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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Dorchester County
Honorable Diane Goodstein, Trial Judge

Appellate Case No. 2022-001369

HERBERT LEROY HOLMES, SCDC # 139850,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT PURSUANT TO WHITE V. STATE

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PETITIONER'S STATEMENT OF ISSUES ON APPEAL

1. Whether the Trial Court erred in admitting DNA evidence where the State failed to establish chain of custody as far as practicable, since the prosecution left to conjecture the identity of some of the persons who handled the evidence and the manner in which the evidence was handled?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

I. Whether the Trial Court correctly held that the State established the chain of custody, as far as is practicable, for the DNA evidence and therefore denied Petitioner's motion to suppress.

STATEMENT OF THE CASE

Petitioner Herbert Leroy Holmes is currently incarcerated within the South Carolina Department of Corrections following his conviction for first degree criminal sexual conduct and kidnapping, for which he was sentenced to concurrent terms of incarceration for thirty years and life, respectively.

In May 2011, Petitioner was indicted by the Dorchester County Grand Jury for first degree criminal sexual conduct (2011-GS-18-0257) and kidnapping (2011-GS-18-0256). App. at 575-578. On April 22-25, 2013, Petitioner proceeded to a jury trial before the Honorable Diane Goodstein. Id. at 552. At the conclusion of trial, the jury found Petitioner guilty as indicted, and Judge Goodstein sentenced Petitioner to concurrent terms of thirty years and life imprisonment, for criminal sexual conduct and kidnapping, respectively. Id. at 579-580.

Petitioner's trial counsel attempted to file a notice of appeal, but the notice of appeal inadvertently cited Rule 203(d)(1)(B)(4), which governs guilty pleas. Id. at 543. As a result, on June 10, 2013, the Court of Appeals dismissed Petitioner's direct appeal. Id. at 548.

On November 21, 2017, Petitioner filed a petition for post-conviction relief.[1] Id. at 441-447. An evidentiary hearing was held on May 19, 2022, before the Honorable Robert J. Bonds. Id. at 463-541. The PCR court held that Petitioner was entitled to a belated direct appeal pursuant to White v. State, but Petitioner was not entitled to post-conviction relief. [2] Id. at 462.

Petitioner then initiated this appeal.

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[1] Petitioner filed this post-conviction relief application *pro se*. Counsel, Christopher R. Geel, was appointed on December 9, 2019.

[2] Concurrent with this Brief, Respondent is filing a Return to Petition for Writ of Certiorari regarding the other matters raised in Petitioner's PCR appeal.

STATEMENT OF FACTS

Victim P.R. ("Victim," her name has been withheld) was held at gun point, instructed to perform oral sex on her attacker, who then anally and vaginally raped her. Id. at 553. During trial, Petitioner objected to the admission of Dr. Bogan's testimony regarding DNA testing. Id. at 274-287. Petitioner objected to the chain of custody regarding the evidence and argued that the State had not fulfilled its obligations under State v. Hatcher, 392 S.C. 86, 708 S.E.2d 750 (2011). App. at 274-287. The Trial Court overruled the objection and admitted the evidence. Id. at 298.

The DNA evidence in question was collected from clothing and various swabs of Victim's body ("clothing" and the "rape kit"), all of which were collected at the Medical University of South Carolina the night of the assault. Id. at 553. Michelle Aimes Vevon and Lisa Cox Schafer were nurses working at MUSC in the trauma unit at the time of Victim's exam. Id. at 99, 120. Neither nurse remembered the Victim's exam at the time of the trial in 2011, Id. at 105, but Vevon recognized her own handwriting on the documentation from the exam, Id. at 103. Cox testified that she collected evidence during the exam based upon her signature on certain items. Id. at 127. During the exam, Victim's clothes were collected along with several swabs and washes (collectively, the "rape kit"). Id. at 553.

Detective James Knight collected the clothes and rape kit from the hospital. Id. at 135, lines 1-11, 582. Detective Knight then transported the evidence to Lieutenant Dale Nevins. Id. at 136-137. Lieutenant Nevins placed the evidence in the Dorchester Sheriff Office evidence locker. Id. at 155-156. In January 1985, the evidence was transported to SLED for testing by Lieutenant Nevins. Id. at 159-160. The rape kit was transported on January 2, 1985, and the clothing was transported on January 31, 1985. Id. at 581, 583, 584. The evidence was tested, and some of it was returned to the Sheriff's Office by Sergeant Burt Salvely. Id. at 161. Other evidence was returned

by Joseph Rivers in April 1988. Id. at 163. In July 1988, evidence was sent back to SLED for additional testing. Id. at 165, 313-314, 585. The evidence was returned to the Sheriff's Office on December 19, 1989, by Emory Rush. Id. at 165-166, 586.

In 1993, Lieutenant Nevins left the Sheriff's Office and custody of the evidence was transferred to Earl Absell. Id. at 167. In 1994, the Sheriff's Office moved. Id. at 204-205. During and after the move, Absell maintained custody of the evidence. Id. at 206.

On March 6, 2009, the evidence was again submitted to SLED for DNA testing. Id. at 317. Dr. Kenneth Bogan at SLED, who had previously tested the evidence, extracted DNA from the Victim's panties and skirt. Id. at 321. Dr. Bogan identified a DNA mixture from at least two individuals. Id. at 322. Dr. Bogan then received a reference sample of Petitioner's DNA, developed a profile, and compared it to the DNA extracted from Victim's body and clothing. Id. at 324. Dr. Bogan eventually determined that Petitioner's DNA matched the DNA found on the Victim's panties. Id. at 331.

Notably, every law enforcement officer and SLED technician who testified stated that the evidence was sealed when they received it and did not contain any signs of tampering. See Id. at 135 (Detective Knight), 162 (Lieutenant Nevins), 198 (Emory Rush), 206 (Earl Absell), 227 (Buster Edwards), 238 (Stephanie Stanley), 307, 314, 317 (Dr. Kenneth Bogan).

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). "The trial court serves as the gatekeeper in the admission of all evidence presented at trial, and in making admissibility determinations, the trial court is required to make certain preliminary findings regarding admissibility requirements . . . ." Watson v. Ford Motor Co., 389 S.C. 434, 456, 699 S.E.2d 169, 180 (2010). One of those preliminary determinations is whether a proper chain of custody has been presented prior to the admission of fungible evidence. See e.g, State v. Hatcher, 392 S.C. 86, 93, 708 S.E.2d 750, 754 (2011); State v. Sweet, 374 S.C. 1, 7, 647 S.E.2d 202, 206 (2007). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.

ARGUMENT

I. The Trial Court correctly ruled that the State had established the chain of custody as far as practicable and thus correctly denied Petitioner's motion to suppress.

Petitioner has argued that the Trial Court erred by admitting DNA evidence from Dr. Bogan. Petitioner bases this argument, both at trial and on appeal, on what he perceives to be an insufficient chain of custody. Given the long history of this investigation, the State established the chain of custody as far as is practicable, and there was no evidence of tampering or contamination of the evidence. Thus, the Trial Court's ruling should be upheld.

"The trial court serves as the gatekeeper in the admission of all evidence presented at trial, and in making admissibility determinations, the trial court is required to make certain preliminary findings regarding admissibility requirements . . . ." Watson v. Ford Motor Co., 389 S.C. 434, 456, 699 S.E.2d 169, 180 (2010). One of those preliminary determinations is whether a proper chain of custody has been presented prior to the admission of fungible evidence. See e.g, State v. Hatcher, 392 S.C. 86, 93, 708 S.E.2d 750, 754 (2011); State v. Sweet, 374 S.C. 1, 7, 647 S.E.2d 202, 206 (2007). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.

"South Carolina law does not require testimony as to the exclusion of any possibility of tampering." State v. Rogers, 361 S.C. 178, 187, 603 S.E.2d 910, 915 (Ct. App. 2004). The Courts of this State have found evidence inadmissible only where there is a missing link in the chain of possession because the identity of those who handled the evidence was not established at least as far as practicable. State v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001). "In other words, where there is a weak link in the chain of custody, as opposed to a missing link, the question is

only one of credibility, not admissibility." Carter, 344 S.C. at 424, 544 S.E.2d at 837. Importantly: "Whether the chain of custody has been established as far as practicable clearly depends on the unique factual circumstances of each case." South Carolina Dep't of Soc. Servs. v. Cochran, 364 S.C. 621, 629 n.1, 614 S.E.2d 642, 646 n.1 (2005). The Supreme Court has stated:

> Courts have abandoned inflexible rules regarding the chain of custody and the admissibility of evidence in favor of a rule granting discretion to the trial courts. "The trial judge's exercise of discretion must be reviewed in the light of the following factors: '. . . the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it.'" "If upon the consideration of such factors the trial judge is satisfied that in reasonable probability the article has not been changed in important respects, he may permit its introduction in evidence."

State v. Hatcher, 392 S.C. 86, 94-95, 708 S.E.2d 750, 754-755 (2011). The Court in Hatcher indicated: "The ultimate goal of chain of custody requirements is simply to ensure that the item is what it is purported to be." Id.

In this case, testimony and exhibits entered at trial established that:

- Following the assault, a medical exam was performed on Victim during which her clothes and a "rape kit" containing various swabs and specimens were collected. App. at 90.
- On October 25, 1985, Detective Knight collected Victim's clothing and the rape kit from the Medical University of South Carolina. App. at 135-136, 582. Detective Knight coordinated with Lieutenant Nevins to place those items in the Dorchester County Sheriff's Office evidence locker. App. at 135-136.
- On January 2, 1985, Lieutenant Nevins delivered the rape kit to SLED for testing. App. at 158-160.On January 31, 1985, Lieutenant Nevins delivered the clothing to SLED for testing. App. at 158-160. Notably, the evidence was sent in two separate trips.
- Dr. Kenneth Bogan of SLED analyzed the evidence and found sperm cells. App. at 308.
- On May 6, 1985, Sgt. Burt Salvely returned some of the evidence to the Dorchester County Sheriff's Office. App. at 161.
- On April 28, 1988, Joseph Rivers returned some of the evidence to the Dorchester County Sheriff's Office. App. at 163.

- On July 21, 1988, Lieutenant Nevins transported evidence, including a woods lamp, saliva filter paper, vaginal wash, oral wash, and an additional vaginal wash. to SLED for DNA testing. App. at 165, 585, 587.
- On July 24, 2988, Dr. Bogan of SLED determined that the evidence was not suitable for DNA testing. App. at 314.
- On December 19, 1989, SLED discharged a 9 x 12 envelope to Emory Rush, who returned it to the Dorchester County Sheriff's Office, where it was kept by Lieutenant Nevins. App. at 166, 586.
- In 1993, Lieutenant Nevins signed over custody of all evidence at the Dorchester County Sheriff's Office to Earl Asbell. App. At 167.
- In 1994, the Dorchester County Sheriff's Office moved buildings. During and after the move, Earl Asbell maintained custody of the evidence. App. At 205.
- On March 6, 2009, evidence technician Buster Edwards transported evidence for this case to and from SLED. App. at 228-229.
- While the evidence was at SLED, Dr. Bogan performed additional DNA testing on the panties and was able to develop a DNA profile. App. at 322. That DNA profile was eventually matched to Herbert Holmes. App. at 331.

Notably, every law enforcement officer and SLED technician who testified stated that the evidence was sealed when they received it and did not contain any signs of tampering. See App. at 135 (Detective Knight), 162 (Lieutenant Nevins), 198 (Emory Rush), 206 (Earl Absell), 227 (Buster Edwards), 238 (Stephanie Stanley), 307, 314, 317 (Dr. Kenneth Bogan).

The investigation in this case took place over 29 years. During that time, law enforcement maintained custody of the evidence and kept it secure. While the chain of custody is not as robust as seen in many modern investigation, none of the issues raised by Petitioner challenge that the items are what they purport to be. Given the "the nature of the article[s]" and "the circumstances surrounding the preservation and custody of [them]," the likelihood of intermeddlers tampering with them is incredibly low. Hatcher, 392 S.C. at 94-95, 708 S.E.2d at 754-755. To hold otherwise would require a finding that an individual accessed these items, which were under law enforcement control, and resealed them in a manner which was undetectable by law enforcement. Additionally,

the intermeddler would have had to add or modify the evidence with items which were so similar to the original evidence that the change went unnoticed by law enforcement. The Trial Court was satisfied that the article had not been changed in important respects and permitted its introduction in evidence. There was evidentiary support for the Trial Court's ruling, so it was not an abuse of discretion. State v. Pagan, 369 S.C. at 208, 631 S.E.2d at 265.

The facts of this case are similar to those in State v. Hatcher, in which the Supreme Court upheld the admission of evidence despite similar questions regarding the chain of custody. In Hatcher, crack cocaine was purchased from the defendant by an undercover informant. 392 S.C. at 88-89, 708 S.E.2d at 751. The drugs which were purchased were collected by a law enforcement officer, who testified at trial, placed into a sealed bag, and transported to SLED for testing. Id. at 89, 708 S.E.2d at 751. Once at SLED, the forensic scientist analyzed the substances and confirmed they were controlled substances. Id. at 89, 708 S.E.2d at 752. The bags were then resealed and returned to local law enforcement. Id. The defendant objected to the chain of custody arguing that the chain of custody did not account for every hand-to-hand transfer within SLED. Id. at 90, 708 S.E.2d at 752. The trial court overruled the objection and admitted the evidence. Id. The Supreme Court ruled that the trial did not abuse its discretion when admitting the evidence because "[i]t is unnecessary that the police account for 'every hand-to-hand transfer' of the item; it is sufficient if the evidence demonstrates a reasonable assurance the condition of the item remains the same from the time it was obtained until its introduction at trial." Id. at 94, 708 at 754 (quoting State v. Price, 731 S.W.2d 287, 290 (Mo. Ct. App. 1987)). The Supreme Court went on to say, "We agree with the Court of Appeals that the mere fact that evidence is sealed upon presentation for testing does not, in itself, establish a sufficient chain of custody. Evidence is still required as to how the item was obtained and how it was handled to ensure that it is, in fact, what it is purported to be.

However, we have consistently held that the chain of custody need be established only as far as practicable, and we reiterate that every person handling the evidence need not be identified in all cases." Id. at 95, 708 S.E.2d 755. The Supreme Court observed that both the officer who collected the drugs and transported them to SLED in tamper evident bags and the SLED agent who retrieved the drugs from the Log–In Department at SLED (still double-sealed) and tested them testified about the chain of custody and their handling of the drugs and the fact that there was no evidence of tampering. Id. While there are more officers involved in Petitioner's case, the facts are similar. Each officer testified that when he received the evidence, it was sealed. See App. at 135 (Detective Knight), 162 (Lieutenant Nevins), 198 (Emory Rush), 206 (Earl Absell), 227 (Buster Edwards), 238 (Stephanie Stanley), 307, 314, 317 (Dr. Kenneth Bogan). Further, the State produced documentation establishing when the evidence was transferred from the Sheriff's Office to SLED for testing and back. Id. at 581-587, see also, e.g., App. at 160-164 (testimony regarding items which were exhibits for identification only but which reflect the chain of custody). Due to the age of the case and the evolution of police documentation standards, the documentation chain is admittedly weaker than in modern cases. Nonetheless, the documentation and testimony demonstrates that the evidence was in law enforcement custody from the time it was collected to the time it was presented at trial. Thus, there is evidentiary support for the Trial Court's ruling admitting the evidence.

This case is also similar to State v. Trapp. In Trapp, drugs were seized from the defendant's bedroom by an investigator. 420 S.C. at 227, 801 S.E.2d at 747. A separate investigator completed a form acknowledging receipt of the drugs and their storage in the evidence locker. Id. The form contained some discrepancies between the search warrant return and the evidence form. Id. at 228, 801 S.E.2d at 748. The drugs were then transported to SLED for testing. Id. at 229, 801 S.E.2d at

748. The defendant objected to testimony regarding the actions of the first investigator, who was unavailable because he had died. Id. at 227, 801 S.E.2d 747 n.4. The defendant also objected to an incomplete chain of custody. Id. The Supreme Court held that the State presented sufficient evidence to reasonably demonstrate a complete chain of custody. Id. at 231, 801 S.E.2d at 749. The Supreme Court noted "[t]estimony from each custodian of fungible evidence, however, is not a prerequisite to establishing a chain of custody sufficient for admissibility." Id. (citing State v. Sweet, 374 S.C. 1, 7, 647 S.E.2d 202, 206 (2007)). The Court continued, "Whe[n] other evidence establishes the identity of those who have handled the evidence and reasonably demonstrates the manner of handling of the evidence, our courts have been willing to fill gaps in the chain of custody due to an absent witness." Id. at 231, 801 S.E.2d at 749-750 (citing State v. Sweet, 374 S.C. 1, 7, 647 S.E.2d 202, 206 (2007)). At trial, a responding officer had testified that he saw the items which were seized. Id. at 232, 801 S.E.2d at 750. He also testified to the standard procedures regarding the receipt of storage of narcotics. Id. The State then produced evidence regarding the transportation of the narcotics to SLED for testing. Id. The Supreme Court also looked to the testimony of the forensic scientist. Id. She stated the items she received were still inside manila envelopes when she removed them from the best evidence kit for testing. Id. Further, the items in the SLED report matched the items that the first investigator certified on the evidence form that he delivered to SLED. Id. The Court found this was evidence from which a juror could reasonably conclude the item was what the State purported it to be. Id. Importantly the Court noted, "Although we are aware that two of the items—a straw and one razor blade—were documented by [the investigator] on the evidence log-in form but not delivered to SLED, we find the care given to these pieces of evidence goes only to the weight of the evidence as opposed to its admissibility." Id. (citing State v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001)). In Petitioner's case,

there was testimony regarding the collection of the rape kit and clothing. App. at 116, 124. Further, there was testimony regarding their storage at the Sheriff's Office. Id. at 136. The State then produced documents and elicited testimony to establish when the evidence was transported to and from SLED for testing. See, e.g., Id. at 58181-587. While certain entries lacked clarity regarding what was transported, "precedent does not require the court to account for every minute of the custody and control of the evidence. Rather, [courts] must view the evidence and ascertain whether the State identified the individuals involved in handling the evidence, reasonably demonstrated that the evidence was handled properly, and established that the evidence seized was the same evidence tested." Trapp at 233, 801 at 750. All of which was done in this case.

Finally, Petitioner points to State v. Cribb. 310 S.C. 518, 426 S.E.2d 306 (1992). In Cribb, two nurses were present for a blood draw. Id. at 309, 426 S.E.2d at 522. One nurse testified that the other nurse administered an IV to Cribb and it was customary for blood to be drawn by the person administering the IV; the other nurse, who administered the IV, did not recall drawing blood from Cribb but assumed she did so because that was her standard procedure. Id. The lab technician did not know who drew Cribb's blood or how it was transferred to the lab. Id. Neither Cribb's medical records nor the label on the blood sample discloses the person(s) who drew the sample and transported it to the lab. Id. The admission of the blood evidence was an error because "[t]he evidence in the record of this case does not identify those persons who handled the blood from the time it was drawn until the time it was tested." Id. In contrast to Cribb, nurse Cox testified that, based upon her signature, she collected the evidence in this case. App. at 124. From that time forward, testimony and documentation shows that the evidence was either in the custody of the Dorchester County Sheriff's Office or SLED. Documentation and testimony detail when the evidence was brought back and forth between the two departments. Thus, Petitioner's case, unlike

Cribb, does have evidence identifying the persons who handled the evidence from the time it was collected until it was tested.

The Trial Court correctly held that the State had established the chain of custody as far as was practicable, admitted the evidence, and allowed Petitioner to challenge the weight and credibility of the evidence, but not its admission, before the jury. Petitioner was able to argue to the jury that they should discount the reliability of the DNA and raised questions regarding the testimony supporting a chain of custody, and he did as evidenced by approximately 25 pages of trial transcript. App. at 274-298. Through cross-examination and argument Petitioner raised these questions so that the jury could then determine what weight to give the evidence and what credibility to assign the witnesses. The jury ultimately found the evidence to be credible and convicted Petitioner.

Thus, the Trial Court did not abuse its discretion in admitting the evidence, and the denial of the motion to suppress was proper.

CONCLUSION

Because the Trial Court correctly found that the State established the chain of custody as far as was practicable, the Trial Court denied the motion to suppress. Therefore, this Court should deny Petitioner's appeal and uphold Petitioner's conviction. Should this Court grant certiorari, Respondent requests the opportunity to fully brief the issues raised.

Respectfully submitted,

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July 24, 2023