

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**Feb 06 2024**

Appeal From Beaufort County  
The Honorable Carmen T. Mullen, Circuit Court Judge

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S.C. SUPREME COURT

Appellate Case No: 2024-000045

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THE STATE,

Respondent,

vs.

LEVY LARKIN BROWN,

Petitioner.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## **STATEMENT OF ISSUE ON APPEAL**

The Court of Appeals did not err in affirming the admission of bloodhound tracking evidence because Sergeant Fraser was properly qualified as an expert, Copper is a trained bloodhound, he was reliable, and he was placed on the uncontaminated trail within a reasonable time.

## STATEMENT OF THE CASE

In March of 2019, Petitioner was indicted by a Beaufort County Grand Jury for armed robbery. Petitioner proceeded to a jury trial on April 21-23, 2021, and was convicted as charged. The Honorable Camen T. Mullen, who presided over the trial, sentenced Petitioner to sixteen years' imprisonment. The Court of Appeals affirmed the conviction in State v. Brown, 2023-UP-365 (Ct. App. 2023). Petitioner's request for rehearing was denied on December 14, 2023. This Petition for Writ of Certiorari follows.

## STATEMENT OF FACTS

On July 15, 2018, two men dressed in all black entered a McDonald's restaurant. (R. 89). One went straight to the manager, held him at gunpoint, and demanded the manager empty the safe. (R. 142-3). The other corralled the remaining employees and locked them in the walk-in freezer. (R. 145-6; 152-3). After the robbers collected the money, they left the restaurant. Sergeant Mikhail Kopylov arrived at the scene and met an employee. (R. 83). They found the remaining employees locked in the freezer. (R. 83-4).

Sergeant Kopylov stated, prior to the robbery, he saw Petitioner and his accomplice "Blue" together near the McDonald's dressed in all-black clothing. (R. 88-9). Sergeant Kopylov knew Petitioner, who was a McDonald's employee. (R. 89). Sergeant Kopylov testified that about twenty minutes after the robbery, Petitioner and Blue approached the officers and asked questions about the incident. (R. 72; 88).

A resident of a nearby apartment complex testified that she saw Petitioner and Blue sitting on her steps. (R. 110). She explained they were not invited, and it "was shocking" to find them there. (R. 111). Petitioner told her there had been a robbery, and they walked to the McDonald's. Blue and the resident spoke with an officer. (R. 112-14). She noted Petitioner was sweating even though it was not hot outside. (R. 115-6).

Brandy Nicole DeWitt testified she worked at EnMarket when Petitioner, a regular customer, entered the store sweating profusely and not wearing shoes. (R. 126-7). Petitioner claimed he needed to run from the apartment complex and discard a gun after receiving a cell phone call from a cousin. (R. 127).

Outside the McDonald's officers found a \$10 bill. (R. 200). Sergeant David Tafoya was

directed to fetch two dogs. He loaded two bloodhounds, including Copper. (R. 158). Copper was trained to track by items or last known area. (R. 159). They presented Copper with the bill found outside the restaurant and he immediately tracked the scent to a do-rag. (R. 162). Copper then tracked the scent to an apartment building where Sergeant Tafoya saw Petitioner and Blue on a balcony. (R. 163-4; 186-7). Sergeant Tafoya noted that outside the restaurant there was also a pair of sandals and another \$10 bill. (R. 161).

Jeremiah Fraser supervises the bloodhound tracking team. (R. 172). He trained all the bloodhounds on the team. (R. 173). The bloodhounds are trained as specific article and last known trackers:

In other words, we can present them with an article in a bag, something somebody has touched. The dog will smell that article, lock in on that scent and track that scent.

They can also track what's called the last-known or fresh scent. In other words, if somebody takes off running in a certain direction, somebody sees which direction they went, we can contain that area, that being the last freshest scent in that area, and strike the dog off that freshest scent.

In this case, with Copper, a pure-blood bloodhound, he tracks last-scent or freshest scent and an article.

(R. 173-4).

Copper started training in 2015. Sergeant Fraser trained Copper. (R. 174). Fraser explained the bloodhounds are tools intended to take the tracker from one piece of evidence to another. (R. 177). He stated bloodhounds are able to differentiate between different people by scent. (R. 178). He explained an individual in fear would expend a greater number of skin cells for the bloodhound to detect. (R. 178).

Sergeant Fraser testified Copper arrived at apartment building 273 and he would not leave, but instead kept circling the building. (R. 184). Sergeant Fraser stated a bloodhound will

follow the freshest scent and will not leave it. (R. 184-5). This will result in a dog circling, as

Sergeant Fraser explained:

It's what's called a scent pool. As you guys have been sitting there all day, more and more of your skin cells are falling off. The rafts are falling off and more and more are building up. It's called a scent pool. It just keeps growing the longer you stay in one spot. That's what happened in this case.

(R. 185).

Copper never located an exit scent. (R. 201). Sergeant Fraser explained:

[T]he dog will track the freshest scent. It goes back to prey. When a dog is after prey, the dog will not go out after an older scent. The dog recognizes fresh, hot scent. He will stay in that area, trying to locate that fresh, hot scent. They are not going to leave.

(R. 185).

Tim French, with the Beaufort County Sheriff's Office forensic lab, performed DNA testing on the two head scarves and shoes found at the scene. (R. 236-8). Petitioner was a one in 199 octillion match to "item 2" [scarf] and Blue was a contributor. (R. 242). Petitioner was a 1 in 32 septillion match to item 4, while another employee was a one in 9 billion match as a contributor. (R. 243-4).

In surveillance footage earlier in the day, Petitioner is seen wearing a backpack that appears similar to the backpack one of the robbers wore. (State's Exhibits 23, 24).

## STANDARD OF REVIEW

At issue is the admissibility of evidence. “The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion.” State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003).

## ARGUMENT

**The Court of Appeals did not err in affirming the admission of bloodhound tracking evidence because Sergeant Fraser was properly qualified as an expert, Copper is a trained bloodhound, he was reliable, and he was placed on the uncontaminated trail within a reasonable time.**

The Court of Appeals properly affirmed the conviction. Sergeant Fraser was properly qualified as an expert because he was the bloodhound team's leader with eighteen years' experience in tracking. Next, the evidence was reliable because bloodhounds are a breed with acute powers of smell, Copper was properly trained, and he had a history of being reliable. Lastly, he was placed on the trail shortly after the robbery and the issue of contamination is not preserved for review.

The trial court did not abuse its discretion in admitting the tracking evidence. "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. Stokes, 381 S.C. 390, 398, 673 S.E.2d 434, 438 (2009). The Court of Appeals correctly affirmed, because the record reflects the court properly exercised its discretion in accordance to the relevant law. See State v. Wallace, 440 S.C. 537, 543, 892 S.E.2d 310, 313 (2023) ("[I]f the record reflects the trial court 'exercise[ed] its discretion according to law,' we will almost always affirm the ruling." (quoting Morris v. BB&T Corp., 438 S.C. 582, 585-86, 885 S.E.2d 394, 396 (2023))).

"[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) by experience the dog is 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.” State v. White, 382 S.C. 265, 272, 676 S.E.2d 684, 687 (2009).

**A. The Court of Appeals properly affirmed the trial court’s finding that Sergeant Fraser was qualified based on his training and experience.**

The Court of Appeals properly found Sergeant Fraser possessed the necessary expertise to be qualified under Rule 702, SCRE; the rule states:

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.

Petitioner asserts that the Court of Appeals incorrectly relied upon State v. Henry in affirming Sergeant Fraser’s qualification as an expert. As Petitioner points out, in Henry, the expert had a postgraduate degree coupled with experience in the field of psychotherapy. State v. Henry, 329 S.C. 266, 495 S.E.2d 463 (Ct. App. 1997). Yet, as noted in Henry, it is not necessary that knowledge of expert witness be derived solely from academic endeavors, as it may be derived from experience. Henry, 329 S.C. 266, 274, 495 S.E.2d 463, 467 (Ct. App. 1997) (citing Sims v. State, 260 Ga. 782, 399 S.E.2d 924 (1991)). “[T]here are a variety of ways in which a person can become skilled or knowledgeable in a field that their opinion in a scientific, technical, or specialized area can assist the trier of fact in determining a fact or in understanding the evidence.” Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 556, 658 S.E.2d 80, 86 (2008) (“[A] trial court’s decision to refuse to qualify a person as an expert based solely on the

failure to meet a licensing requirement arguably impairs the truth-seeking function of courts”).  
See also Honea v. Prior, 295 S.C. 526, 369 S.E.2d 849 (Ct. App. 1988) (Finding two social workers were qualified based on their education, post-graduate training, and clinical experience with victims of sexual assault, as well as their opportunities to observe the victim.).

In State v. Childs this Court found a bloodhound handler for the Greenville County Sheriff’s department qualified to testify about work he conducted during an investigation. State v. Childs, 299 S.C. 471, 476, 385 S.E.2d 839, 842 (1989). The Childs Court noted that the handler’s testimony laid a proper foundation by stating he had run bloodhounds for eleven to twelve years and that he had been qualified as an expert ten or more times. Id. at 476-7 385 S.E.2d 842-3.

Here, the trial court did not abuse its discretion by finding Sergeant Fraser qualified as an expert witness. He obtained specialized knowledge throughout his eighteen years of experience. Not only does he have eighteen years of experience, but he attended training and has spent nearly a decade in a leadership role. (R. 172). Sergeant Fraser’s specialized knowledge was crucial in determining the reliability of tracking evidence presented at trial.

Petitioner asserts concerns with Sergeant Fraser’s training and time elapsed since certification. However, Petitioner was properly permitted to assist the jury with his specialized knowledge derived through practical experience. While Sergeant Fraser had not been qualified as an expert quite as many times as the officer in Childs, he did have eighteen years of experience in the field. The Court of Appeals properly noted that Petitioner’s concerns are to be considered when determining the credibility associated with testimony offered, not whether that evidence is admissible. See Henry, 329 S.C. 274, at 274 495 S.E.2d at 467 (“Generally, however, defects in

the amount and quality of the expert's education or experience go to the weight to be accorded the expert's testimony and not to its admissibility.'").

The Court of Appeals properly affirmed the trial courts qualification of Officer Fraser as an expert.

**B. Bloodhounds excel in their sense of smell.**

The Kentucky Court of Appeals has noted "It is matter of common knowledge, of which courts are authorized to take notice, that dogs of some varieties (as the bloodhound, foxhound, pointer, and setter) are remarkable for the acuteness of their sense of smell." Pedigo v. Commonwealth, 44 S.W. 143, 145 (Ky. 1898); See also State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989) (finding no abuse of discretion in trial court's admission of bloodhound tracking evidence where an officer stated the dogs have characteristics of acuteness in scent as well as the power of differentiating between human and other scents). The Court of Appeals properly affirmed because it is common knowledge that bloodhounds excel in their sense of smell.

**C. Copper was trained to follow scent and is reliable.**

Petitioner alleges that the Court of Appeals was incorrect in affirming the trial court's finding that Copper was sufficiently reliable. To lay a proper foundation, it must be shown that the dog is found to be reliable by experience. Some other jurisdictions have elaborated upon what constitutes a showing of reliability. State v. Barger, 612 S.W.2d 485, 492 (Tenn. Crim. App. 1980) (upholding a conviction where the hound had been used successfully in tracking the scents of human beings on three prior occasions.); Toler v. State, 457 So. 2d 1115 (Fla. Dist. Ct. App. 1984) (affirming when there was evidence of the dog's training, coupled with the fact that

he/she has successfully tracked humans).

Petitioner continues trial counsel's contention that Copper was only "successful" on two of twelve tracks. Yet, Copper should not be determined to be unreliable because he was not "successful" in all attempts. In a few of the examples, Copper found evidence rather than the person. Those results show Copper is reliable, even if he was determined to have been "unsuccessful." Copper was trained by Sergeant Fraser, who stated he was reliable, and he had a history of successfully tracking humans.

In the instant case, it is an indication of Copper's reliability that he tracked to a head scarf with Petitioner's DNA on the path leading to the building where Petitioner was. Further, in August 2017, the handler presented Copper with a piece of person's clothing. Copper then tracked through woods, vehicles, a shed, towards a residence, and found the person. (R. 36). The Court of Appeals properly found the trial court did not abuse its discretion in finding Copper to be reliable.

**D. Copper was placed on the trail a short time after the robbery and the issue of contamination is not preserved.**

Copper was placed on the trail soon after the robbery and trial counsel did not contest contamination. Copper was sent out to track the robber right after the robbery took place. The Court of Appeals properly found that the issue of the trail's contamination was not preserved for review, because Petitioner's counsel conceded the issue at the pretrial hearing. The Court of Appeals properly found that the trial court did not abuse its discretion in finding Copper was sent on the trail in a reasonable time and that there was no issue of contamination. Petitioner has failed to meet his burden in establishing a manifest abuse of discretion.

Additionally, any error is harmless beyond a reasonable doubt. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial). The robber lost his shoes and Petitioner appeared with no shoes at the convenience store with a story of the urgent need to dispose of a weapon “for a cousin” shortly after the robbery. (R. 86; 127). A do-rag was left outside the McDonald’s restaurant; the DNA matched Petitioner’s DNA. (R. 169; 242). Petitioner was seen with Blue in black clothing close in time to the robbery by an officer. (R. 88-9). Even if the prosecution did not present evidence that Copper tracked to the building, Petitioner was spotted after the robbery in a place where he was not invited. (R. 110). The State produced sufficient evidence to render any error in the admission of tracking testimony insignificant.

Accordingly, this Petition for Writ of Certiorari should be denied.

**CONCLUSION**

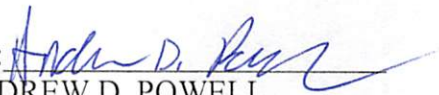
For all the foregoing reasons, it is respectfully submitted that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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