

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Aiken County

Doyet A. Early, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

PAUL CHANDLER,

APPELLANT

APPELLATE CASE NO. 2013-001179

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in admitting expert testimony regarding dog tracking when the dog had never before successfully tracked a scent in the field?

STATEMENT OF THE CASE

On April 15, 2013, an Aiken County grand jury indicted appellant Paul Chandler for second degree burglary. On May 15-16, 2013, appellant was tried before the Honorable Doyet A. Early, III, and a jury. R. 1. Jeffrey A. Slocum, Jr. and Virginia L. Sheftall represented the State. R. 1. Barry L. Thompson, II, and Wallis A. Alves represented appellant. R. 1. The jury convicted appellant. R. 226, 1. 21 – 227, 1. 1. On May 20, 2013, Judge Early denied appellant's motions for a new trial and sentenced appellant to twelve years' imprisonment. R. 240, 11. 22 – 24. After timely filing and service of the notice of appeal, this appeal follows.

ARGUMENT

The trial court erred in admitting expert testimony regarding dog tracking when the dog had never before successfully tracked a scent in the field.

Relevant Facts

Around 10:45 PM on January 16, 2013, Ann Widener went to her husband's truck to fetch his pills because of pain from a recent root canal. R. 66, ll. 2 – 8. R. 70, ll. 13 – 18. She heard a sound and ran back inside. R. 66, ll. 14 – 25. She told her husband she heard a noise. R. 66, ll. 14 – 25. Phillip Widener (“Widener”) “got dressed, got his gun, and his flashlight.” R. 67, ll. 1 – 5. Mrs. Widener called 911. R. 67, ll. 1 – 5.

Widener went to his shed. R. 69, ll. 2 – 12. He announced he had a gun then heard noises behind his shed. R. 69, ll. 14 – 18. He shined his flashlight and saw a man for about “three to four seconds.” R. 70, l. 2 – 71, l. 18. Widener claimed he got a good look at the man before the man ran. R. 71, ll. 14 – 20. Widener fired his pistol into the ground. R. 72, ll. 19 – 24.

Jeff Key was the chief of police for the Wagener Police Department. R. 154, ll. 19 – 22. He was awakened from his bed by the call concerning the Widener's shed. R. 155, ll. 14 – 18. Chief Key received a description of the suspect from another officer that it was a light skinned black male, approximately 35-45 years old, with facial hair. R. 156, ll. 5 – 8. Based solely on this description, Chief Key went to his office and retrieved a photo line-up from SLED that was between one and two years old. R. 156, ll. 5 – 24. R. 23, l. 5 – 24, l. 9. Appellant was the only person from the small town of Wagener in the line-up. R. 182, ll. 1 – 14. Widener picked appellant's photo from the line-up within fifteen seconds. R. 85, l. 16 – 87, l. 2.

Over a defense objection, the court admitted the testimony of K-9 officer Jeremy Hill (“Hill”). R. 129, l. 23 – 132, l. 25. Officer Hill testified that his Belgian Malinois dog named Xantos picked up a scent from near Widener’s shed and followed it to appellant’s house. R. 133, l. 25 – 139, l. 20. Officer Hill testified that it took five minutes for Xantos to lead him to appellant’s house. R. 135, ll. 16 – 22.

Discussion

The trial court should not have admitted the dog tracking evidence in this case because it was unreliable. See SCRE 702. While the trial court followed the guidelines of State v. White, 382 S.C. 265, 272, 676 S.E.2d 684, 687 (2009), its analysis under White was incorrect. Under White, the proponent of dog tracking evidence must meet certain foundational requirements. Id. The proponent must show: (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. Id. (emphasis added).

The State presented no evidence supporting the fourth emphasized qualification: experience showing the dog was reliable. During voir dire direct-examination, Officer Hill first responded to a question regarding Xantos’ “ballpark” success rate from “trainings during school and after school” that it was “Ninety percent or more.” R. 120, ll. 10 – 12. Judge Early adroitly picked up on the key word in the question: trainings:

THE COURT: How about in the field? Has he tracked anybody in the field? How many people has he tracked in the field? **Not training, real live tracking?**

THE WITNESS: He's had approximately two tracks.

THE COURT: **Two tracks?**

R. 120, ll. 13 – 17 (emphasis added). During voir dire cross-examination, the court learned that of the two tracks Xantos performed in the field, the first was unsuccessful and the second track was appellant. R. 126, ll. 9 – 16. Defense counsel used the dog's training records to show that he was often distracted and that Officer Hill had trouble finding the track, causing the dog to veer off the trail. R. 127, l. 3 – 129, l. 20.

Following voir dire, appellant objected to the qualification of Officer Hill and the admission of the dog tracking evidence. R. 129, l. 23 – 131, l. 3. Defense counsel based his objection on Officer Hill and the dog's lack of experience and that two tracks in the field were not sufficient to establish reliability. R. 129, l. 23 – 131, l. 3. Judge Early overruled the objection, basing his ruling on the dog's successful tracks during training. R. 132, ll. 2 – 10.

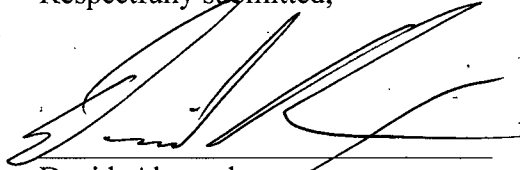
Counting the dog's training tracks in making the reliability analysis was error. White requires that "by experience" the dog is found to be reliable. "Experience" does not mean training. It means work in the field. No one would suggest that a police officer making his second arrest was an experienced officer simply because he'd been trained at the academy. The same logic follows for the dog. The dog in White had worked with his handler for over seven years and they "had accomplished approximately 750 tracks together." Id. at 271, 676 S.E.2d at 687. The dog in this case had an insignificant fraction of the experience of the dog in White. Before Officer Hill and Xantos could be qualified as experts, they should have been used by the police as investigative tools for several years and on multiple tracks to establish a sample size sufficient to determine reliability. Instead, the

State sought to admit Officer Hill and Xantos' first "successful" track as evidence in court. White and Rule 702 simply require more data before this type of evidence can be admitted. For these reasons, the case should be reversed and remanded for a new trial.

CONCLUSION

For the foregoing reasons, the Court should reverse and remand this case for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David Alexander", written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of June, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Doyet A. Early, III, Circuit Court Judge

THE STATE,

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V.

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APPELLANT

APPELLATE CASE NO. 2013-001179

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Paul Chandler states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Doyet A. Early, III, which was held on May 20, 2013, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Paul Chandler.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of June, 2014.

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IN THE COURT OF APPEALS

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Doyet A. Early, III, Circuit Court Judge

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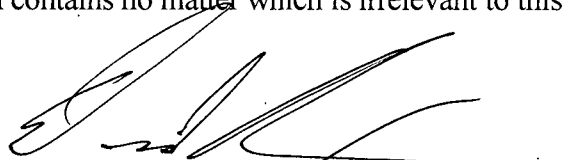
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s);
- (2) Trial transcript;
- (3) Transcript of hearing dated May 20, 2013;
- (4) State's Exhibit 26;
- (5) State's Exhibit 27;
- (6) State's Exhibits 9 and 25 (to be transported).

I certify that this designation contains no matter which is irrelevant to this appeal.

June 10th, 2014



David Alexander
Appellate Defender

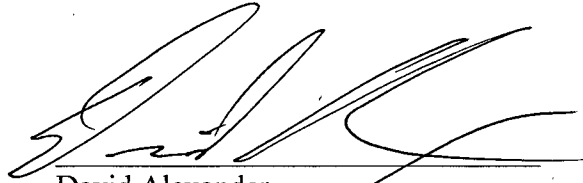
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

June 10th, 2014.

A handwritten signature in black ink, appearing to read "David Alexander", written over a horizontal line.

David Alexander
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

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THE STATE,

RESPONDENT,

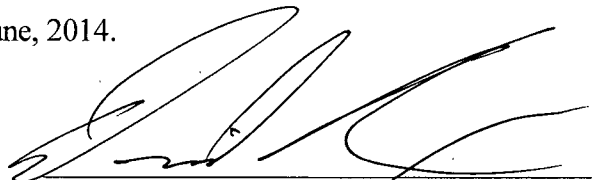
V.

PAUL CHANDLER,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Paul Chandler, #295971 at McCormick Correctional Institution, McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899 this 10th day of June, 2014.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 10th day of June, 2014.

Rhonda Denise Foxworth (S.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021.