

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to the Court of Appeals  
Appeal from Beaufort County  
Carmen T. Mullen, Circuit Court Judge

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**RECEIVED**

**Jan 11 2024**

S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

LEVY LARKIN BROWN,

PETITIONER

Opinion No. 2023-UP-365 (S.C. Ct. App. Filed November 15, 2023)

APPELLATE CASE NO. 2021-000485

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PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS

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**CERTIFICATE OF COUNSEL**

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on December 14, 2023. App. 4-9.

### **QUESTION PRESENTED**

Whether the Court of Appeals erred holding the trial court's admission of bloodhound tracking evidence was not an abuse of discretion where: (1) the state's witness, Officer Jeremiah Fraser, did not have the requisite knowledge, skill, experience, training, or education to be qualified as an expert witness and (2) the state failed to show the dog used to track was reliable?

### STATEMENT OF THE CASE

On March 21, 2019, petitioner was indicted by a Beaufort County grand jury for armed robbery. R. 317. Petitioner was tried April 21-23, 2021, before the Honorable Carmen T. Mullen and a jury. R. 1. Melissa Duque and Courtney Gibbs represented petitioner. R. 1. Assistant solicitors, Jared Shedd and Samantha Molina, represented the state. R. 1.

The jury found petitioner guilty of armed robbery. R. 307. Judge Mullen sentenced petitioner to sixteen years' imprisonment. R. 315.

The Court of Appeals affirmed petitioner's conviction and sentence in *State v. Brown*, 2023-UP-365 (S.C. Ct. App. filed Nov. 15, 2023). App. 1-3. Petitioner sought rehearing which was denied on December 14, 2023. App. 4-9.

This petition for a writ of certiorari follows.

## ARGUMENT

The Court of Appeals erroneously held the trial court's admission of bloodhound tracking evidence was not an abuse of discretion where: (1) the state's witness, Officer Jeremiah Fraser, did not have the requisite knowledge, skill, experience, training, or education to be qualified as an expert witness and (2) the state failed to show the dog used to track was reliable.

### **Introductory facts**

On July 15, 2018, two masked individuals entered a McDonald's in Beaufort County. One held the manager on duty, Susannah Krebs, at gunpoint and ordered her to empty the safe while the other led employees at gunpoint into the walk-in refrigerator. R. 132, l. 11-149, l. 6; 142, l. 15-144, l. 16. After Krebs emptied the safe, she was also led to the walk-in refrigerator and the two individuals fled the scene. R. 144, l. 17-145, l. 5. At least three employees called 911, including Shaquila Smalls an employee who was standing outside the restaurant during the incident. R. 83, ll. 4-9; 90, ll. 13-19; 153, ll. 7-17; State's exhibit 1, recording of 911 calls.<sup>1</sup>

This McDonald's was located in a commercial area. There were multiple businesses surrounding the restaurant and an apartment complex within walking distance. R. 96-97. Officer Mikhail Kopylov was the first to respond. R. 82, ll. 4-18. When Kopylov arrived, he spoke to Shaquila Smalls and Timothy Garvin who were standing outside the restaurant. Next, Kopylov cleared the building and began asking the employees about the incident. R. 82, l. 22-84, l. 10. The employees described the intruders as having no visible identifying characteristics, dressed all in black, and covered from head to toe. R. 92, ll. 2-23.

The Beaufort County Sheriff's Department Bloodhound Team responded to track the suspects that reportedly left on foot. R. 157, ll. 6-20. Dog handler, Officer David Tafoya,

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<sup>1</sup> State's exhibit 1, recording of 911 calls, is on file with the Court.

arrived with Copper, a bloodhound trained to track by article or last-known area. R. 158, l. 2-159, l. 4.

Copper was taken to what law enforcement determined was the last-known location of the suspects where officers discovered a ten-dollar bill in the McDonald's parking lot. Close to the ten-dollar bill there was a do-rag and a pair of sandals. R. 160, l. 21-161, l. 4. Tafoya commanded Copper to begin tracking. Copper put his nose to the do-rag. Then Copper tracked into a cut-through to a nearby apartment complex. Copper began circling one of the buildings in the apartment complex. R. 162-163. Petitioner was standing with Dequan Blue outside on the third story breezeway of that apartment building. Officers spoke to petitioner and Blue but did not arrest them at that time. R. 186, l. 19-187, l. 16.

### **Pretrial objection**

During pretrial motions, defense counsel objected to the dog tracking evidence arguing it was inadmissible for three reasons. First, Officer Fraser did not meet the requirements to be qualified as an expert under Rule 702, SCRE. Counsel pointed out that Fraser had only ever attended two educational courses, a course in 2003 and then another in 2010. Fraser had not completed any additional or recent training and did not have any current certification. R. 30, 19-25. Second, defense counsel contended Copper was not reliable based on his record that showed out of a total of twelve calls he went on he only located two subjects.

Additionally, counsel pointed out Copper did not actually alert on petitioner who was standing outside. There were eight apartments located in the building that Copper was circling, and it could have been anyone in that building that the dog was alerting to. R. 37-40. Lastly counsel argued that the scent trail was contaminated. R. 48, ll. 5-19.

In response to defense counsel's objection the state proffered Officer Fraser's testimony.

R. 24-36. Fraser testified that he had been a member of the bloodhound tracking team for the last eighteen years and as head of the team he participated in training the dogs. R. 24, l. 20-25, l. 9. Fraser testified he attended “the dog training academy in 2003,” and the national police bloodhound association in 2010 but did not have a certificate for the 2010 course. R. 26, l. 3-27, l. 22. When asked if he had testified as an expert before Fraser responded, “I want to say twice, but I know once for sure.” R. 25, ll. 10-18.

Fraser also testified regarding Copper’s reliability. R. 29-30; 31-36; 41-47. Fraser claimed Copper was “generally reliable.” R. 29, ll. 5-12. Defense counsel asked Fraser questions about specific calls from the time that Copper began until the time of this incident and Fraser testified that Copper began going out on calls in 2017. R. 32, ll. 4-7. The record reflects Copper went on twelve different calls. Of those twelve calls it appears that Copper successfully found two individuals. R. 37, ll. 1-13; 39, ll. 17-23. Fraser insisted finding the individual is not the only measure of success on a track. He explained it was significant that Copper located evidence during some of these tracks. R. 45, l. 21-46, l. 16.

At the conclusion of the pretrial hearing the trial court qualified Fraser as an expert in bloodhound tracking based on the length of time he had been working with dogs and his training. R. 31, ll. 10-13; 49, ll. 5-13. The court ruled “the experience shown, by Copper in this case [was] reliable.” R. 52, ll. 10-11. Lastly, the court ruled there was no evidence that the trail was contaminated. R. 52, ll. 14-24.

### **Trial testimony**

At trial, Officer Fraser testified about how bloodhounds track by scent. Fraser suggested that our bodies “are constantly giving up skin cells.” The dog is tracking the skins cells that our body is losing. R. 178, ll. 1-7. When Fraser was asked if there were factors that affect how

many skin cells a person might shed Fraser responded:

Absolutely. Take, for instance, an armed robbery. When somebody has committed an armed robbery, adrenaline is pounding, their breathing is substantially harder. As you breathe, you're kicking out more skin cells, kicking out more scent for that dog to follow. We call that fear scent. So what happens is your body starts expelling more skin cells than it would normally sitting in a calm environment.

R. 178, ll. 15-25.

Additionally, Fraser described why Copper did not alert on petitioner who was standing outside. He explained it would be unlikely that a dog would go up stairs. He claimed the dog circling below was sufficient indication. R. 188.

At trial, testimony revealed petitioner was frequently in the area where the robbery occurred because he worked at the McDonald's and spent time at the nearby apartments. The manager on duty that evening, Susannah Krebs, testified that she was close with petitioner and that he was a trainee in the management program. R. 146, ll. 6-9; 147, ll. 3-6; 151, l. 24-151, l. 8; 151, l. 21-152, l. 17. Neither Krebs nor any of the other employees that had worked with petitioner recognized either of the suspects to be petitioner during the incident. R. 133, l. 22-135, l. 6; 149, l. 13-150, l. 21.

Petitioner called two witnesses in his defense. First was Officer John Jambriska who responded to the scene. Jambriska testified when he arrived police were setting up a perimeter and he was sent to the apartment complex. R. 256. Defense Exhibit 2, Jambriska's dash camera video, was admitted during his testimony.<sup>2</sup> The video showed Jambriska stopping his car to approach a car parked in the woods in the area of the perimeter. In the video Jambriska told the two individuals in the car to move somewhere else. Jambriska claimed that while he could not

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<sup>2</sup> Defense exhibit 2, Jambriska's dash camera video, is on file with the Court.

recall what the description of the suspects was, he knew at the time that the people in the car did not match the description and if they had he would have detained them. R. 258, ll. 10-21.

### **Discussion**

In affirming petitioner's conviction and sentence, the Court of Appeals held the trial court did not abuse its discretion "by qualifying the police officer as an expert because the officer had eighteen years' experience in dog tracking, had trained the Beaufort County Sheriff's office bloodhound tracking team's dogs, and had been qualified as an expert in at least one prior case. This court cited *State v. Henry*, 329 S.C. 266, 495 S.E.2d 463 (Ct. App. 1997), for the proposition that defects in the amount and quality of the expert's education or experience go to the weight and not the admissibility of the testimony.

In *Henry* the Court of Appeals held the psychotherapist possessed requisite skill, training, experience, learning, and knowledge to render an expert opinion regarding victim's post-traumatic stress disorder. *State v. Henry*, 329 S.C. 266, 495 S.E.2d 463 (Ct. App. 1997). In that case the psychotherapist had a postgraduate academic degree and was a practicing psychotherapist for seven years. Additionally, she had been qualified more than fifteen times as an expert in state court and had also been qualified as an expert in federal district court and family court.

This case is distinct from *Henry*. In *Henry*, the expert at issue was a medical professional with an advanced degree that had been admitted as an expert numerous times. Here, while Officer Fraser had worked with the bloodhound tracking team for several years, he had only ever been to *two* trainings in that time and only received certification from his training sixteen years prior. Although the court's opinion states Officer Fraser had been qualified as an expert in at least one prior case, Fraser himself seemed unsure stating that he thought he had been qualified

two times prior but maybe it was only one time.

Rule 702, SCRE provides, “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”

In “executing its gatekeeping duties, the trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony.” *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury.” *Id.* Next, “the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter.” *Id.* “Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable.” *Id.* “If these preliminary requirements are not met, as a matter of law, the trial court may not permit the jury to consider the evidence.” *Id.* at 456, 699 S.E.2d at 180.

In explaining the “reliability foundational requirement” particular to dog tracking evidence, this Court adopted the following evidentiary framework in *State v. White*, 382 S.C. at 270, 676 S.E.2d at 687.

[A] sufficient foundation for the admission of dog tracking evidence is established if (1) *the evidence shows the dog handler satisfies the qualifications of an expert under Rule 702*; (2) the evidence shows the dog is of a breed characterized by an acute power of scent; (3) the dog has been trained to follow a trail by scent; (4) *the dog has been found to be reliable*; (5) the dog was placed on the trail where the suspect was known to have been within a reasonable time; and (6) the trail was not otherwise contaminated.”

(emphasis added).

The state failed to show that Fraser satisfied the qualifications of an expert under Rule 702, SCRE. *See State v. Harris*, 318 S.C. 178, 456 S.E.2d 433 (Ct.App.1995) (party presenting expert must show witness possesses, either through study or experience, specialized knowledge that makes him better qualified than jury to form opinion on particular subject).

The trial court failed to “execut[e] its gatekeeping duties pursuant to Rule 702, SCRE and *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). While the subject matter of Fraser’s testimony was likely beyond the ordinary knowledge of the jury, the substance of Fraser’s testimony was unreliable. *See Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). Officer Fraser’s testimony regarding how bloodhounds track by scent was disconcerting. Even should the Court find the trial court properly qualified Fraser as an expert in bloodhound tracking he was not an expert in how the human body releases scent or sheds skin cells and his testimony was inadmissible.

The Court of Appeals held “the trial court did not abuse its discretion by finding the bloodhound, Copper, was reliable because the tracking team trained weekly with the bloodhound; the officer who monitored the bloodhound explained that the dog was trained weekly using specific methodologies to track from a ‘last known scent’ or ‘off a specific article’; the bloodhound’s track was based on items that contained [petitioner’s] DNA; and the officer attested to his reliability.” The court cited *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009), in support of its holding.

The trial court’s finding of reliability is not supported by the record. Fraser merely claimed Copper had shown to be “generally reliable.” R. 29, ll. 5-12. According to the report used by Fraser during the pretrial hearing at the time of the incident Copper had been working

for approximately two years and had only successfully tracked two people out of twelve different incidents. While it is true that Fraser testified that finding a suspect is not the only indication of success it is also true that Copper was an inexperienced dog in especially in comparison to the situation in *White* where the dog had been on over seven hundred and fifty tracks over the course of seven years. *White* at 271, 676 S.E.2d at 687.

Unlike in petitioner's case, White conceded the dog handler met the Rule 702, SCRE, qualifications due to his experience and training. *Id* at 269, 676 S.E.2d at 686. Also, in *White* this Court found there was "ample evidence concerning the training and reliability of the dog." *Id.* at 271, 676 S.E.2d 687. While the Court of Appeals cited to the extensive training of the bloodhound in this case, it only mentions that Fraser "attested to [Copper's] reliability."

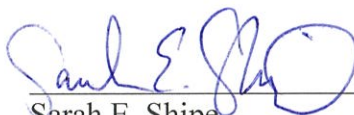
Fraser's misleading bloodhound tracking evidence was inadmissible where it went directly to the issue before the jury: whether petitioner was the person who robbed the McDonald's. *See State v. Tapp*, 398 S.C. 376, 393, 728 S.E.2d 468, 477 (2012) (Pleicones, J., dissenting) ("Improper 'expert' evidence which goes to the heart of the case is not harmless"). This error was not harmless in this case where all the evidence linking petitioner to the robbery was circumstantial. Petitioner did not contest that he was in the area that day and evening and surveillance video from earlier in the day that proves that petitioner was there. Evidence showed petitioner worked at the McDonald's and spent time with individuals that lived in the nearby apartment complex. Accordingly, it would not be unusual for items belonging to him to have been in that area. Petreia Lesene testified at trial that petitioner walked with her from the apartments to McDonald's after the robbery, therefore it is unsurprising that his scent would be fresh in that area. R. 112, l. 4-113, l. 22.

Dog tracking evidence is only reliable (and thus admissible) if all six prongs of *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009), are met. The trial court erred when it qualified Fraser as an expert witness in bloodhound tracking because Fraser did not have the requisite knowledge, skill, experience, training, or education to be qualified as an expert witness. The trial court erred when it admitted dog tracking evidence because the state failed to show the dog used to track had by experience been found reliable.

**CONCLUSION**

Petitioner respectfully requests this Court issue a writ of certiorari and order full briefing on the issue presented.

Respectfully Submitted,



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This 11th day of January, 2024.