

ORIGINAL

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
William H. Seals, Jr., Circuit Court Judge

RECEIVED

JUL 15 2014

Opinion No. 2014-UP-265 (S.C. Court of Appeals filed June 30, 2014)

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

GREGORY ALLAN IVERY,

APPELLANT.

APPELLATE CASE NO. 2012-213216

PETITION FOR REHEARING

The Appellant, Gregory Allan Ivery, respectfully petitions the Court for a rehearing of its Opinion No. 2014-UP-265 pursuant to Rule 221(a), SCACR based upon the following points overlooked or misapprehended by the Court:

On June 30, 2014, this Court filed its unpublished opinion affirming Appellant's convictions for distribution of crack cocaine and the related proximity charge. In his appeal, Appellant argued that the Trial court erred in admitting a video recording of the alleged drug transaction where the State failed to properly authenticate the video recording when the State did not present any witness at trial who could testify that the video recording accurately depicted the alleged drug transaction.

In its Opinion, this Court first cited to Rule 901(a), SCRE which provides that the “requirement of authentication as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Appellant contends that Detective Cothran’s testimony was not sufficient to support a finding that the video in question was what he claimed it to be. Detective Cothran did not physically see or observe any of the alleged drug transaction and therefore he could not satisfy the requirements of authentication. R. 32, ll. 2-4.

This Court also cited to Rule 901(b) which provides examples of authentication or identification conforming with the requirements of Rule 901. This Court cited to the following examples: a witness provides “[t]estimony that a matter is what it is claimed to be” and “[i]dentification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.”

First, as mentioned above, Detective Cothran could not provide testimony that the matter is what it claimed to be since he did not physically see or observe any of the alleged drug transaction. Second, while Detective Cothran testified that he could hear the conversation during the alleged transaction, he never verified at trial that it was Appellant’s voice on the audio. R. 32, ll. 2-4. There was also no testimony that Detective Cothran was familiar with Appellant’s voice. Cf. State v. Aragon, 354 S.C. 334, 336, 579 S.E.2d 626, 626-27 (Ct. App. 2003) (finding the State properly authenticated taped telephone conversation between victim and defendant where victim had known defendant for over ten years and recognized his voice during the conversation).

At trial, the alleged informant denied ever purchasing any crack from Appellant and denied that it was him appearing in the video recording. The alleged informant further denied circling Appellant's picture in a subsequent photo line-up. R. 64, l. 9 – 65, l. 19; 68, ll. 18 – 21. The alleged informant's testimony was essential to authentication of the video recording because upon a review of the recording, one cannot even see any handover of the alleged drugs. The alleged informant's testimony would have been necessary to describe exactly what is happening in the video and to confirm that the person seen on the video was in fact Appellant. [State's Exhibit 4 – Video Recording (on file with court)]. When the alleged informant denied ever purchasing the drugs from Appellant or appearing on the video, the State therefore could not present any witness who could testify that the video recording accurately represented the events that occurred during the alleged drug transaction.

Courts from other jurisdictions have allowed the admission of a video recording of a drug transaction where the prosecution made a proper foundation for admission through the testimony of someone who witnessed the occurrence videotaped. See United States v. Rivera-Maldonado, 194 F.3d 224, 236-37 (1st Cir. 1999) (finding admission of drug transaction videotapes proper where agent who had actually videotaped the crime scenes testified that "each daily video accurately reflected what he had observed as it was being taped"); United States v. Medina-Herrera, 606 F.2d 770, 774 (7th Cir. 1979) (finding "proper foundation for the admission of tapes was made through the testimony of agents who witnessed the defendant's actions and made the tapes"); Trull v. State, 811 So.2d 243, 246 (Miss. Ct. App. 2000) (holding videotape of the drug transfer was properly authenticated where the agent testified that he "was present when the events on the

videotape transpired, and that the video was an accurate depiction of the events as they transpired that day.”).

Two cases relied upon by the State in its Respondent’s Brief are distinguishable from the facts of this case. In Crutcher v. State, 68 So.3d 724 (Miss. Ct. App. 2011), the court found that the State sufficiently authenticated a videotape of a drug sale as to render the evidence admissible. In Crutcher, however, the informant testified at trial and confirmed that there was a drug transaction. Id. at 727. In Appellant’s case, the alleged informant denied that he was involved in any drug transaction with Appellant.

In Brooks v. Commonwealth, 424 S.E.2d 566 (Vir. Ct. App. 1992), the court held that a videotape of a drug transaction was admissible even though the officers testifying did not actually observe the transaction taking place and even though the informant did not testify. The drug transaction was videotaped while several officers monitored the informant’s body mike. One detective did, however, actually observe the defendant walking up and down the street in the area both before and after the drug purchase. Another detective who was monitoring the body mike recognized the distinctive voice of the defendant with whom the detective had numerous prior contacts. Another detective who had come into contact with the defendant on at least fifty previous occasions also identified the voice and laugh of defendant. Finally, another detective also recognized the defendant’s voice. Id. at 568-69. In Appellant’s trial, there was no testimony that Detective Cothran was familiar with Appellant’s voice and could identify Appellant’s voice on the video recording.

If the courts do not require that video recordings be authenticated by someone who observed the events on the video or who is at least familiar with the voices on the video, then essentially anyone who watches the video recording can authenticate it.

Accordingly, where the State did not offer the testimony of anyone who witnessed the alleged drug transaction between the alleged informant and Appellant or who could at least identify the voices on the video, the Trial Court improperly admitted the video recording where the State failed to make a proper foundation for its admission. The Trial Court committed an error of law by admitting a videotape without a proper foundation, and this Court should reverse the Trial Court's ruling on the admissibility of this evidence where the Trial Court abused its discretion. See State v. Lee, 399 S.C. 521, 526-27, 732 S.E.2d 225, 228 (Ct. App. 2012) (providing appellate standard of review for trial court's ruling on the admission of evidence).

The Trial Court's improper admission of the video recording was not harmless where there was a reasonable probability that the jury's verdict was influenced by the challenged evidence." Lee, 339 S.C. at 527, 732 S.E.2d at 228. Here, the State heavily relied on the videotape to identify Appellant as the individual who allegedly sold drugs to the alleged informant. In the State's opening statement, the solicitor informed the jury that the entire drug transaction was recorded on video and let the jury know that they would be able to view the video. R. 11, ll. 9-12.

During trial, Detective Cothran could only identify Appellant as the person who allegedly sold the drugs by watching the video since he did not observe the transaction firsthand. R. 44, ll. 12-19.

During the State's closing, the solicitor also highlighted the video, repeatedly reminding the jury that they saw the entire video of the transaction and that they could watch the video again if they needed to. R. 80, ll. 24-25; 81, ll. 9-12; 81, l. 24 – 82, l. 1.

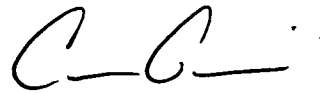
During their deliberations, the jury asked to view the video of the transaction again and the video was replayed for them. R. 94, l. 22 – 95, l. 1.

Without the video recording, the State's identification of Appellant as the one who sold drugs to the alleged informant would have rested primarily on the alleged informant's pre-trial identification of Appellant, a witness who then declined to identify Appellant at trial as the seller and who denied ever circling Appellant's picture in a photo line-up. R. 64, l. 9 – 65, l. 19; 68, ll. 18-21. Although it was a jury determination as to the credibility of the alleged informant, the video recording, relied upon so heavily by the State under these circumstances, was not harmless beyond a reasonable doubt. Therefore, it was error as a matter of law for the Trial Court to have admitted the video recording into evidence, and Appellant is entitled to a new trial.

CONCLUSION

For the reasons set forth herein, Appellant Gregory Allan Ivery respectfully requests that the Opinion of the Court of Appeals be withdrawn, his convictions be reversed, and the case remanded to the trial court for a new trial.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

This 15th day of July, 2014.

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APPELLATE CASE NO. 2012-213216

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Mr. Gregory Allan Ivery, #131131, Lieber Correctional Institution, 136 Wilborn Avenue, Ridgeville, SC 29472, this 15th day of July, 2014.



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 15th day
of July, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 24, 2021.