ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Lexington County

Howard P. King, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DOUGLAS J. MAYES,

APPELLANT

APPELLATE CASE NO. 2012-213144

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in admitting the drugs, crack cocaine and cocaine, and the chemist's report into evidence when the drugs, after testing, changed form from solid into liquid because they were not stored in a climate controlled storage, and thus the state could not provide the evidence that was seized?

2. Did the trial court err in admitting the drug scales and baggies into evidence when they were missing for two weeks and thus there was no clear chain of custody?

STATEMENT OF THE CASE

In August 2011, the Lexington County Grand Jury indicted Douglas James Mayes on the charges of trafficking crack cocaine more than twenty –eight grams but less than one hundred grams; possession with intent to distribute cocaine (powder); and possession of a weapon during the commission of a violent crime (PWID). On October 1-2, 2012, Mayes proceeded to trial before the Honorable Howard P. King and jury. Mayes was represented by Wayne Floyd, and the state was represented by Michael Ross. The jury returned a verdict of guilty on the trafficking charge; guilty of the lesser offense of simple possession of cocaine; and not guilty on the possession of a weapon charge. Judge King sentenced Mayes to twenty-five years on the trafficking crack cocaine, and ten years on the possession of cocaine. R. 210, ll. 14 – R. 211, ll. 2. Mayes' attorney filed a notice of appeal. This appeal follows.

STATEMENT OF FACTS

Deputy Eric Kirkland, lead investigator in the case, testified pretrial that he received an anonymous complaint of drug activity at a location in the Pelion area of Lexington County. He was told that a black male named Dougie lived there along with a white female and child. R. 9, ll. 15 – R. 10, ll. 23; R. 73, ll. 3 – 11. Deputy Kirkland arranged a controlled drug purchase using a confidential informant (CI) with the CI and Mayes on January 31, 2011. The CI identified Mayes from a photo lineup. R. 11, ll. 19 – R. 14, ll. 23.

A second controlled drug buy occurred on February 9, 2011. Deputy Kirkland then obtained a search warrant for Mayes' address. R. 15, ll. 9 – R. 23, ll. 25. Deputy Kirkland and a seven man team executed the search warrant on Mayes residence on February 17, 2011. R. 73, ll. 3 – R. 75, ll. 16. In the master bathroom hidden among rolls of toilet paper were found three bags of what appeared to be crack cocaine, a pill bottle with crack cocaine, and a bag of what appeared to be powder cocaine. R. 50, ll. 3 – R.58, ll. 24.

In the kitchen was found a set of digital scales and a Pyrex dish, and plastic baggies. R. 62, ll. 11 – R. 66, ll. 25; R. 68, ll. 11 – 23.

Deputy Kirkland arrested Mayes in the living room where he and the female were handcuffed. He Mirandized Mayes and explained they were there executing a search warrant for narcotics. When Deputy Kirkland asked Mayes if he knew anything about what was back there, Mayes replied: "It's mine. Everything back there is mine." R. 76, ll. 1 – R. 78, ll. 24. After a Jackson v. Denno, 378 U.S. 368 (1964) hearing, the judge determined the statement was voluntary. R. 70, ll. 1 – R. 72, ll. 17.

The chemist from the Sheriff's Department, Emily Homer, tested the drugs and found: Item 1.1 was 64.06 grams of cocaine base crack; Item 1.2 was 1.89 grams cocaine

base crack; Item 1.3 was cocaine 2.96 grams; and Item 1.4 was 4.29 grams cocaine base crack and item 1.5 was .14 grams cocaine base crack. R. 108, ll. 1 – 24; R. 110, ll. 19 – R.112, ll. 24. Ms. Homer testified that all of the drugs were in solid form with no liquid. R. 112, ll. 25 – R. 113, ll. 7.

The evidence custodian, Candy Kyzer, received the drugs in the Best Kit from the deputy. She put the sealed kit with the drugs in the drug lab temp box. She held them there until the chemist wanted them. The chemist returned them to her after testing. R. 84, ll. 14 – R. 86, ll.25. She signed these drugs out to the chemist, Ms. Homer, on February 22, 2011. The chemist returned them to the evidence room March 29, 2011. The drugs were then placed in a regular drug box "that we put miscellaneous drug cases in." R. 87, ll. 1 – R. 89, ll. 5.

Deputy Kirkland signed the drugs out on September 6, 2011 for a meeting with the solicitor in preparing for court. He returned them two hours later. R. 89, ll. 6 – 21.

The drugs were signed out again on May 15, 2012 to the chemist, Ms. Homer because when the solicitor came to view the evidence, the solicitor noticed liquid in the Best Kit. The drugs were returned to the chemist at that point. The chemist returned them to another evidence custodian, Beth Harmon. R. 89, ll. 22 – R. 90, ll.

Beth Harmon received the drugs in the Best kit from the chemist on July 31, 2012. She admitted that she did misfile the drugs then. A few days later on August 3, 2012, she was placing other items into the multi-case boxes in the drug room, and noticed this one was misfiled. When she took it out, it leaked on her. The seal had a crease in it which allowed the liquid to seep out. She called her supervisor and they heat sealed the drugs into a K-pack bag. R. 101, ll. 1 – R. 107, ll. 15.

Ms. Homer, the chemist, testified that when she returned the drugs tot eh evidence room, they were in the same condition as they were when she received them. R. 118, ll. 15 – 25. When she was called by the evidence custodian and solicitor to view the drugs, they were partially liquefied. R. 120, ll. 19 – 25. It was her opinion that drugs did not withstand heat very well because they are organic substances. The more impure the substance was the lower the point at which it will melt. She said the evidence room was not climate controlled and the drugs went through other people in the solicitor's office. Crack cocaine would be impure from the amount of adulterants added to it such as lidocaine, benzocaine,and baking soda. The change in form did not affect her report and conclusion. R. 120, ll. 25 – R. 123, ll. 21.

Defense counsel objected to the drugs being admitted into evidence because the drugs were not in the same form as they were when they came into the custody of the Sheriff's Office. Counsel argued that they were altered. R. 119, ll. 2 – R. 120, ll. 12. Counsel argued that the chemist report should not come into evidence unless the drugs were admitted. Counsel argued that the drugs must come into evidence to make the case. He said the drugs were not admissible because they had changed form, and that the Sheriff's Department was responsible for taking care of the evidence. He said it was pure speculation that the drugs melted from the heat. Everyone in the chain had to say the drugs were in the same form. He argued that the chemist said that she did not test for adulterants. R. 129, ll. 22 – R. 137, ll. 19.

The judge admitted the drugs because he ruled there was a spontaneous chemical change with no wrong doing on anyone's part. R. 137, ll. 20 – 140, ll. 2.

During her testimony, Candy Kyzer, said that she received the digital scales and baggies in the evidence room on February 17, 2011. She put them in a banker's box where they put miscellaneous items instead of taking up shelf space with just small items. Deputy Kirkland checked these items out also on September 6, 2011 to take to the solicitor's office for trial preparation. He returned them the same day. They were marked for evidence. R. 84, ll. 14 – 24; R. 91, ll. 8 – R. 93, ll. 24.

Ms. Kyzer admitted that in October 2011, she was asked to bring the scales and baggies to court as the case was going to trial. She could not find these items. They were located about two weeks later in the evidence room. They were returned to the correct box. R. 93, ll. 25 – R. 96, ll. 24.

Defense counsel objected when the items were offered into evidence on the basis that chain of custody had not been properly established. No one could say where the items were during those two weeks. The judge ruled that there was no evidence the items ever left the evidence room. He ruled they were non-fungible so there was not the issue of the identity. The judge admitted the scales and baggies into evidence. R. 97, ll.1 – R. 99, ll. 1.

Defense counsel argued for a directed verdict motion at the close of the state's case which the judge denied. R. 141, ll. 20 – 146, ll. 8. Counsel then argued for the suppression of the scales and baggies based on the lack of a chain of custody, and for the suppression of the drugs because they were different than they were when seized. The judge denied his motion. R. 146, ll. 4 – R. 150, ll. 19.

In a pretrial hearing, defense counsel told the court that the case was called for trial in October 2011. However, after pretrial motions, the solicitor told defense counsel the case

would have to be continued because evidence was missing. R. 35, ll. 1 – R. 36, ll. 25.

ARGUMENT

The trial court erred in admitting the drugs, crack cocaine and cocaine, and the chemist's report into evidence when the drugs, after testing, changed form from solid into liquid because they were not stored in a climate controlled storage, and thus the state could not provide the evidence as it was seized.

The state argued that the issue was evidence preservation, and cited the cases of State v. Cheeseboro, 346 S.C. 326, 552 S.E.2d 300 (2001) and State v. Bland, 399 S.C. 220, 730 S.E.2d 909 (Ct. App. 2012) . However, both cases are distinguished from Mayes' case.

In State v. Cheeseboro, *supra,* the Supreme Court held that the destruction of the murder weapon used in the murder of a barber and his customer on March 14, 1996, before the defense team could examine it, did not require suppression of testimony about the weapon or dismissal of the indictments where there was no bad faith in the destruction of the gun, as the bullets and documentation of the comparison of the bullets was still available to the defense, and the defendant was not prejudiced because the gun was incriminating rather than exculpatory. The gun was destroyed by the police department after testing because it was not marked as being involved in the barbershop murders but was rather marked as unclaimed property.

Mayes' case is distinguished because the drugs were the only evidence against him. There was other evidence against Cheeseboro including an eyewitness. Although the chemist had completed her report, there was no evidence she examined the drugs in liquid form. In Cheeseboro, the bullets and comparison were still available for the defense to examine. In Mayes, the drugs were not available for him to have an independent evaluation done. This was prejudicial to Mayes.

In State v. Bland, 399 S.C. 220, 730 S.E.2d 909 (Ct. App. 2012), the Court of Appeals held that the photo lineup shown to the witness in this attempted armed robbery and attempted burglary

which may have included a photo of the defendant, and the disappeared from the case file was not a violation of Bland's due process rights because it did not have an exculpatory value where the witness could not positively identify the defendant using the lineup.

Mayes' case is distinguished in that again, there was other evidence against Bland. There were two eyewitnesses in Bland's case, and it concerned a photo lineup.

In State v. Cheeseboro, *supra,* the Supreme Court held that the state does not have an absolute duty to preserve potentially useful evidence that might exonerate a defendant. To establish a due process violation, a defendant must demonstrate (1) that the state destroyed the evidence in bad faith (10 that the evidence possessed an exculpatory value apparent before the evidence was destroyed, **and** the defendant cannot obtain other evidence of comparable value by other means.

In State v. Bailey, 677 N.W.2d 380 (2004), the Supreme Court of Minnesota held that the admission of the DNA evidence was not a violation of the defendant's due process right. However, Justice Russell A. Anderson concurred in part and dissented in part. In his dissent, Justice Anderson wrote due process concerns are implicated when data relied upon by a laboratory in performing tests are not available to the opposing party for review and cross examination. He cited the Federal Bureau of Investigation's Quality Assurance Standards for Forensic DNA Testing Laboratories that require procedures to ensure the integrity of the physical evidence. The FBI standards required laboratories that do DNA testing to follow documented procedures that minimize loss, contamination, and/or deleterious change of evidence.

In Justice Meyer's dissent in Bailey, he concluded that the admission into evidence of the DNA evidence violated Bailey's right to due process because Bailey was not allowed to examine the genetic primer sequences applied in the Profiled kit that was used by the state; the DNA sample was so degraded that only a partial profile could be obtained; the sample was not large enough to

allow testing of additional loci; the sample was destroyed by the state's testing so no part was available for independent testing by Bailey's experts, and Bailey was not given notice of the destructive testing.

The trial court erred in allowing the drugs and the accompanying report into evidence. The state has the responsibility to preserve evidence to be used against Mayes, especially when it is the only evidence against him. In Mayes' case, the drugs as seized by the state and as found in his residence were not the same as that presented at trial. Mayes was denied the opportunity to have independent testing if he chose to do so. It was not the same evidence as listed in the warrant and indictment. The state needed to have the drugs in climate controlled storage. The chemist knew the drugs could change form as she testified this had happened another time. She told those in charge that there should be climate control in the evidence room but it was after this incident. R.128, ll. 1 – 22.

ARGUMENT

The trial court erred in admitting the drug scales and baggies into evidence when they were missing for two weeks and thus there was no clear chain of custody.

In State v. Sweet, 374 S.C. 1, 4-5, 647 S.E.2d 202, 204, (2007), the Supreme Court ruled that a trial court's decision to admit evidence will not be reversed on appeal absent an abuse of discretion.

State v. Glenn, 328 S.C. 300, 492 S.E.2d 393, 395 (1997), succinctly summarizes the chain of-custody law:

> Because fungible items such as drugs or blood samples are not readily identifiable and may be easily tampered with, the party offering such items into evidence must establish a chain-of-custody as far as practicable. [Citations omitted.] Where the analyzed substance is passed through several hands, the evidence must not leave it to conjecture as to had it and what was done with it between the taking an analysis. However, the proof of chain-of-custody need not negate all possibility of tampering, but instead must only establish a complete chain of evidence as far as practicable. [Citations omitted.]
>
> While the chain of custody requirement is strict where fungible evidence is involved, where the issue is the admissibility of non-fungible evidence – that is evidence that is unique and identifiable – the establishment of a strict chain of custody is not required … [i]f the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the item is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit nearly on the basis of testimony that the item is the one in question and is in a substantially unchanged condition. On the other hand, if the offered evidence is of such a nature as not to be readily identifiable, or to be susceptible to alteration by tampering of contamination, the sound exercise of the trial court's discretion may require a substantially more elaborate foundation. A foundation of the latter sort will commonly entail testimony tracing the "chain-of-custody" of the item with sufficient completeness to render it reasonably probable

> that the original item has neither been exchanged with another nor been contaminated or tampered with. [Citations and quotation marks omitted.]

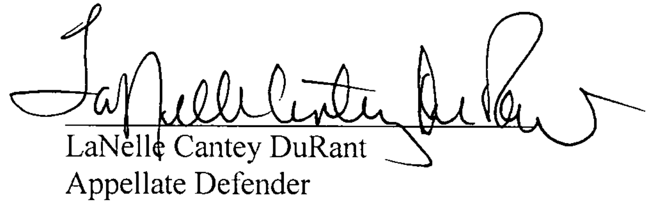
In State v. Freiburger, 366 S.C. 125, 620 S.E.2d 737 (2006) the Supreme Court wrote that while the chain of custody requirement is strict where fungible evidence is involved, where the issue is the admissibility of non-fungible evidence—that is, evidence that is **unique and identifiable---**the establishment of a strict chain of custody is not required if the offered item possesses characteristics which are fairly unique and readily identifiable. [emphasis added]. The evidence in Freiburger was a gun with a serial number and markings on the gun. The Court ruled the chain in that case was sufficient.

In Mayes' case, the evidence did not indicate that the scales and baggies had any particular identifiable markings that would distinguish them from any other scales or baggies. They were kept in the storage room in a banker's box with evidence from other cases. The scales and baggies were lost for two weeks. There was no evidence that they were in the evidence room all of that time. In short, the State was unable to account for these Items all of the time. The scales and baggies were significant evidence against Mayes because the state argued that they were scales used to measure drugs for sale. They were not reliable evidence due to the lack of a chain of custody.

CONCLUSION

Based on the above, the convictions and sentences should be reversed, and the case remanded for a new trial.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

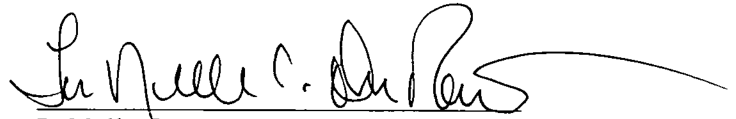
ATTORNEY FOR APPELLANT

This 23rd day of October, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

October 23rd, 2013



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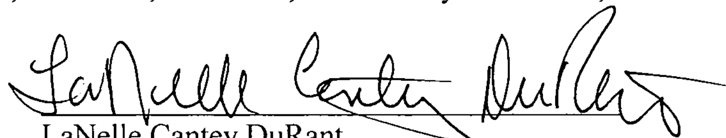
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Jennifer Ellis Roberts, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 23rd day of October, 2013.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 23rd day of October, 2013.

________________________(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.