 S.D. 49, 933 N.W.2d 1 to argue suppression is warranted. But *Sharpfish* is not applicable to this appeal because it is a

case about consensual encounters. That decision has absolutely nothing to do with search warrants or the sufficiency of affidavits in support of them. Indeed, this Court recently reiterated the difference evaluating reasonable suspicion for a traffic stop and probable cause for a search warrant. *State v. Tenold*, 2019 S.D. 66, ¶ 30, 937 N.W.2d 6, 15.

Further, despite Defendants' claim to the contrary, the search warrant affidavit at issue in this case was not based solely on Roberts' belief that there were drugs in Apartment 15. DB 12-13. Instead, it was based on a culmination of evidence, drawn from Roberts' personal observations and experiences, as well as the investigating officers' observations, training and experience. The magistrate court evaluated that information and made a "practical, common-sense decision" that "there [was] a fair probability that contraband or evidence of a crime [would] be found" in Apartment 15 or on Defendants' persons. *Tenold,* 2019 S.D. 66, ¶ 30, 937 N.W.2d at 15 (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332 (1983)).

In viewing the totality of the circumstances, there was more than sufficient evidence in the affidavit for the magistrate to find probable cause to issue a search warrant.

B. The Good Faith Exception Applies.

The State primarily relies on the argument presented in its original brief (SB 16-17) but observes that Defendants' position is

premised on the accusation that Officer Jandt, a trained and experienced law enforcement officer, was not acting in good faith when he submitted the search warrant affidavit for judicial review. DB 13.

This Court held in *State v. Running Shield*, that suppression of evidence obtained by a search warrant is only appropriate in four instances:

> (1) 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'; (2) 'the issuing magistrate wholly abandoned his judicial role'; (3) the affidavit is 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable'; and (4) the warrant is "so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid."

2015 S.D. 78, ¶ 7, 871 N.W.2d 503, 506 (quoting *United States v. Leon*, 468 U.S. 897, 923, 104 S.Ct. 3405, 3421 (1984)).

Defendants do not claim that any of these four exceptions apply; they simply state that Officer Jandt's entrance into Apartment 15 without a warrant, based on his reasonable belief of exigent circumstances,[1] prohibits the issuance of a search warrant. DB 13-14. But all of the information contained in the affidavit was obtained prior to Officer Jandt's entrance into Apartment 15.

[1] The exigent circumstances exception was presented to the circuit court and argued in Defendants' Brief. DB 6-9. However, it is not an argument the State is bringing before this Court.

Any observations or information obtained after law enforcements' entry into Apartment 15 was not included in the affidavit.

Defendants suggests that the case be remanded for further findings on the good-faith exception to determine if Officer Jandt acted recklessly when he entered Apartment 15 prior to obtaining a warrant. DB 14. Because the affidavit did not contain any details as to what law enforcement observed when they entered Apartment 15, further findings are unnecessary.

Similarly, Defendants ask that the expanded independent source doctrine be applied. DB 14. The expanded independent source doctrine allows "partially tainted warrants" to be upheld as long as the "remaining untainted information establishes probable cause." *State v. Boll*, 2002 S.D. 114, ¶ 34, 651 N.W.2d 710, 719. Here, there is no tainted information in the affidavit. All the evidence presented in the affidavit was observed by law enforcement prior to their entry into Apartment 15. The independent source doctrine is not applicable here.

CONCLUSION

The State respectfully requests that the circuit court's order suppressing evidence be reversed and the search conducted pursuant to the search warrant be upheld.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellant's Brief contains 1,390 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2016.

Dated this 22nd day of May 2020.

/s/ Erin E. Handke
Erin E. Handke
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 22, 2020, a true and correct copy of Appellant's Brief in the matter of *State of South Dakota v. Carrie Lynn Ostby and Dana Olmsted* was served via electronic mail upon Ellery Grey, ellery@greyeisenbranlaw.com and Robert D. Pasqualucci, robert@rushmorelaw.com.

/s/ Erin E. Handke
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Assistant Attorney General