STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Union County
Honorable John C. Hayes, III, Circuit Court Judge
Appellate Case No. 2011-205207

THE STATE,

Respondent,

vs.

RANDY JARROD CROSBY,

Appellant.

RESPONDENT'S RETURN TO PETITION FOR REHEARING

On August 20, 2014, this Court issued an unpublished opinion in which it unanimously affirmed Appellant Randy Jarrod Crosby's conviction for possession of crack cocaine with intent to distribute. State v. Crosby, Op. No. 2014-UP-324 (S.C. Ct. App. filed Aug. 20, 2014). Pursuant to Rule 221(a), SCACR, Pope petitioned this Court for rehearing, and this Court requested that Respondent ("the State") file a return to Crosby's petition. For the following reasons, Crosby's petition for rehearing should be denied.

Investigatory Stop and Search Issues

In his petition for rehearing, Crosby contends this Court misapprehended the issues raised in regard to the constitutionality of the investigatory stop and search of his vehicle. In support of that contention, Crosby maintains the information provided by Harris was inherently unreliable and could not have established reasonable suspicion or probable cause because Harris was not previously known to the law enforcement officers, the information he provided was allegedly not

against his penal interest, and Harris offered the information in an effort to obtain his release from jail. However, in Crosby's case, Harris provided information to the officers about the person he directly identified as his personal supplier of crack cocaine, Roderick Pope – Crosby's co-defendant and accomplice. Critically, by providing that information to the officers, Harris's statements established – apart from any of the evidence the officers already had – he was a crack cocaine dealer, and those statements could have been used against him as powerful evidence in regard to his own pending crack cocaine distribution charge. Moreover, had the information not been truthful, Harris could have been subjected to criminal and civil liability for providing the false information due to the fact his identity was known to the officers. See State v. Driggers, 322 S.C. 506, 514, 473 S.E.2d 57, 61 (Ct. App. 1996) ("Klepp-Egge also acted against his best interests by providing the police with information that possibly linked him to the crime."); see also United States v. Harris, 403 U.S. 573, 583-584 (1971) ("Common sense in the important daily affairs of life would induce a prudent and disinterested observer to credit these statements. People do not lightly admit to a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility – sufficient at least to support a finding of probable cause to search. That the informant may be paid or promised a 'break' does not eliminate the residual risk and opprobrium of having admitted criminal conduct."). Accordingly, just as this Court determined, Harris' statements to the officers were sufficiently reliable – once corroborated – to establish reasonable articulable suspicion for the traffic stop and probable cause for the search of the vehicle Crosby was riding in with Pope. See Driggers, 322 S.C. at 511, 473 S.E.2d at 60 ("[A] non-confidential informant should be given higher level of credibility because he exposes himself to public view and to possible criminal and civil liability

should the information he supplied prove to be false."); see also Illinois v. Gates, 462 U.S. 213, 233 (1983) ("[An informant's veracity and basis of knowledge] are better understood as relevant consideration in the totality-of-the-circumstances analysis that traditionally has guided probable cause determinations: a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability.").

Furthermore, in seeking for this Court to grant rehearing, Crosby maintains this Court erred in finding the information provided by Harris was sufficiently corroborated to establish both reasonable articulable suspicion and probable cause in light of the facts Pope's vehicle was not at the Lighthouse Fish Camp as Harris stated it would be when Captain McNeil first observed Pope's vehicle and there were allegedly no drugs found in Pope's vehicle at the time of the search. Contrary to Crosby's contentions, the information provided by Harris was sufficiently corroborated to provide reasonable suspicion and probable cause, including as to the location of Pope's vehicle. Specifically, prior to the stop, Harris informed the officers Pope would be travelling in a black Ford Expedition on Highway 176 and would be coming into Union County towards a convenience store located off of the highway. Thereafter, as the officers waited along the highway for the described vehicle to arrive, Harris informed the officers Pope had just driven past the Lighthouse Fish Camp. Moments later, the officers observed a black Ford Expedition driving into Union County along Highway 176 approximately a mile to a mile and half after it would have passed the Lighthouse Fish Camp and only a few miles away from the location where Harris arranged to meet Pope, which was entirely consistent with the information reported by Harris in light of the fact Pope's vehicle was travelling down a highway at highway speeds and had just passed a fixed location along that highway. Thus, before initiating the investigatory stop of the black Ford Expedition, the officers verified: (1) the

vehicle matched the description of the make, model, and color of the vehicle identified by Harris; (2) the vehicle was travelling towards the location where Pope was supposed to meet Harris; and (3) it had recently driven by a specific location on the highway Pope reported he had just passed. See Alabama v. White, 496 U.S. 325, 332 (1990) ("Because only a small number of people are generally privy to an individual's itinerary, it is reasonable for police to believe that a person with access to such information is likely to also have access to reliable information about that individual's illegal activities."); see also Gates, 462 U.S. at 244-245 ("It is enough, for purposes of assessing probable cause, that 'corroboration through other sources of information reduced the chances of a reckless or prevaricating tale,' thus providing 'a substantial basis for crediting the hearsay.' " (citation omitted)). Because the officers were able to corroborate those substantial details, including the information regarding the black Ford Expedition's precise location at a specific time, it was entirely reasonable for the officers to believe Harris was also correct when he indicated Pope was involved in criminal activity and had crack cocaine in the black Ford Expedition, and that probable cause basis to stop and search Pope's vehicle was further enhanced when the officers observed Crosby make furtive movements after he saw the officers behind Pope's vehicle. See White, 496 U.S. at 331 ("[B]ecause an informant is shown to be right about some things, he is probably right about other facts that he has alleged, including the claim that the object of the tip is engaged in criminal activity."). For those reasons, this Court properly affirmed the trial judge's ruling regarding the constitutionality of the investigatory stop and search. Crosby's petition for rehearing should be denied.

Chain of Custody Issue

In his petition for rehearing, Crosby contends this Court misapprehended the issue raised in regard to the admissibility of the scale and crack cocaine. In support of that contention,

Crosby maintains the scale was a fungible item because it was allegedly not unique and identifiable while appearing to assert the scale's chain of custody was insufficient because one of its batteries was missing and its original evidence bag was broken. However, to the contrary, the scale was clearly a non-fungible item because it was fairly unique, readily identifiable, and relatively impervious to change – just like a gun, a purse, or a piece of porcelain from a toilet. Cf. State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 742 (2005) (instructing a gun is a non-fungible item); State v. Rogers, 361 S.C. 178, 186, 603 S.E.2d 910, 914 (Ct. App. 2004) (holding a purse was a non-fungible item); State v. Glenn, 328 S.C. 300, 305, 492 S.E.2d 393, 395 (Ct. App. 1997) (finding a porcelain fragment from a toilet was a non-fungible item). As a result, the scale could properly be admitted if it was identified as the one it was purported to be and was in substantially unchanged condition, and the trial judge properly admitted the scale in Crosby's case after those requirements were met through the testimony presented during trial.[1] See Freiburger, 366 S.C. at 134, 620 S.E.2d at 741-742 (recognizing the establishment of a chain of custody is not required prior to the admission of non-fungible items into evidence and explaining non-fungible evidence can properly be admitted on the "basis of testimony that the item is the one in question and is in a substantially unchanged condition").

Furthermore, in seeking for this Court to grant rehearing, Crosby maintains the chain of custody in regard to the crack cocaine was insufficient solely because false information was included in a chain of custody affidavit. However, testimony was presented during Crosby's trial establishing the identity of each person who was in custody of the crack cocaine and what was

[1] Moreover, just at this Court correctly concluded, the State established a sufficient chain of custody in regard to the scale even though one was not required through the testimony presented during trial demonstrating Lieutenant Sherfield was in possession of the scale from the point it was taken during the search to the point it was introduced during trial. See Rogers, 361 S.C. at 187, 603 S.E.2d at 914-915 ("[E]ven if a chain needed to be established, it had been. At trial, every individual who had possession of the purse, which contained the slip of paper, testified to having it and denied tampering with it.").

done with it prior to analysis, which meant a complete chain of custody was established. See State v. Governor, 362 S.C. 609, 613, 608 S.E.2d 474, 476 (Ct. App. 2005) (finding fungible evidence should have been admitted in light of the fact a complete chain of custody was presented and noting discrepancies in the manner in which the evidence was handled were not a proper basis for suppression); see also Benton v. Pellum, 232 S.C. 26, 33-34, 100 S.E.2d 534, 537 (1957) (" 'Where the substance analyzed has passed through several hands the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis.' " (citation omitted)). Accordingly, because a complete chain of custody was established, any issues regarding the credibility of the testimony or the information included on the chain of custody affidavit were solely matters impacting the weight to be afforded the crack cocaine and not its admissibility. See State v. Johnson, 318 S.C. 194, 196, 456 S.E.2d 442, 444 (Ct. App. 1995) ("The State established a continuous chain of custody through the testimony of all people who had control and possession of the evidence. Although a discrepancy existed as to the dates Dailey received the evidence, no evidence was presented to indicate the drugs were not within the control of identifiable people during the entire time. **A reconciliation of this discrepancy was not necessary to establish the chain of custody**, but merely reflected upon the credibility of the evidence rather than its admissibility." (emphasis added)). For those reasons, this Court correctly affirmed the trial judge's ruling in regard to the scale and crack cocaine. Crosby's petition for rehearing should be denied.

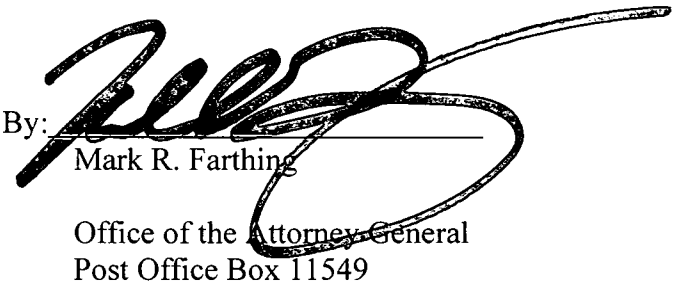
Conclusion

Based on the foregoing coupled with the arguments raised in the Final Brief of Respondent and during the oral argument before this Court, the State respectfully requests that Crosby's petition for rehearing be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General



By: _____
Mark R. Farthing

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

September 8, 2014

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PROOF OF SERVICE

I, Angela S. Bennett, certify that I have served the within Respondent's Return to Petition for Rehearing on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Carmen V. Ganjehsani, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 8th day of September, 2014.

ANGELA S. BENNETT
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727