

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County

William H. Seals, Jr., Circuit Court Judge

Opinion No. 2014-UP-265 (S.C. Ct. App. filed June 30, 2014)
11-GS-23-09810 & 09811.

THE STATE,

RESPONDENT,

V.

GREGORY ALLAN IVERY,

PETITIONER.

2012-213216

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

CARMEN V. GANJEHSANI
Appellate Defender

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

ATTORNEY FOR PETITIONER.

RECEIVED

SEP 18 2014

S.C. Supreme Court

INDEX

INDEX 1

CERTIFICATION BY COUNSEL 2

QUESTION PRESENTED FOR REVIEW 3

STATEMENT OF THE CASE 4

ARGUMENT

The Court of Appeals erred in affirming the Trial Court’s admission into
evidence of a video recording of the alleged drug transaction where the State
failed to properly authenticate the video when it did not present any witness
at trial who could testify that the video accurately depicted the alleged drug
transaction 5

CONCLUSION 13

CERTIFICATION OF COUNSEL

The Court of Appeals issued its decision on June 30, 2014. App. 1-2. Counsel for Petitioner certifies that the petition for rehearing was made on July 15, 2014 and finally ruled on by the Court of Appeals on August 20, 2014. App. 3-11.

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in affirming the Trial Court's admission into evidence of a video recording of the alleged drug transaction where the State failed to properly authenticate the video when it did not present any witness at trial who could testify that the video accurately depicted the alleged drug transaction?

STATEMENT OF THE CASE

On June 12, 2012, Petitioner Gregory Allan Ivery was indicted by the Greenville County Grand Jury for (1) distribution of crack cocaine in violation of S.C. CODE ANN. § 44-53-375; and (2) distribution of crack cocaine within ½ mile of a school or park in violation of § 44-53-445. R.106.

A trial was held before the Honorable William Seals and a jury on October 11, 2012. R. 1. Ivery was represented by Ernest Hamilton, and the State was represented by Assistant Solicitor Lauren Davis Price. Id.

After informing the court that it could not reach a decision with “eleven guilty, one not guilty,” the Trial Court gave an Allen¹ charge, after which the jury returned a verdict of guilty on both counts. R. 95, l. 6 – 99, l. 4. The Trial Court sentenced Ivery to (1) twenty-three (23) years as a third offender for distribution of crack cocaine; and (2) ten (10) years concurrent on the proximity to a school or park charge. R. 104, ll. 10-14.

On June 30, 2014, the South Carolina Court of Appeals affirmed Petitioner’s convictions and sentences in an unpublished opinion. *State v. Ivery*, Opinion No. 2014-UP-265 (S.C. Ct. App. filed June 30, 2014); App. 1-2. Petitioner subsequently filed a petition for rehearing on July 15, 2014. App. 3-10. The Court of Appeals issued an order denying the petition for rehearing on August 20, 2014. App. 11.

This petition for writ of certiorari to the Court of Appeals follows.

¹ Allen v. United States, 164 U.S. 492 (1896).

ARGUMENT

The Court of Appeals erred in affirming the Trial Court's admission into evidence of a video recording of the alleged drug transaction where the State failed to properly authenticate the video when it did not present any witness at trial who could testify that the video accurately depicted the alleged drug transaction.

At trial, Detective Charles Keith Cothran testified that an individual named James Grant signed an agreement to work as a confidential informant with the Greenville City Police Department. R. 24, l. 5 – 25, l. 25. Grant asked if there was anything he could do for the police department because he had been charged with shoplifting and therefore, he decided to become a confidential informant in an effort to try to get assistance with his shoplifting charge. R. 37, ll. 14-21; 49, ll. 3-10.

Grant informed Detective Cothran that he could purchase crack cocaine from an individual named Greg Ivery. R. 24, ll. 9-14. Detective Cothran told Grant to arrange a deal for June 30, 2011 and to come to the police department that day. R. 26, ll. 2-4.

On June 30, 2011, Detective Cothran testified that Grant arrived around 11:40 a.m. and he equipped Grant with a hidden audio and video recording device. R. 27, l. 7 – 29, l. 17. Detective Cothran also said that Grant explained the he was going to buy \$140 worth of crack cocaine from Ivery, and Detective Cothran accordingly gave Grant \$140 of police funds for the purpose of purchasing crack cocaine from Ivery. R. 29, ll. 19-24.

Detective Cothran then said that he and other detectives got in their vehicles, Grant got in his own vehicle, and Grant then followed the officers to the deal location which was purportedly Ivery's residence. R. 30, l. 23 – 31, l. 9.

Detective Cothran testified that initially Ivery was not home, but they waited a little while and Ivery arrived. Grant then allegedly told Ivery he wanted to purchase \$140 worth

of crack and gave Ivery the \$140 worth of police funds. Ivery then allegedly went inside the home to retrieve the crack cocaine and brought it to Grant. Grant then left and returned to the police department. R. 31, l. 14 – 32, l. 1.

Detective Cothran did not physically see or observe any of the alleged drug transaction. R. 32, ll. 2-4.

At trial, the State moved to admit the video recording of the alleged drug transaction into evidence and publish it to the jury. R. 42, l. 21 – 43, l. 7; State’s Ex. 4 (video). Ivery’s counsel objected on the ground that Detective Cothran could not authenticate the video because he was not in the video and did not observe the events that occurred in the video. R. 43, ll. 9-13. The Trial Court overruled Ivery’s objection and the video was admitted into evidence and played for the jury in open court. R. 43, ll. 14-22. Ivery renewed his objection to the admissibility of the video recording at the close of the State’s case because Detective Cothran could not verify that the video was an accurate portrayal of the alleged transaction. R. 78, ll. 14-21.

The Trial Court erred in admitting the video recording of the alleged drug transaction into evidence because the State did not lay a proper foundation for its admissibility. South Carolina Rule of Evidence 901(a) requires “authentication or identification as a condition precedent to” the admissibility of evidence. This requirement “is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Rule 901(a), SCRE.

Rule 901(b)(1) provides that authentication can be accomplished by testimony from someone familiar with and with knowledge of the contents of the document or recording. Authentication can therefore be accomplished through someone with knowledge of the

events depicted on a videotape. See State v. Campbell, 259 S.C. 339, 344, 191 S.E.2d 770, 773 (1972) (“Normally it is sufficient to justify admittance of photographs into evidence if a person familiar with the scene can say that the pictures truly represent the scene involved.”)

The State presented no witness at trial who could testify that the video accurately depicted the alleged drug transaction. Detective Cothran conceded he did not observe the alleged transaction. R. 32, ll. 2-4. While Detective Cothran testified that he could hear the conversation during the alleged transaction, he never verified at trial that it was Ivery’s voice on the audio. Id.; 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, Grant denied ever purchasing any crack from Ivery and denied that it was him appearing in the video recording. Grant further denied circling Ivery’s picture in a subsequent photo line-up. R. 64, l. 9 – 65, l. 19; 68, ll. 18 – 21. Therefore, the State presented no 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.”).

Where the State did not offer the testimony of anyone who witnessed the alleged drug transaction between Grant and Ivery, 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, 399 S.C. at 527, 732 S.E.2d at 228. Here, the State heavily relied on the videotape to identify Ivery as the individual who allegedly sold drugs to Grant. 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 Ivery 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 Ivery as the one who sold drugs to Grant would have rested primarily on Grant's pre-trial identification of Ivery, a witness who then declined to identify Ivery at trial as the seller and who denied ever circling Ivery'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 Grant, the video recording, relied upon so heavily by the State under these circumstances, was not harmless beyond a reasonable doubt. Accordingly, it was error for the Trial Court to have admitted the video recording into evidence, and Ivery is entitled to a new trial.

In its Opinion affirming Ivery's convictions, the Court of Appeals 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." As argued above, Ivery 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.

The Court of Appeals also cited to Rule 901(b) which provides examples of authentication or identification conforming with the requirements of Rule 901. The Court of Appeals 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 argued 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 Ivery and denied that it was him appearing in the video recording. The alleged informant further denied circling Ivery’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 Ivery. [State's Exhibit 4 – Video Recording (on file with court)]. When the alleged informant denied ever purchasing the drugs from Ivery 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.

Two cases relied upon by the State in its Respondent's Brief before the Court of Appeals 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 Ivery's case, the alleged informant denied that he was involved in any drug transaction with Ivery.

In Brooks v. Commonwealth, 424 S.E.2d 566 (Va. 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 Ivery's trial, there was no testimony that Detective

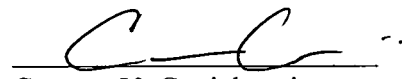
Cothran was familiar with Ivery's voice and could identify Ivery's voice on the video recording.

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. It was an error as a matter of law for the Trial Court to have admitted the video recording as evidence in Ivery's trial where it was not properly authenticated, and Ivery is entitled to a new trial.

CONCLUSION

For the reasons set forth herein, Petitioner Gregory Allan Ivery respectfully requests this Court to grant his Petition and issue a writ of certiorari to the Court of Appeals to review the decision, reverse the Opinion of the Court of Appeals and his convictions, and remand the case for a new trial.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER.

This 18th day of September, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
William H. Seals, Jr., Circuit Court Judge

Opinion No. 2014-UP-265 (S.C. Ct. App. filed June 30, 2014)
11-GS-23-09810 & 09811.

THE STATE,

RESPONDENT,

V.

GREGORY ALLAN IVERY,

PETITIONER.

CERTIFICATE OF SERVICE

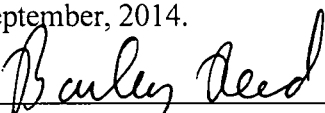
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and the S.C. Court of Appeals this 18th day of September, 2014.



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day
of September, 2014.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021