

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Joseph Martin Swaringen, Appellant.

Appellate Case № 2022-000928

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May 12 2025

SC Court of Appeals

Appeal From Greenville County
Perry H. Gravely, Circuit Court Judge

Opinion № 6109ingen
Heard November 14, 2024 - Filed April 23, 2025

Petition for Rehearing

Pursuant to Rule 221 of the South Carolina Appellate Court Rules, Joseph Martin Swaringen, the Appellant above named, hereby Petitions this Court to rehear this matter based upon the following grounds:

A. Motion for Directed Verdict Based on Commingling of Evidence

This Court misapprehended several cases used by the Court to approve the commingling of the four plastic bags seized in this case. First, this Court erred in failing to recognize whether drugs packaged in plastic bags can be commingled before being analyzed is a question of law and should be reviewed *de novo*. “We review questions of law *de novo*, with no deference to trial courts.” *Smalls v. State*, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839 (2018). The improper commingling of the four bags makes the directed verdict motion a question of law and not a

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question of fact.

Second, this Court cited *People v. Coleman*, 391 Ill.App. 909, N.E.2d 953 (Ill. Ct. App. 2009) for the position that a police officer may legally commingle one bag with 14 other bags and still have a correct weight after analysis. *State v. Swaringen*, Op. No 6109 (S.C.Ct.App filed April 23, 2025)(Howard Adv.Sh. No 16) at 38. This Court misapprehended *Coleman* as the total weight of the 15 individual bags was not an issue in the case. The Illinois court stated the parties at trial had stipulated, “[T]he white powder in People’s [e]xhibit N[o] 2 was 926.0 grams of cocaine.” *Coleman*, at 967, 909 N.E.2d at 958. Further, the *Coleman* case, contained this these facts, “Cotton testified that defendant [Coleman] was Hendrix’s supplier and that earlier in the morning, the day of the raid, defendant brought over a package of cocaine and she helped break it up and put it in the 15 bags.” *Id.* at 967, 909 N.E.2d at 935. Thus, in the *Coleman* case, the stipulation and the testimony of Cotton eliminated prejudice to Mr. Coleman. Prejudice in this case is shown when the four bags are commingled as there was no stipulation and no testimony as to the contents of the four bags before they were seized.

In *People v. Clinton*, 397 Ill. App. 3d 215, 922 N.E.2d 1118 (2009) the Court said, “Here, Boler combined six packets of suspected heroin before determining whether each of the packets did, in fact, contain heroin. In doing so, we now have no way of knowing whether each packet contained heroin or if only one contained heroin.” *Id.* at 223, 922 N.E.2d at 1126. The *Clinton* decision was cited in the opening brief of Mr. Swaringen.

Also, in *People v. Jones*, 174 Ill. 2d 427, 429–30, 675 N.E.2d 99, 101 (1996) the Illinois court held:

What inference can be drawn concerning the composition of the three packets not

tested? Without more, the answer is none at all. And in this case, the five packets containing loose substances cannot be equated with identically marked and stamped tablets, pills, or capsules. While it is not difficult to speculate, as did the trial judge, that the remaining three packets may have contained cocaine, such a finding must be based on evidence and not upon guess, speculation, or conjecture. *Id.* at 429–30, 675 N.E.2d at 101.

The Illinois courts would have reversed the conviction of Mr. Swaringen had this case occurred in Illinois. *See, also, People v. Miramontes*, 426 Ill. Dec. 350, 354 116 N.E.3d 199, 203 (Ill. App. Ct. 2018). This Court misapprehended the decisions of the Illinois Court.

This Court, in its order, also misapprehended *Sheffield v. State*, 635 S.W.2d 862 (Tex. App. 1982). *Swaringen* at 38. The *Sheffield* Court noted that the four pills involved in the trial had been placed in the same pocket as four pills previously purchased from the defendant. *Id.* at 864.

In affirming the conviction, the Court said:

It is appellant's position that the narcotics should not have been admitted into evidence since it could not be determined which pills were the ones appellant was charged with delivering. We do not agree. A chemist for the State testified that he tested five of the pills and that all contained phenmetrazine. It follows that at least one of the pills delivered by appellant at the time in question contained the controlled substance. Therefore, while we do not encourage the practice of commingling evidence, we do not believe that in the instant case it was harmful.

Id.

In *Sheffield* the defendant could not show any prejudice from the commingling. The distribution of one pill was sufficient to sustain the conviction. When all the five pills tested positive for phetenmetrazine, the odds are 100 per cent that one of the pills involved in the last distribution was the controlled substance for which he was convicted. Mr. Sheffield could show no prejudice.

The facts in *Sheffield* are very different from the facts in this case. The government never

established to 100 per cent certainty, or any other degree, that each bag contained methamphetamine. In fact, there is no degree of accuracy that each bag in this case contained methamphetamine. As James Armstrong, the chemist who examined the items testified that only what he tested, less than 1/100 of a gram could be guaranteed to be methamphetamine. ROA at 290, ll 16-20

When the person responsible for testing the seized items for the required weight of drugs to qualify for trafficking, testified as stated above, the State has not proven a trafficking case. As a matter of law, the State has failed to prove this trafficking in methamphetamine case.

This Court also misapprehended *Greenwade v. State*, 124 So. 3d 215 (Fla. 2013). This court said, “The substance at issue here does not pose an identifiable danger of misidentification, as was the issue in *Greenwade*.” Swaringen, at 39. This finding by this Court overlooks the fact that the description of the alleged illegal substances in both cases is practically the same. In this case, Officer Miller described the substance as, “There was - - also inside the Pelican case there was a white-like crystal-like substance and also there was a baggy.” ROA at 167, l 25 to 168, l. In *Greenwade*, the Court stated, “Katherine Warniment, a Florida Department of Law Enforcement (FDLE) forensic chemist, testified during trial that she received one sealed Ziploc bag containing a quantity of off-white powder and was asked to identify any controlled substances in the powder.” *Id.* at 217. This Court overlooked the fact that a description of “white like crystal-like substance” in this case and “off-white powder” in *Greenwade*, is an attempt to make a distinction when there is none. Thus, the substance at issue in this case does pose an identifiable danger of misidentification as was the issue in *Greenwade*.

Part of the substance seized in this case is pictured on page 461. The officers described

the substance seized as all being similar to that picture. The substance seized in the picture when commingled with the other bags would all appear very similar. This Court did not explain why the commingling of the four bags did not pose a serious risk of misidentification.

The *Greenwade* Court stated the basic facts of that case as follows:

All nine baggies were individually field tested before they were transferred to the Sheriff's Office property room where each baggie was emptied into nine individual envelopes. Dr. Katherine Warniment, a Florida Department of Law Enforcement (FDLE) forensic chemist, testified during trial that she received one sealed Ziploc bag containing a quantity of off-white powder and was asked to identify any controlled substances in the powder. Dr. Warniment's chemical testing revealed that the commingled powder contained cocaine. Dr. Warniment also determined that the contents of the Ziploc bag weighed 234.5 grams.
Id. at 217

The holding in *Greenwade* was set forth in the opening brief of Mr. Swaringen. This Court appeared to misapprehend the holding. *Swaringen*, at 38-39. In the conclusion the *Greenwade* Court stated:

Based on the foregoing, we hold that to satisfy the burden of proving that the evidence seized meets the statutory threshold for weight in trafficking prosecutions beyond a reasonable doubt, the State must prove through chemical testing that each individually wrapped packet of white powder seized contains at least a mixture of a controlled substance before the State may combine and weigh the commingled substance. However, we note that our holding applies only to the circumstance in which law enforcement officers discover individually wrapped packets of a substance that poses an identifiable danger of misidentification. Consequently, we quash the decision below and approve the decisions in *Ross*, *Safford*, and *Sheridan*. We further conclude that the trial court should have granted the motion for judgment of acquittal with regard to *Greenwade*'s trafficking conviction because the State commingled the contents of the nine individual baggies before chemically testing the aggregate.
Id. at 230-31.

Under the above stated holding in *Greenwade*, this case would also have been reversed had it arisen in Florida. The officers in this case discovered four individually

wrapped bags of a substance they believed to have been illegal drugs. The four individual bags were commingled prior to testing. Whether they were commingled by accident or intentionally is not relevant. “The nature of the fox’s disguise matters little to the chicken.” *State v. Rowell*, 444 S.C. 109, 115, 906 S.E.2d 554, 557 (2024).

This Court misapprehended *Coleman*, *Sheffield*, and *Greenwade*. This Court should rehear this matter, correct the misapprehension of the three cases and reverse the conviction of Joseph Martin Swaringen on the legal ground that the commingling of the four bags prevented the state from proving trafficking in methamphetamine as alleged in the indictment. Under this decision, the State will only be required to make an analysis of only one small bag of similar looking substance and then add all the weights together to obtain a trafficking amount of an illegal drug. This is cheaper. The importance of the correct decision being obtained is more important than savings of any type.

B. Chain of Custody

As to the chain of custody, this Court overlooked and misapprehended import facts in this case. First, this Court noted in a footnote that the absence of a video of the exchange of the items seized could be explained by the stipulation that not all the videos were available due cameras being inoperative. *Swaringen*, at 39, n. 5. The camera focusing on the entrance to the trauma room was operational. The seized items were in the trauma room. The stipulation stated, “Alvin Harrison, an independent contractor of Prisma, as part of his duties, pulled video relating to the defendant coming into Prisma for treatment. His job is to pull all relevant video based solely on police incident reports he received.” ROA at 451. As the video camera focused on the trauma room was operable,

this stipulation states all relevant video to this incident from this camera was pulled by Mr. Harrison. Any comings and going of law enforcement or hospital personnel with the seized items in their hands would be relevant. The stipulation as to when the video stops refers solely to the video of the loading dock. The video of the loading dock would not ever have contained the video of the alleged transfer from Ms. Edmonds to Officer Miller.

In this case, this Court attempted to distinguish this case from *State v. Pulley*, 423 S.C. 371, 815 S.E.2d 461 (2018). In making this distinction, this Court stated, “Here, hospital staff and security personnel were able to identify each link in the chain from the moment the belongings were transferred to the hospital to the time they were tested.” *Swaringen*, at 40. This is not a correct statement of the facts of this case.

As the video to the trauma bay was operable, the stipulation says Mr. Harrison pulled all relevant video from the operable camera. The relevant video would obviously include the officers going into the trauma bay and leaving with any items they seized. Mr. Edmonds testified as to the video, “Looks like the police officers are arriving which would indicate that I have found something that is out of the ordinary and that is questionable. And they have been contacted.” ROA at 56, ll 19-22. She did not mention the officer making a second trip to the trauma center.

Officer Christopher Miller as follows:

Q. (By Mr. Blouin) And when you got to the trauma bay, what did you find?

A. (By Officer Miller) I was handed a black plastic Pelican case.

Q. Describe what a Pelican case is for - - -

A. A Pelican case is a little black plastic case with magnets on the bottom. And it's generally used for automobiles. Like people will stick them up under the

frame of a car to put a set of spare keys or something like that.

Q. Okay. What else was handed to you?

A. There was - - also inside the Pelican case there was a white-like crystal-like substance and also there was a baggy.

Q. All right. So who did you - - what did you do when you - - who did you receive it from?

A. Lisa Edmonds.¹

Q. All right. And what did you do when you received the crystal-like substance.

A. Once I received it, I took it back to my office.

ROA 167, 1 16 to 168, 1 7.

Officer Miller never testified to making two trips to the trauma room to retrieve the drugs.

Ms. Edmonds never testified as to Officer Miller making two trips to the trauma room. As the camera facing the trauma room was operable, logic would suggest that if Mr. Henderson, had seen a second visit to the trauma room, he would have saved that video also.

On cross-examination Officer Miller admitted that he did not take the Pelican box nor any drugs from the trauma room.

Q. (By Mr. Yarborough) You just came out of that trauma bay and nowhere in your hands is a black bag is there?

A. (By Officer Miller) No.

Q. And no where in your partner's hands is a black bag, right?

A. No.

Q. Okay. And there's not a - - I don't know what y'all keep calling that thing, a box, there's no box in your hands?

A. No.

Q. Neither one. And did you have - - when you went in there did you have an evidence bag?

A. No, did not.

Q. So, you walked in there and you took - - you took narcotics and put them in your hand?

A. Yes, - -

Q. And you've been trained by SLED, I mean Greenville Police for how long?

¹ Even this testimony is confusing as Officer Miller originally testified the seized items were reported by Kelsey Lynn Ridgeway. ROA 42, 1 19 to 43, 1 3. Exhibit 12, ROA at 463, was found after the first trial had started. That exhibit reflects the name "Lisa Edmonds" as being the person from whom the items were recovered.

A. I worked for them for over 20 years.

Q. Yeah. And that's not how you collect evidence, is it.

A. I had no evidence in my hand at that time.

Q. Okay. So you don't get anything out of there? You leave whatever it is in there right?

A. I had not received any evidence at that time.

ROA at 204, ll 1-24.

The testimony at ROA at 205, ll 22-25 simply adds to the confusion.

The video clearly shows, as Mr. Miller admitted, he left the trauma bay with no evidence.

To reconcile his later statement, one would have to conclude that when Officer Miller entered the trauma bay, he had no intention of seizing the evidence. The video further shows Ms. Edmonds leaving the trauma bay with the seized substances still present in an unsecured room. Those are the facts shown on the video. At no time did Officer Miller say he made a second trip to the trauma room. All the record shows is that subsequently the drugs somehow ended up in the office of Officer Miller. The obligation is upon the State to account for the drugs from the moment of seizure.

In *State v. Pulley*, 423 S.C. 371, 815 S.E.2d 461 (2018) the items seized from the automobile of the defendant could be seen in the in car video on the hood of the police car. In the video the defendant and another officer, who signed the chain of custody form as turning in the items to the evidence locker, can be seen driving away from the scene. Originally the officer left at the scene denied turning in the items seized. He later changed his testimony. In holding the chain of custody had not been proven, the South Carolina Supreme Court said:

Although a perfect chain of custody is not required, a sufficient chain of custody requires more than the State presented in this case. Here, the express denial of handling the cocaine by Brewer, followed by a stipulation of a missing link by the State, the subsequent reversal by Brewer that he did in fact take the cocaine from the scene, coupled with the State's failure to produce testimony from Craven

indicating how he obtained possession of the cocaine after the drugs were seen on the hood of Brewer's car, equates to conjecture.

Id. at 378–79, 815 S.E.2d at 465.

This case involves the same problems, except Officer Miller did not take the stand a second time and change his testimony.² This Court overlooked the fact that Officer Miller, as noted above, did not take any items from the trauma room when he entered the room on the video. He has acknowledged that fact. When and from whom Officer Miller received the seized items is not known. Ms. Edmonds says she gave the officers the seized items when they were in the trauma room.³ She never testified she gave the seized items to Officer Miller. The video shows her testimony as to giving the seized items to Officer Miller is not correct. How and when Officer Miller received the seized items is left to conjecture or speculation. The State has offered no testimony from either Ms. Edmonds or Officer Miller that Officer Miller or another officer made a second trip to the trauma room. When and how did the alleged drugs get to Officer Miller's office? That basic and important question is not answered. In the decision in this matter this Court overlooked and did not answer this important question. Mr. Swaringen is still seeking the answer. A proper chain of custody demands the answer.

To further add to the lack of a proper chain of custody, Officer Miller testified the bag was sealed and placed in evidence locker 6. ROA at 184, ll 8-10. Officer Eric Keiper, who

² In arguing the motion on this issue, defense counsel pointed out this problem. ROA at 312, ll 13-18. The State did not call Officer Miller or the other officer seen in the video to testify as to how they obtained the allegedly seized items.

³ Ms. Edmonds never identified the officer to whom she claims she gave the seized item. The State, in a question, referred to them as "those officers" and she agreed. ROA 136, ll 8-9. In denying the chain of custody motion, the trial judge incorrectly noted that Ms. Edmonds says she gave the items to Officer Miller. ROA 314, ll 18-19.

retrieved the items from the evidence locker, stated the bag he retrieved was not sealed. ROA, 238, 1 20 to 239, 1 21. If a sealed bag was placed into the evidence locker, a sealed bag should have been taken out. This Court overlooked that fact.

Officer Keiper did not testify as to changing the bags in any manner. He testified he took the four bags shown on pages 453 to 461 and placed them in a bag separate from the Pelican Box. He then sealed the bag and sent it to the Greenville laboratory. James Armstrong testified that when he opened the bag sent to him, all the small bags had opened and the substance commingled. The fact this Court overlooked was that if, as Mr. Keiper testified, he simply put the smaller bags into a bigger bag, then the smaller bags shown on pages 453 to 461, would not have spilled out and the substances commingled. This Court overlooked this fact in finding the chain of custody had been sufficiently proven.

As the chain of custody in this case is defective as a matter of law, this Court should rehear this matter and hold as a matter of law that the chain of custody was defective and reverse the conviction of Mr. Swaringen.

C. Lesser-Included Jury Charge

This Court overlooked the fact that the testimony in this case gave the jury a reasonable basis for concluding that Mr. Swaringen was only guilty of simple possession of methamphetamine. James Armstrong, the chemist who examined the commingled substances, testified less than 1/100 of a gram was guaranteed to be methamphetamine. ROA 280, 11 16 - 18

This Court failed to note that in determining if a charge should be given, the South Carolina Supreme Court has said, "In determining whether the evidence requires a charge on a lesser-included offense, we view the facts in the light most favorable to the defendant." *State v.*

Williams, 427 S.C. 148, 156, 829 S.E.2d 702, 706 (2019). The jury easily could have simply agreed with Mr. Armstrong and concluded the only amount of drugs that can be guaranteed is less than one-hundredth of a gram. Even considering the facts cited by this court as to Mr. Swaringen actions after the wreck and his having \$700, the jury could still conclude the amount was very small and that does not support a trafficking charge. Simply put, the jury agreeing with Mr. Armstrong was evidence of a lesser included offense. This Court should rehear this matter and rule the lesser included charge should have been given and reverse the conviction.

D. Suppression Based on Compliance with SLED Regulations Pursuant to Section 44-53-485

In ruling on this issue, this Court overlooked the impact of *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879 (2007) and *State v. Taylor*, 436 S.C. 28, 870 S.E.2d 168 (2022) upon this case.⁴ Each case involved the impact of failing to record the defendant at the scene of the driving under the influence arrest. South Carolina Code § 56-5-2953 provides, “(A) A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 *must* have his conduct at the incident site and the breath test site video recorded.” (Emphasis added) The driving under the influence statute also provided no remedy if the section were violated. Just as in the present case, the legislature did not provide that the case be dismissed nor the evidence be excluded in the event the defendant is not recorded as required in the code section.

The South Carolina Supreme Court in *Taylor* held that the failure to comply with the “must” requirement of the statute for recording the defendant requires the exclusion of the evidence. The Court held, “[S]uppression of tainted evidence flowing from the failure to

⁴ Counsel must share some of the blame as neither case was cited in either the opening brief or reply brief.

administer Miranda warnings in accordance with subsection 56-5-2953(A) — not per se dismissal of the DUI charge—is the proper remedy.” *Id.* at 39, 870 S.E.2d at 174. *Suchenski* had previously held the remedy for not complying with the statute was dismissal. Thus, the prior holdings of the South Carolina Supreme Court require that this Court give the same impact for the failure of the officers to comply with the “must” provision of the statute as to the requirements of the chain of custody. If the law is to be changed or modified, it must be done by the South Carolina Supreme Court.

The statute involved in this case was passed in 1993. *Suchenski* was decided in 2007. The legislature has been aware, at least since 2007, that the use of the word “must” requires that any evidence seized under the statute be suppressed. The legislature has not amended the code section involved in this case.

Had the SLED regulations mandated by the statute been fully complied with in this case, many if not all the problems with the chain of custody in this case would have been eliminated. Had the seizing officer or the first evidence custodian had simply complied with Regulation 73-73(J) the problem with commingling would not have existed in this case. Someone, unfortunately we do not know who, failed to properly secure the four small bags to prevent them from spilling out. The SLED regulations form an important function to protect the integrity of the evidence.

As exclusion of evidence is the remedy set forth by the South Carolina Supreme Court where law enforcement must take certain action, the seized items in this case should have been excluded for the failure to comply with South Carolina Code § 44-53-485. The failure to follow the exclusion requirement of the statute as interpreted by the Supreme Court is a violation of the

due process clause of the 14th Amendment to the Constitution of the United States of America and Article I, § 3 of the Constitution of the State of South Carolina. ROA 322, 1 22 to 323, 1 5. This Court should rehear this matter and rule the seized items should have been excluded for violating the code section as required by the decisions of the South Carolina Supreme Court. This Court should reverse the conviction of Mr. Swaringen.

E. Evidence Suppression Based on Search by Private Person

the search by Ms. Edmonds was in fact a search by a government agent. This Court misapprehended this issue when the Court captioned this issue as “Evidence Suppression Based on Search by Private Person.” *Swaringen*, at 43. Had this case arisen while the Greenville Health Authority was operating the hospital, this Court should have had no problem saying the searches by hospital staff must comply with the Fourth Amendment. The Greenville Hospital Authority cannot lease to Upstate Affiliate Organization, fewer obligations to the public than it had at the time of the lease. The employees of Upstate Affiliate Organization are, by virtue of the lease, government actors.

As to the actual search, this Court overlooked the fact that, as the United States Supreme Court said, “The policy or practice governing inventory searches should be designed to produce an inventory.” *Florida v. Wells*, 495 U.S. 1, 4 (1990). No inventory was produced at trial.

As no inventory policy was ever produced, we do not know if this alleged inventory search was properly conducted. As the Court has again said, “Our view that standardized criteria, or established routine, must regulate the opening of containers found during inventory searches is based on the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence.” *Wells*, at 4 (internal citation omitted).

The record does not establish that the search was conducted in a lawful manner.

This Court overlooked the testimony that this search may not have been an inventory search. ROA at 129, ll 19-23 (testimony is about looking for evidence to give to police). A search to look for items that the police might want is not an inventory search.

This Court should rehear this matter and hold the search of Mr. Swaringen's belongings was the result of an improper search by a state agent and reverse the conviction.

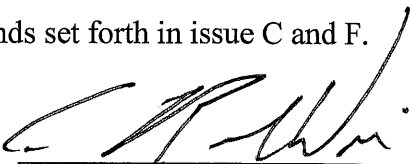
F. Flaws in Chain of Custody Jury Charge

This Court and our Supreme Court have frequently said, “[W]here a party has established the identity of each person in the chain of custody, issues regarding the care of the evidence only go to the weight of the specimen as credible evidence, and not its admissibility.” *State v. Sweet*, 374 S.C. 1, 8, 647 S.E.2d 202, 206 (2007). Saying that the evidence goes to the weight and not its admissibility is a useless saying unless the jury is told how to weigh the evidence. The jury was not advised of this in this.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for rehearing as to issues A, B, D, and E and reverse the conviction of Joseph Martin Swaringen and dismiss the charges and this Court should remand this case for a new trial on the grounds set forth in issue C and F.

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C. Rauch Wise
305 Main Street
Greenwood, SC 29646
(864) 229-5010
rauchwise@gmail.com
S.C. Bar No 6188
Attorney for Appellant