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Aug 11 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Sumter County

Honorable Alison Renee Lee, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WILLIAM LEE ROSEBORO, JR.

APPELLANT

APPELLATE CASE NO. 2022-001551

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in admitting the marijuana where the State failed to prove a sufficient chain of custody from the time the marijuana was originally seized by the United States Postal Service (USPS)?

STATEMENT OF THE CASE

Appellant was indicted during the April 2018 term of the Sumter County grand jury for one count of trafficking marijuana, 100 or more pounds but less than 2000 pounds. R. (Indictment). The State, represented by Christa Bell and Ernest Finney, III, called the case to trial on October 25, 2022, before the Honorable Alison R. Lee and a jury. Appellant was represented by Michael D. Routzong. Tr. 1. Prior to the call of the case, the State moved to amend the indictment to the lesser included offense of possession with intent to distribute marijuana (PWID).¹ Tr. 7, l. 9-Tr. 8, l. 8. After a three-day trial, Appellant was found guilty of possession with intent to distribute marijuana. Tr. 349, ll. 2-13. Judge Lee sentenced Appellant to eight years imprisonment with credit for time served. R. 372, ll. 1-7.

Appellant timely filed a notice of appeal on November 2, 2022. This brief follows.

¹ Based upon Appellant's prior criminal record the State proceeded forward on the PWID charge as a second offense. Tr. 8, ll. 1-8.

STANDARD OF REVIEW

“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

The trial judge erred in admitting the marijuana where the State failed to prove a sufficient chain of custody from the time the marijuana was originally seized by the United States Postal Service (USPS).

Relevant Facts

On January 12, 2018, Michael Rogers, an inspector with the United States Postal Inspection Service branch of the USPS, intercepted a suspicious package. The package, which was addressed to Appellant at his apartment in Sumter, South Carolina, had drawn Rogers's attention because the name and address on the return label when run through the law enforcement database CLEAR came back as false. Tr. 80, ll. 3-12; Tr. 82, ll. 19-25; . Tr. 84, ll. 7-17; Tr. 90, ll. 7-22; Tr. 101, ll. 3-7. Upon visually inspecting the parcel, Rogers noted it was tightly taped, had originated in California which is considered a "source area of marijuana" coming to the east coast, and it was shipped priority. Those facts, combined with the bad return address, heightened his suspicion of the parcel. Tr. 101, l. 13-Tr. 102, l. 14. Rogers requested a drug canine to inspect the box. Tr. 101, ll. 7-9.

Rogers placed four or five boxes, along with the suspicious parcel, on the floor in a room at the Sumter police department. Tr. 103, ll. 1-18. Sergeant Cameron Bryant and K-9 Murphy conducted the box inspection. Tr. 232, l. 17-Tr. 233, l. 8; Tr. 10-16. Neither Bryant nor K-9 Murphy were present in the room when Rogers set up the boxes for inspection. K-9 Murphy was deployed into the room and Bryant observed changes in his behavior that indicated an alert to narcotics. Specifically, K-9 Murphy displayed a head snap, which is a quick turn of the head whenever he first identifies the odor he smells, he tracked the scent back to the suspicious parcel, placed his nose on the box, and then gave a final alert by sitting. Tr. 241, l. 25-Tr. 242, l. 8.

Rogers obtained a federal search warrant to open the suspicious parcel. Tr. 85, ll. 4-17. He opened the box from the bottom to avoid damaging the shipping label and found four silver mylar bags inside. Within the mylar bags, he found four vacuum sealed bags of a green leafy substance that was later identified as marijuana. The parcel also contained packing popcorn. Tr. 86, ll. 6-19. The contents of the parcel were photographed and weighed. The parcel was repackaged with just enough marijuana to “make the charge,” along with papers and/or books to add back the weight of the removed narcotics. Once the parcel was repackaged and resealed, Rogers conducted a “controlled delivery” where he posed as regular mail carrier and delivered the parcel to an employee at Appellant’s apartment complex office. Tr. 83, l. 16-Tr. 84, l. 6; Tr. 85, ll. 16-24; Tr. 113, ll. 8-15.

While the controlled delivery was occurring, members of the Sumter Police Department’s drug unit were in the parking lot of Appellant’s apartment complex to conduct surveillance. Tr. 114, l. 1-5. Investigator Joseph Lane, the lieutenant of the Sumter Police Department drug unit, was part of the surveillance team. Tr. 121, ll. 11-23. According to Lane, surveillance began at 10:40 a.m. on January 12, 2018. At 10:54 a.m., Rogers was in route to the apartment complex with the repacked parcel which he delivered at approximately 11:02 a.m. At approximately 11:08 a.m., Appellant was observed entering the apartment complex office. At approximately 11:10 a.m., Appellant was observed leaving the office of the apartment complex carrying the parcel that Rogers had previously delivered. Tr. 123, ll. 19-22; Tr. 126, l. 3-Tr. 127, l. 6.

Appellant was arrested, the parcel was re-seized, and he was searched incident to arrest. Inside of his wallet, police located a receipt from a post office in California with the parcel

tracking number on it and airline receipts² in Appellant's name for a flight from Columbia, SC to Los Angeles, CA dated for January 9 to January 11, 2018. Tr. 95, ll. 1-18; Tr. 96, l. 22-Tr. 97, l. 17; Tr. 130, l. 13-Tr. 131, l. 14. Joseph Powell, a now retired drug analyst, tested the contents of the parcel. He determined that each of the four vacuum sealed bags contained marijuana weighing a total of 1,796.2 grams or 3.9 pounds. Tr. 195, l. 23-Tr. 196, l. 4; Tr. 211, ll. 2-6.

At trial, Lane testified about the chain of custody for evidentiary items. He stated that all the items that were seized from Appellant on January 12, 2018, including the parcel, its contents, and the items found in his wallet, were placed by him into an evidence locker at the Sumter Police Department. Once the evidence was placed into a locker it could only be removed by the evidence custodians who would take the evidence, label it, and transport it to the proper storage area to await testing or trial. He testified that every time the evidentiary items are handled by a person, that person signed off on a log notating when they handled the evidence and what they did with the evidence. He stated that a "chain of custody is very important when it comes to evidence, very, very important." Tr. 131, l. 7-Tr. 135, l. 24.

The State called Officer Alexis Carter, one of two evidence technicians for the Sumter Police Department, to testify to the chain of custody. Carter was not employed with the police department at the time of Appellant's arrest. However, she had been trained by Jim Alsbrook who was the evidence custodian who initially took custody of the evidence in Appellant's case. Tr. 160, l. 13-Tr. 161, 21. When the solicitor attempted to question Officer Carter about the chain of custody log, Counsel Routzong objected and asked to take up a matter of law. Tr. 163, ll.1-22.

² Appellant's name was subsequently run through the Airline Reporting Corporation which confirmed that he flew from Columbia, SC to Los Angeles, CA between January 9, and January 11, 2018. Tr. 105, ll. 8-23.

Counsel Routzong initially argued that Carter was not in the chain of custody from the time the evidence was seized until it was tested and therefore her testimony was not relevant. He believed Carter was going to testify to things done by her predecessor Alsbrook and he believed that was problematic. Tr. 164, ll. 10-24

Solicitor Bell clarified that Alsbrook was not a witness because he was retired and stated that his testimony would not further the case because he would not have been able to bring the marijuana into court. She asserted that the chain in Appellant's case consisted of Lane, Powell, the prior evidence custodian Alsbrook, and Carter who brought the marijuana into court. Solicitor Bell argued that Carter, as the current evidence technician, could establish the chain of custody as best as practicable by showing the procedures followed and that it was not necessary or possible to bring Alsbrook in to testify as he no longer worked for the police department. Tr. 164, l. 10-Tr. 166, l. 19.

Counsel Routzong maintained that Carter's testimony was not relevant because she was not in the chain of custody up until the time the marijuana was tested. He stated the fact that she brought the drugs to court was not relevant to any issue at trial. He asserted the chain of custody was from postal inspector Rogers to the drug analyst Powell, that Carter was not a part of the chain, and that any testimony she could offer was not relevant pursuant to Rule 401, SCRE. Tr. 166, l. 21-Tr. 169, l. 19. He conceded that the State could have Carter testify that as the current evidence technician she had brought the marijuana to court but that anything else she could testify to would not be relevant. Tr. 170, ll. 1-4.

Counsel Routzong further argued that pursuant to Rule 6, SCRCrimP, that the defense had demanded the presence of all individuals in the chain of custody and the State was required to bring them all to court. He admitted that gaps in the chain could be filled "a little bit" but that

under Rule 6 the State was required to produce the chain witnesses if they were available. Tr. 170, l. 17-Tr. 172, l. 1. Solicitor Bell stated that Carter was able to testify based on the evidence logs as to how the items were handled as part of the police departments routine practices. Tr. 175, ll. 2-11. The trial judge ruled that under case law the current custodian of evidence could testify to the records and files showing how the evidence was handled to further establish the chain of custody and that would satisfy the requirements of Rule 6, SCRCrimP. Tr. 177, l.18-Tr. 179, l. 18.

After the court initially ruled, Counsel Routzong argued additional issues with the evidence log and chain of custody. As to the log, he argued that it did not comport with a proper chain of custody document because it did not contain a sufficient description of the substance or its container to distinguish it and that it did not contain assurances that the substance was delivered in substantially the same condition as when it was received. He relied upon templates provided in the South Carolina criminal procedure rules book to support his argument. He further argued that the gaps could be filled in but only with sufficient documentation such as the forms in the rule book. He also argued that he could not confront the missing members of the chain. Tr. 180, l. 17-Tr. 184, l. 22.

Solicitor Bell argued the forms defense counsel relied on were suggestions and not required forms. Further, she stated that the chain as established so far began with Rogers seizing the package, then went to Lane who deposited the items into evidence and that defense counsel had ample opportunity to cross-examine the witnesses. The chain would be further established once Powell testified, and the State was prepared to offer into evidence the logs documenting the movement of the marijuana into evidence. Thus, the State had established a sufficient chain of custody. Tr. 184, l. 24-Tr. 186, l. 21.

In reply, Counsel Routzong asserted that there were “clearly” some people in the chain who were not testifying. Further, Counsel Routzong argued that there was an unknown person in the chain, specifically the individual in the apartment complex office that Rogers initially delivered the parcel to. He argued that if the State could not produce that person, then the drugs should be suppressed, and the case dismissed. Tr. 186, l. 22-Tr. 187, l. 15. Solicitor Bell asserted that Appellant had been under surveillance the entire time and when they arrested Appellant the parcel appeared to be in the same condition as when it was delivered. Thus, because there was no indication that the parcel had been altered during the amount of time it was in the apartment complex office that the unknown person argument was without merit. Tr. 187, l. 17-Tr. 188, l. 6.

Quoting State v. Taylor, 360 S.C. 18, 598 S.E.2d 735 (Ct. App. 2004), Counsel Routzong argued that “[w]here the identity of persons handling the evidence is unknown, our courts have consistently held the evidence is inadmissible.” Taylor at 23, 598 S.E.2d at 737. He adamantly maintained that because the State could not produce the individual from the apartment complex that the parcel was delivered to that the case should be dismissed. Tr. 188, l. 7-Tr. 189, l. 1. In response, Solicitor Bell reversed course and argued that the chain of custody only began when law enforcement took custody of the evidence from the Appellant. Prior to that, the State was not required to prove who handled the package. Solicitor Bell also argued that there was testimony that Appellant had been under surveillance, that there was a very short time period between delivery and pickup of the parcel, and that the parcel was “unscathed in any way.” Tr. 189, ll. 2-19.

The trial judge ruled that Taylor did not apply under the circumstances of Appellant’s case because the chain of custody was designed to make sure evidence was not tampered with

after it was seized from the defendant in a case, not whether it was tainted before it was given to a defendant. The judge ruled the State had to establish the chain of custody from the time the marijuana was seized from the defendant's person through testing and that the case law applied once the evidence came into law enforcement's hands. Relying on case law that the State was not required to produce every person in a chain of custody, the trial judge overruled defense counsel's objection and motion to suppress the drugs and dismiss the case. Tr. 190, l. 2-Tr. 192, l. 19.

Counsel Routzong renewed his objection to the sufficiency of the chain when the State moved the evidence logs and chain of custody documents into evidence, when the State recalled Officer Carter to the stand, and when the State moved the marijuana into evidence. Tr. 216, ll. 14-24; Tr. 222, l. 4-Tr. 223, l. 20; Tr. 230, l. 22-Tr. 231, l. 8. During the motion for a directed verdict, Counsel Routzong again referenced the insufficient chain of custody and argued that the case law stated the chain begins when the evidence is initially seized by law enforcement or had initial control over the evidence and that the initial control and seizure in Appellant's case occurred when postal inspector Rogers opened the parcel pursuant to the search warrant. He argued that the State had a gap in the chain, namely the unknown office personnel who took initial delivery of the package, and that gap was fatal to their case. Tr. 247, l. 6-Tr. 250, l. 21; Tr. 255, ll. 7-Tr. 256, l. 20. The State asserted it had established a sufficient chain of custody and that defense counsel's argument went to the weight, not the admissibility, of the evidence. Tr. 250, l. 23-Tr. 255, l. 6

The trial judge ultimately ruled that the case law did not address the circumstances where a parcel was delivered to a non-law enforcement person who was not cooperating with law enforcement in some capacity. In ruling, the trial judge stated that the case law did not support

the requirement “that the intervening person to whom the package was delivered in this particular case to the office of the apartment complex, does not required that they have to come in and testify as to what happened to the package.” Additionally, the judge found there was testimony to support that the package and the contents did not appear to have been changed from the time that Rogers delivered it and that there was only a short period of time when the package was in the apartment complex office. The trial judge denied defense counsel’s motion for the direct verdict and to dismiss the case. Tr. 260, l. 22-Tr. 264, l. 24.

Discussion

The trial judge’s ruling regarding the chain of custody was based on an error of law. The case law is clear that the chain of custody for evidence begins with law enforcement’s initial seizure and interaction with the evidence. In Appellant’s case, the initial seizure of the evidence occurred when Rogers opened the parcel, removed three of the four packages of marijuana, and then resealed the parcel for the controlled delivery. The State was required to identify every person in that chain of custody from that point forward and it failed to do so when it could not identify the civilian that the parcel was initially delivered to at the apartment complex. That gap in the chain was fatal and the charge against Appellant should have been dismissed.

“A party offering into evidence fungible items such as drugs or blood samples must establish a chain of custody as far as practicable.” State v. Taylor, 360 S.C. 18, 22–23, 598 S.E.2d 735, 737 (Ct. App. 2004) (internal citations omitted). “Where the analyzed substance has passed through several hands, the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis. While the proof of chain of custody need not negate all possibility of tampering, it must establish a complete chain of evidence as far as practicable.” Id. (internal citations omitted).

The identity of the persons who handled the evidence must be established. State v. Cribb, 310 S.C. 518, 522, 426 S.E.2d 306, 309 (1992), citing Raino v. Goodyear Tire and Rubber Co., 309 S.C. 255, 422 S.E.2d 98 (1992). A complete chain of evidence, tracing possession from the evidence's initial control to its final analysis, must be established as far as practicable. State v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001). A missing link in a chain of custody creates an issue of admissibility. Id.

“In applying this rule, we 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) (internal citations omitted). “On the other hand, where the identity of persons handling the specimen is established, we have found evidence regarding its care goes only to the weight of the specimen as credible evidence.” Id. (internal citations omitted). “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 and not admissibility.” Id. (internal citations omitted).

“Where the identity of persons handling the evidence is unknown, our courts have consistently held the evidence is inadmissible.” Taylor, at 23, 598 S.E.2d at 737. In cases where the identity of a person handling the evidence was unknown “the party offering the [evidence] failed to trace the handling of the evidence from the time it was gathered until it was tested. As a result, the identity of the people who had control of the evidence and what was done with it during their possession was left to speculation.” Taylor, at 24, 598 S.E.2d 735, 737

Admittedly, “each person who handled the evidence is not required to testify.” State v. Sweet, 374 S.C. 1, 7, 647 S.E.2d 202, 206 (2007). When “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. However, evidence is inadmissible under this rule when the offering party omitted a link in the chain of possession by failing to establish the identity of each custodian at least as far as practicable. State v. Governor, 362 S.C. 609, 612, 608 S.E.2d 474, 475 (Ct.App.2005).

The State failed to prove a sufficient chain of custody during Appellant’s trial. The chain of custody began when Inspector Rogers intercepted the parcel and opened it subject to the federal search warrant that he had obtained. Rogers then removed three of the four packages of marijuana and left only one package in the parcel. From that point forward, the State was required to prove the chain of custody as far as practicable, which required proving the identity of all persons in the chain. However, the uncontradicted testimony was that Rogers delivered the parcel to Appellant’s apartment complex office and left it with an unknown person for approximately ten minutes. The person who accepted the initial delivery of the parcel was never established. The fact that this person was a civilian uninvolved in the case, or that the package was only in their possession of a limited period, does not negate the fact that the State failed to even identify who they were. Further, the State did not even make a base effort to identify the person who accepted initial delivery of the parcel must less attempt to identify them “as far as practical.” This left a gap, a missing link, in the chain of custody that under the established jurisprudence of this state was fatal to the prosecution of Appellant.


Notably, there was no testimony as to what occurred to the three packages of marijuana that were not included in the controlled delivery. After Rogers removed those packages, it was not clarified what he did with them or how he secured them. However, it was uncontradicted that law enforcement officers had three of the four packages of marijuana from the parcel in their possession prior to the controlled delivery. This further establishes that the chain of custody

began when Rogers opened the parcel and not when, as the judge ruled, the parcel was seized from Appellant. Further, even the solicitor initially admitted that the chain of custody started with Rogers and only began to backtrack when Counsel Routzong argued that the chain of custody failed because they State did not and could not identify who Rogers delivered the parcel to.

Not only did the State not establish a sufficiently complete chain of custody but it failed to establish a chain of custody as far as practicable. While every person who handled the evidence does not have to be hauled into court to testify, it was paramount that the State identify every person in the chain and identify how the evidence was handled and stored, from the time Rogers took possession of the parcel through testing. In the case *sub judice*, the State failed to trace the evidence from the time it was gathered until the time it was tested and the jury was left to speculate as to who had control over the marijuana and what may have happened to it for ten minutes. The trial judge's ruling that the chain did not begin until Appellant was arrested was in error and allowed the State to circumvent the requirements of providing a complete chain of custody. Appellant's conviction and sentence should be reversed.

CONCLUSION

Based on the foregoing arguments, Appellant respectfully requests that this Court hold the State failed to establish a sufficient chain of custody, reverse his conviction, and remand the matter back to the Court of General Sessions for Sumter County for a new trial.



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Appellate Defender
ATTORNEY FOR APPELLANT

This 11th day of August, 2023.