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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM GREENVILLE COUNTY
General Sessions Court
The Honorable Perry H. Gravely

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Appellant Case No 2022-000928
Lower Case No. (2021GS2306825)

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State of South Carolina, . . . . . Respondent,

vs.

Joseph M. Swaringen . . . . . Appellant

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# FINAL REPLY BRIEF OF APPELLANT

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## Argument

### Question I

**Did the trial court err in failing to direct a verdict as to the trafficking charge when the testimony of the chemist was the substances in the four individual bags had come out and co-mingled and therefore he was unable to test the individual bags to determine if each contained methamphetamine?**

The State has argued that a random sampling of the substance seized is sufficient to sustain the conviction. This is true not withstanding the fact that the original four bags placed inside the larger sealed bag had come loose and were completely commingled when they arrived at the laboratory. In a sense, even when a sample is taken from a single individual bag the sample is a random sample. A laboratory does not test the entire contents of a single bag. The reason, as explained by James Armstrong in this case, is once methamphetamine comes in contact with a substance that is not methamphetamine, the other substance is likely to test positive for methamphetamine. Rec. on App. at 279, ll 11-18.

The vast majority of cases cited by the State involve the testing of a few uniform looking pills that were found in the same bag. This is substantially different from the testing of a powdery substance that is commingled with substances in different bags. To test a few pills contained in a single bag would have been a random sampling of the pills in that bag. Under the State's theory, the instant the four bags became commingled, Mr. Swaringen was guilty of trafficking more than 28 grams of methamphetamine, regardless of the contents of the other bags.

The case cited by the State involving plants are also unlike the facts of this case. When plants are growing in a field, the random sampling of some of the plants is more akin to the

random sampling of the contents of one bag. *State v. Perry,* 358 S.C. 633, 595 S.E.2d 883 (2004). In addition, the remaining plants could be tested by the defendant if they so desired. In this case, making the substance available for testing would not prove one or more of the bags did not contain methamphetamine. Commingling a powdery substance and then testing the result is also substantially different from testing one pill out of a bag. It is also substantially different from testing a limited number of similar bags of a white powdery substance. Again, if the bags are kept separate, a defendant can then test the untested bags.

In *People v. Ayala,* 96 Ill. App. 3d 880, 422 N.E.2d 127 (1981) the defendant was arrested with two bags of suspected heroin. While each bag was given a preliminary test to establish the substance could be heroin, only one bag was subjected to a test to conclusively prove the substance was heroin. In holding the failure to conclusively test both bags required the reversal of the conviction for possession of more than 30 grams of heroin, the court said:

> An inference that the untested bag contained heroin could be drawn from the fact that the preliminary test indicated heroin 'might' be present, and from the fact that defendant possessed both substances and from their physical similarity. This proof would be sufficient if the standard were that of the preponderance of the evidence, and is perhaps even clear and convincing, but we are not persuaded that the State has proved beyond a reasonable doubt that the untested bag in fact contained heroin. *Id.* at 882-83, 422 N.E.2d at 129.

In *State v. Robinson*, 517 N.W.2d 336 (1994) the chemist opened 6 or 7 packets of the 13 packets seized and placed the substance from those packets into a weighing dish. He then removed them for testing. The remaining bags were never tested. In remanding the case for sentencing for possession of a lesser amount cocaine, the court said, "When a penalty as serious as 10 years' imprisonment may hinge on a gram, it seems not too much to require scientific testing to establish the requisite weight." *Id.* at 340.

The State has admitted that the testing of each bag is far more preferable. Br. of Resp. at 16. When the penalty in South Carolina for a first offense possession of more than 28 grams of methamphetamine is punishable by at least seven years in prison, the preferred method should be the only method. And when the State of South Carolina seeks to imprison a person for life for the possession of 28 grams of methamphetamine, the preferred method should also be the judicially required method. To hold otherwise is to decline to hold the state to their true burden of proof. While permitting the testing of only one bag of many or to permit the commingling of several different bags will certainly make the burden on the government to convict the guilty much easier, it also makes the burden of convicting the innocent much easier. As the Superior Court of Pennsylvania said:

> It is true, of course, that permitting the Commonwealth to introduce the out-of-court assertions ... against the defendant ... would make it easier to convict the guilty. Unfortunately, it would also make it easier to convict the innocent. If such a trade-off is acceptable, why not suspend the hearsay rule entirely when the Commonwealth introduces evidence in a criminal case? More defendants, guilty and innocent alike, would undoubtedly be convicted. The same result would obtain if we allowed the Commonwealth to introduce coerced confessions. *Commonwealth. v. Bujanowski*, 418 Pa. Super. 163, 172, 613 A.2d 1227, 1232 (1992)

Our criminal justice system is best served when the State is held to its burden of proof. Only then will the state hesitate to prosecute the questionable case. Only then can appellate courts be confident in the quality of the conviction in the trial courts of our state.

## Question II

**Did the trial court err in holding the chain of custody had been properly established when the testimony and the video established the investigating officers left the emergency room without the alleged drugs and no testimony ever established when they obtained**

**possession of the alleged drugs after their departure from the emergency room?**

Joseph Swaringen has asked a very simple question. When and how did the alleged drugs get to Officer Miller's office? That basic and important question is not answered. One can assume he eventually got it in some fashion from the emergency room trauma bay. No testimony in this case establishes how he got the drugs. The state has acknowledged the video footage does not show officer Miller leaving the trauma bay with any drugs, box or saddlebag.[1] Ms. Edmonds testified she found the four packets loose in the black saddle bag. Rec. on App. at 291, ll 6-17.

The State has argued, "[N]either Edmonds nor Officer Miller testified they ever left the drugs unattended or unaccounted for after Edmonds found them and then transferred to the officer." Br. of Resp. at 22. This is simply not correct. Ms. Edmonds never testified Officer Miller made two trips to the trauma bay. Officer Miller never testified he made two trips to the trauma bay. The video shows Officer Miller leaving the trauma bay with nothing in his possession. He admitted to this fact. Rec. on App. at 204, ll 1-24. When he left the trauma bay, the video and his testimony established he had nothing in his hands. The unanswered question is who had the drugs after Officer Miller left the trauma bay? How long were the drugs left at some unknown location before some unknown person moved the drugs to the office of officer Miller to be placed in an unsealed bag.

Further confusion is created by the fact that State's exhibit 12 lists the time of the seizure of the items by Officer Miller as 20:15 hours or 8:15 PM. The time stamp on the video of Mr. Swaringen entering the hospital is 9:51:58 PM. Obviously both cannot be correct.

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[1] The State has referred to "the available surveillance footage." The state elected which video footage to save after all the available footage was view by an employee of the hospital.

This case should be controlled by *State v. Pulley,* 423 S.C. 371, 815 S.E.2d 461 (2018) as noted in the opening brief. Opening Br. at 10. The State has failed to distinguish *Pulley* in its brief. In *Pulley,* the alleged drugs somehow made it to the police evidence drop box. The means by which the alleged drugs got there was not known. Here, the alleged drugs somehow made it to Officer Miller's possession after he left the trauma bay. The means by which they got there is not known. An assumption that items were given to an officer is not proof the items were given to the officer. As the State never established how the seized items got to Officer Miller's office, the state has not proven the chain of custody and the case should be reversed.

**Question III**

**Did the trial court err in failing to charge the lesser included offense of simple possession of methamphetamine when James Armstrong, the chemist, could not testify that all the commingled bags contained methamphetamine and he could only say was what he tested contained methamphetamine?**

The State argues the defendant, "[S]imply recognized the existence of theoretical possibilities, which was something that could have potentially supplied the jurors with a reason to find the State had not met its burden of proof but was not affirmative evidence regarding the identity or weight of the methamphetamine that was sufficient to warrant presentation of a lesser included offense to the jury." Br. of Resp. at 30. The State, thus, does not consider the testimony by James Armstrong to be evidence justifying the lesser included offense. Mr. Armstrong was very specific when he said:

> Q. (By Mr. Wise) So basically then the only thing you can positively say is less than a hundredth of a gram is guaranteed to be meth?
> A. (By Mr. Armstrong) The items that I tested, yes sir.

Rec. on App. at 280, ll 16-18

This testimony is some evidence by which a jury could conclude that the state only proved Mr. Swaringen possessed a very small amount of methamphetamine. The South Carolina Supreme Court has said, "We find no conflict with the evidence that the amount of cocaine in appellant's possession exceeded the quantity required to invoke the trafficking statute." *State v. Grandy*, 306 S.C. 224, 226, 411 S.E.2d 207, 208 (1991). The same cannot be said in this case. As noted in the opening brief, when determining if a defendant's request to charge is proper, the evidence must be looked at in the light most favorable to the defendant. Viewing this testimony in the light most favorable to Mr. Swaringen, there is evidence from which the jury could conclude Mr. Swaringen could only have been guilty of simple possession of methamphetamine. The Supreme Court has also said, "Like a lesser-included offense, an alternate theory of liability may only be charged when the evidence is equivocal on some integral fact and the jury has been presented with evidence upon which it could rely to find the existence or nonexistence of that fact." *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011). The evidence in this case is equivocal as to the amount of methamphetamine the state proved Mr. Swaringen possessed.

Interestingly, as to the chain of custody the State says the role of the jury is "to find the facts, weigh the evidence, evaluate witness credibility, determine what inferences should be drawn from the facts, and resolve any evidentiary conflicts that may have arisen during trial." Br. of Resp. at 10. If the State truly believes this, then the jury should have made the determination as to whether the failure to keep the packets separate created a reasonable doubt as to how much methamphetamine Mr. Swaringen possessed. The jury was entitled to infer that Mr. Armstrong was correct when he said the only thing he can guarantee is 1/100th of a gram was proven to be

methamphetamine.

## Question IV

**Did the trial court err in admitting the seized items into evidence when the officers handling the evidence failed to comply with the SLED regulations for handling evidence that were issued pursuant to S. C. Code § 44-53-485 states the evidence must be handled "pursuant procedure promulgated by the South Carolina Law Enforcement Division?**

When the state argues that because S. C. Code § 44-53-485 contains no remedy, it is meaningless. The state equates the statute to "[A] tale told by an idiot, full of sound and fury, Signifying nothing." McBeth, Act 5, Scene 5. If the suppression of the evidence is not required by the use of the word "must," then the statute has no meaning. The statute is no more than a mere suggestion. S. C. Code § 17-25-45 provides, "a person must be sentenced to a term of imprisonment for life without the possibility of parole." No remedy is provided for in the statute if a sentencing judge does not give a life sentence. Does the State agree that as there is not a remedy, a judge is free to ignore the mandatory life? The word "must" appears in both statutes. It cannot have one meaning in one statute and another meaning in the other statute.

The State has argued "However, in articulating that statutory mandate, our legislature elected *not* to include any statutory language imposing or creating a penalty - such as suppression of the evidence - for non compliance with that particular provision." Br. of Resp. at 34 (emphasis in original). The opposite argument is the legislature elected to use the mandatory word "must" and elected not to prohibit the exclusion of the evidence as a remedy. In 1987 the South Carolina Supreme Court decided *State v. McKnight*, 291 S.C. 110, 352 S.E.2d 471

(1987).[2] The case held that a violation of a statute gives greater rights than the violation of the constitution. The court even held a defendant would have standing to object to the statutory violation where one would not have standing for a constitutional violation. The court said, "Therefore, one contesting the legality of a search because of a defect under Section 17–13–14076 need only show that the State is attempting to introduce the evidence against him." *Id.* at 115, 352 S.E.2d at 474. "The Legislature is presumed to be aware of this Court's interpretation of its statutes." *Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003). The legislature knew in 1992, when the chain of custody statute was passed, that the courts of our state had said suppression is the proper remedy for a violation of a statute. Had the legislature intended to prohibit the suppression of evidence from a violation of a statute, they knew they needed to write such a provision into the statute.

The fact should also be noted that the State made not claim of a good faith effort by the officers to comply with the code section. As noted in the opening brief, no officer ever testified they even knew of the code section or the regulations. One cannot make a good faith effort to comply with regulations of which they had no knowledge.

To the extent that *State v. Shelton*, 344 S.C. 340, 543 S.E.2d 585 (Ct. App. 2001) requires Mr. Swaringen to prove he has been prejudiced by the violation of the statute, he meets that burden. The pictures of the bags as allegedly seized bore no resemblance to the four small baggies found in the larger plastic bag opened by Mr. Armstrong. The pictures of the bags in

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[2]The *McKnight* case was decided some eleven years after *State v. Chandler,* 267 S.C, 138, 226 S.E.2d 553 (1976), a case relied upon by the state. Br. of Resp. at 34. On the issue of suppression of evidence for a statutory violation, it was overruled by implication in *McKnight* . *Ford v. Atl. Coast Line R. Co.*, 169 S.C. 41, 168 S.E. 143, 160 (1932), aff'd, 287 U.S. 502, 53 S. Ct. 249, 77 L. Ed. 457 (1933)(recognizing application of overruling a decision by implication)

State's exhibits 2-10 would not have come open in the manner the drugs did in this case.[3] The bags did not come open in the accident. S.C. Code of Regulations R. 73-73 sets forth the requirements for securing the seized items. Subsection J provides, "Small items of controlled substance evidence such as powders, rock-like substances, and capsules shall not be placed into a large outer container unless they have first been provided some form of protective interior container such as a pill box, bottle, envelope, or plastic pouch." Had the seizing officer complied with this provision, the four baggies would not have been commingled.

In addition, the duties of the evidence custodian are set forth in S.C. Code of Regulations R. 73-90. The regulations provide, "E(4) A statement by the evidence custodian in possession of the controlled substance evidence that the evidence is in substantially the same condition as when it was received. Any alteration of the controlled substance evidence must be documented in writing and the record of alteration must be kept with the chain of custody." Eric Keiper was the evidence custodian as defined by the regulations. If the evidence bags were commingled when he received them or when he transferred them, his required report should have reflected that information. His report was not introduced. Mr. Keiper testified the items he received were in a plastic Pelican case. Rec. on App. at 234, ll 7-8. He also testified the bag was not sealed by the seizing officer as required by the regulations. Rec. on App. at 238, l 20 to 239, l l 6. Mr. Keiper did not testify as to placing the individual bag inside a secure bag as required by the regulations. Form C (Rule6) requires the evidence custodian to the items were delivered to the next person

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[3] There is also confusion as to whether the baggies are even numbered correctly. State's exhibit 3 is identified as "Baggy 2." State's exhibit 10 is listed as Baggy 1, but more closely resembles Baggy 2. State's exhibits 6 and 7 purport to be "Baggy 4," but they also do not resemble each other.

"in substantially the same condition as when I received it." Form C (Rule 6). His testimony is that he substantially changed the items. If he in fact did this, the regulations require this to be noted in the form he was required to use. S. C. Code of Regulations R. 73-70, 12 and 21;

As the criminalist, Mr. Armstrong also was required to note any discrepancies. S. C. Code of Regulations R. 73-110 provides, "B. The examining criminalist shall carefully examine all sealed SLED Drug Evidence Security Envelopes which are transmitted to the Forensic Laboratory. The criminalist shall note any damage, imperfection, or indication of tampering evident on the SLED Drug Evidence Security Envelope." Mr. Armstrong was required to note the commingling of the items as the commingling was evidence the items were not properly sealed or had been tempered with if the items were properly packed and sealed as required by the seizing officer. He did not.

In State's Exhibit 15, Rachel Rifenburg, an evidence custodian who did not testify, is introduced. As a result, we do not know if the four bags were commingled when she received them. As an evidence custodian, she would have been required to note the commingling if she had observed it.

No witness for the state, except of Mr. Armstrong, ever testified that the seized baggies were commingled. If no one admitted commingling the bags, then there is obvious evidence of tampering. Had those involved in the chain of custody had complied with the SLED regulations, Mr. Swaringen would have know when the commingling occurred. He was prejudiced by the failure of seizing officer, evidence custodians, and the criminalist to keep the proper records. He was deprived of proper evidence to show the mishandling of the evidence.

## Question V

**Did the trial court error in failing to suppress the evidence found in a motorcycle saddle bag on the ground that the search at the hospital was not by a state agency and was the action of private citizens?**

*Preservation issue*

The ruling by Judge R. Keith Kelly became the law of the case. He fully heard a pre-trial motion relating to the legality of the search. The parties in this trial agreed the ruling by Judge Kelly would carry forward. Rec. on App. at 77, ll 8-24. As the South Carolina Supreme Court has said, "It is settled that one circuit judge does not have the power to review, modify, affirm or reverse the findings of another circuit judge." *State ex rel. Medlock v. Love Shop, Ltd.*, 286 S.C. 486, 488, 334 S.E.2d 528, 529 (Ct. App. 1985). Judge Gravely had no authority to overturn the ruling of Judge Kelly.

*Private Search*

The State contends as Ms. Edmonds was an employee of Prisma Health, the search was by a private individual and, therefore, does not violate the constitutions of the State of South Carolina or the United States of America. The State's reliance upon *Sloan v. Greenville Hosp. Sys.*, 388 S.C. 152, 694 S.E.2d 532 (2010) is misplaced. The issue in that case was whether the hospital system is a state agency and therefore subject to the statute that mandates procurement policies for state agencies. The court found that the hospital system is local political subdivision. As a local political subdivision, the hospital is not subject to laws regulating state agencies. As a local political subdivision, the hospital was still subject to the constitutions of the State of South

Carolina and the United States of America.

And while *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) did hold there are no universal truths as to the application of the decision, the State has offered no theory as to why Prisma Health should be exempt from the *Burton* decision. The United States Supreme Court has said, "Because MUSC is a state hospital, the members of its staff are government actors, subject to the strictures of the Fourth Amendment." *Ferguson v. City of Charleston*, 532 U.S. 67, 76 (2001). Prisma Health, operating as the lessee of a local political subdivision, is subject to the provisions of the state and federal constitutions. As the United States Supreme Court said in *Burton*, "Specifically defining the limits of our inquiry, what we hold today is that when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself." *Burton*, at 726. As the lessee property owned by a political subdivision, Prisma Health is a state actor for constitutional purposes.

*Inventory Search*

A private company need not have any rules concerning an inventory search. A private company can search or not search as it sees fit. As noted above, Prisma Health may be a private company but they are leasing the property of a local political entity. If they elect to conduct an inventory search, the search must comply with rules set forth by the United States Supreme Court as to inventory searches. As noted in the opening brief, and un-refuted by the State in its brief, no inventory was every produced in this case, Also as noted in the opening brief, the State never produced any policy as to how Prisma Health conducts it searchers. The State is correct that the

inventory search policy may be testified to by individuals. In *State v. Miller,* 423 S.C. 95, 814 S.E.2d 166 (2018) the actual policy was stated in the opinion. Even when reliance on officer testimony is made, the specifics of the policy are mentioned in the testimony. Here, no specifics of the inventory policy were ever mentioned in the testimony. As noted in the opening brief, while the assistant solicitor stated he could obtain a copy of the policy, none were ever produced. A record devoid of the specific of any inventory policy is an inadequate record to sustain an inventory search.

**Question VI**

**Did the trial judge err in failing to give the requested charge as to how the jury should address any flaws in the chain of custody?**

In arguing that the lower court was correct in not giving the jury a charge as to the chain of custody, the State has argued, citing Rule 104(a) of the SCRE, "Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court." Br. of Resp. at 47. This is true for all evidence questions. In urging the chain of custody was sufficiently proven, the State on five separate occasions stated "the question is only one of credibility and not admissibility" or a slight variation of the concept. Br. of Resp. at 21, 22, 23, and 24.

When the defendant has suggested a jury charge to tell the jury how they are to determine the credibility or weight of the evidence as to the chain of custody, the State now urges such a charge is not necessary. At no point in the jury charge was the jury every told if they have a reasonable doubt or even a reasonable concern about the validity of the chain of custody, they are to find the defendant not guilty. If the jury believes the chain of custody of the evidence in this case is not valid, then of necessity, they have to find a defendant not guilty. When a judge admits

evidence saying it goes to the weight or credibility and not its admissibility, the a jury has to be told what to do if they are not satisfied as to the chain of custody is not sufficiently proven. Judges in South Carolina routinely give charges as to the credibility of witnesses, both lay and expert. A charge as to the credibility of the chain of custody, when requested by the defense, is not a charge on the facts. The credibility of the chain of custody is as important as the credibility of the witnesses. A jury should be so instructed.

## CONCLUSION

For the foregoing reasons, and for the reasons set forth in the opening brief, as to Issues I, II, IV and V, this Court should reverse the conviction of Joseph Swaringen and dismiss the charges against him. As to issues III and VI, this Court should reverse the conviction and remand to the lower court for a new trial.

October 5th, 2023

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## CERTIFICATE OF COUNSEL

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**The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR.**

October 5th, 2023

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