

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

On Writ of Certiorari to the Court of Appeals
Appeal from Greenville County
Honorable William H. Seals, Jr., Circuit Court Judge
Appellate Case No. 2014-001967

THE STATE,

Respondent,

vs.

GREGORY ALLAN IVERY,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON CERTIORARI

The Court of Appeals properly affirmed the trial judge's decision to admit an audio-visual recording of a confidential informant's narcotics transaction with Ivery because the State fully authenticated the recording pursuant to the requirements of Rule 901, SCRE, by presenting the testimony of an officer who installed properly-functioning recording equipment on the confidential informant prior to the transaction, was familiar with the area where the transaction took place, heard the transaction as it occurred by using a listening device, reviewed the recording captured by the recording equipment after the transaction was complete, made an exact copy of the recording without alteration, and confirmed the recording was a true and accurate depiction of the transaction he heard occur.

STATEMENT OF THE CASE

Procedural History

In September of 2011, Petitioner Gregory Allan Ivery was arrested for distributing crack cocaine at the conclusion of a narcotics investigation involving the assistance of a confidential informant. In June of 2012, the Greenville County Grand Jury indicted Ivery for one count of distribution of crack cocaine and one count of distribution of crack cocaine within one-half mile of a school or park. On October 11, 2012, a jury trial was commenced in the Greenville County Court of General Sessions with the Honorable William H. Seals, Jr., circuit court judge, presiding. At the conclusion of trial, the jury convicted Ivery as indicted. Following the verdict, the trial judge sentenced Ivery to concurrent terms of imprisonment of twenty-three years for distribution of crack cocaine and ten years for distribution of crack cocaine within one-half mile of a school or park. Ivery then timely filed and perfected an appeal.

Subsequently, following oral argument, the Court of Appeals issued an unpublished opinion in which it unanimously affirmed Ivery's conviction. State v. Ivery, Op. No. 2014-UP-265 (S.C. Ct. App. filed June 30, 2014). Thereafter, Ivery petitioned the Court of Appeals for rehearing, and the petition was denied. Ivery then filed a petition for a writ of certiorari in the Supreme Court.

Factual History

In June of 2011, James Grant offered to begin working as a confidential informant for the Greenville Police Department after he was charged with shoplifting. (R. pp. 24-25; p. 37). In response to Grant's offer, Detective Charles Cothran, a detective in the vice and narcotics unit of the Greenville Police Department, advised Grant he could not promise him anything but would talk to the solicitor about any assistance Grant provided

to the police department. (R. p. 23; p. 25; p. 37). Grant then signed an agreement to the work as a confidential informant and began providing Detective Cothran with information about narcotics activity in the community. (R. pp. 24-25).

Later that month, Grant advised Detective Cothran he could purchase crack cocaine from an individual known as "Red," who was subsequently identified as Petitioner Gregory Allan Ivery, and Detective Cothran instructed Grant to attempt to arrange a narcotics transaction with Ivery. (R. p. 24; p. 26). Thereafter, on June 30, 2011, Grant reported to Detective Cothran's office and advised the officer he had successfully arranged to purchase \$140 worth of crack cocaine from Ivery at Ivery's residence. (R. pp. 26-27; p. 29; p. 31). Detective Cothran then searched Grant to make sure he was not in possession of any contraband while Detective Russell Irvin of the Greenville Police Department searched Grant's vehicle. (R. p. 15; p. 18; pp. 27-29). After no contraband was found, Detective Cothran equipped Grant with a hidden audio and video recording device and provided him with \$140 in law enforcement funds. (R. p. 18; pp. 27-29). The three men then drove to a location near Ivery's residence, and the officers waited there as Grant continued on to the residence in his own vehicle.¹ (R. pp. 18-19; pp. 30-31).

Once Grant arrived at Ivery's residence, he waited for Ivery to arrive while the officers continued to monitor him by using a listening device. (R. p. 18; p. 31). Shortly thereafter, Ivery arrived at his residence, and Grant gave him the law enforcement funds he had received from Detective Cothran. (R. p. 31). In exchange, Ivery gave Grant a small plastic bag he had retrieved from his residence that contained 1.79 grams of crack

¹ During trial, Detective Cothran confirmed he was familiar with the area where the transaction occurred based on his patrol experience. (R. p. 40). He further confirmed Ivery's residence was located approximately one-eighth of a mile away from a community center. (R. p. 40).

cocaine. (R. p. 31; p. 69; p. 71). Grant then left Ivery's residence, and the officers followed him back to their office. (R. p. 32).

Upon arriving back at the office, Grant gave Detective Cothran the crack cocaine he had purchased from Ivery, and Detective Cothran removed the recording device from Grant, transferred the recording of the transaction from the recording device to his computer, reviewed the recording, reproduced an exact and unaltered copy of it onto a D.V.D., and secured the D.V.D. containing the recording as evidence. (R. p. 32; pp. 39-40; p. 52). Detective Cothran then asked Grant to identify the seller of the crack cocaine from a photographic lineup, and Grant identified Ivery as the person who sold him the crack cocaine without any hesitation. (R. pp. 33-35).

Subsequently, Ivery was arrested and indicted for distribution of crack cocaine and distribution of crack cocaine within one-half mile of a school or park, and he proceeded to trial. (R. pp. 3-4; pp. 105-106; pp. 108-109). During trial, Detective Irvin and Detective Cothran testified about their roles in the narcotics investigation, with both officers confirming they monitored Grant's transaction with Ivery as it took place over a listening device. (R. pp. 16-19; pp. 26-32). Additionally, Detective Cothran noted he secured an audio-visual recording of the transaction from the recording device equipped to Grant prior to the transaction and indicated the recording equipment was working properly at that time. (R. pp. 39-42). Furthermore, he confirmed he reviewed the recording of the narcotics transaction recovered from the device, Ivery was visible in the recording, and it was a fair and accurate depiction of Grant's transaction with Ivery. (R. pp. 41-43).

Following Detective Cothran's testimony, the solicitor moved for the recording to be admitted into evidence, and defense counsel objected. (R. p. 43). In support of that

objection, defense counsel asserted: "He's saying that – he's not authenticating what he saw in the video as to him being there. He looked at it but he wasn't the one in the video. How can he authenticate something that he was not there to see?" (R. p. 43). The trial judge then overruled the objection, and the recording was admitted and played for the jury. (R. p. 43). After the recording was played for the jury, Detective Cothran again confirmed the recording truly and accurately depicted the transaction that occurred on June 30, 2011, and he noted a telephone conversation he had with Grant during the transaction was depicted in the recording. (R. pp. 43-44).

Subsequently, Grant testified for the State and indicated he was currently incarcerated while serving a thirty-two month sentence for shoplifting. (R. p. 60; p. 66). Grant then went on to confirm his signature was on the photographic line-up form from which Ivery's photograph was identified but denied circling anything, signing anything, purchasing anything from anyone, appearing in any recording, or receiving any money to purchase crack cocaine. (R. pp. 64-65). As his testimony continued, he further asserted he was not going to be the solicitor's "do boy." (R. p. 67).

Thereafter, James Armstrong, an analyst in the Greenville County crime lab and an expert in chemical drugs, testified about his analysis of the substance secured in Ivery's case. (R. p. 69; p. 72). Armstrong confirmed the substance was 1.79 grams of crack cocaine, and the crack cocaine was admitted into evidence without objection. (R. pp. 70-71). Detective Cothran was then recalled to the witness stand, and he testified he retrieved the crack cocaine from Grant after the narcotics transactions while further noting Grant gave a signed statement in which he admitted he purchased crack cocaine from Ivery before turning it over to the officer. (R. p. 74; p. 76).

Subsequently, the State rested its case, defense counsel moved for a directed verdict, and the motion was denied. (R. pp. 77-78). Defense counsel then renewed his objection to the admission of the recording of the narcotics transaction, asserting:

The other matter is the showing of the video that was not sufficiently validated by the officer. He wasn't in the video and therefore he couldn't verify that it was accurate on everything that was shown in it. He said he saw it and it looked like it happened or something so we object to the evidence of the video in this case.

(R. p. 78). Once again, the trial judge denied the motion. (R. p. 78).

Thereafter, at the conclusion of trial, the jury convicted Ivery of distribution of crack cocaine and distribution of crack cocaine within one-half mile of a school or park.

(R. pp. 97-99). Following the verdict, Ivery candidly apologized to the trial judge, stating:

I want to apologize to the Court for even being here. Ain't much I can say about that. If I had to do it all over again, I'd do it entirely different. Now, I got a chance to look at my life and try to make the best of it. I'm not trying to run away from anything, I'm going to face my responsibility from anything I go to do. I want to apologize for putting you through what I put you through an it ain't much I can say. I'm sorry and ask for forgiveness.

(R. pp. 103-104). The trial judge then sentenced Ivery to an aggregate term of imprisonment of twenty-three years, and Ivery appealed his convictions. (R. p. 104).

On appeal, Ivery sought a reversal of his convictions, arguing the trial judge erred by admitting the recording of the drug transaction and by giving what Ivery contended was an unconstitutionally coercive Allen charge to the jury. (App'x pp. 1-2). However, the Court of Appeals affirmed. (App'x pp. 1-2). In affirming, the Court of Appeals found the authentication requirements of Rule 901, SCRE, had been satisfied in Ivery's case in regard to the recording and the trial judge's Allen charge to the jury was not improper or unconstitutionally coercive. (App'x p. 2).

ARGUMENT

The Court of Appeals properly affirmed the trial judge's decision to admit an audio-visual recording of a confidential informant's narcotics transaction with Ivery because the State fully authenticated the recording pursuant to the requirements of Rule 901, SCRE, by presenting the testimony of an officer who installed properly-functioning recording equipment on the confidential informant prior to the transaction, was familiar with the area where the transaction took place, heard the transaction as it occurred by using a listening device, reviewed the recording captured by the recording equipment after the transaction was complete, made an exact copy of the recording without alteration, and confirmed the recording was a true and accurate depiction of the transaction he heard occur.

Ivery contends the Court of Appeals erred by affirming the trial judge's decision to admit the audio-visual recording of Grant's narcotics transaction with Ivery. In support of that contention, Ivery maintains the recording was not properly authenticated because the State failed to offer the testimony of anyone who actually visually observed the transaction take place. Importantly though, just as both the trial judge and the Court of Appeals recognized, such testimony was **not** required in order for the recording to be properly authenticated. Instead, in order for the recording to be authenticated, the State was only required to introduce sufficient evidence to support a finding the recording was what it was purported to be, and the State satisfied that threshold requirement by introducing the testimony of the officer who installed the properly-functioning recording equipment on Grant, was familiar with the area where the transaction took place, heard the transaction as it occurred by using a listening device, reviewed the transaction captured by the recording equipment, made an exact copy of the recording without altering it in any way, and confirmed the recording was a true and accurate depiction of the transaction he heard occur. Because the officer's testimony confirmed the recording was exactly what it was purported to be, the trial judge did not abuse his broad discretion in admitting the recording into evidence during trial, and the Court of Appeals committed

no conceivable error in affirming the trial judge's evidentiary ruling. Accordingly, Ivery's petition for a writ of certiorari should be denied.

STANDARD OF REVIEW

The reception or exclusion of evidence is a matter left largely to the sound discretion of the trial judge. State v. Groome, 274 S.C. 189, 190-191, 262 S.E.2d 31, 32 (1980). On appeal, appellate courts give "great deference" to trial judges when reviewing evidentiary rulings. State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010); see State v. Bixby, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010) ("[D]eference is due to the trial court's admission of the evidence."). Moreover, an appellate court will not reverse a trial judge's decision to admit or exclude evidence absent a clear prejudicial abuse of the trial judge's broad discretion in evidentiary matters. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-848 (2006) ("The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice."); State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice."). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

ANALYSIS

In general, evidence must be authenticated before it can be admitted. State v. Aragon, 354 S.C. 334, 336, 579 S.E.2d 626, 627 (Ct. App. 2003). In order for evidence to be authenticated, the party offering the evidence must establish the evidence is what it

is claimed to be. Id.; see Rule 901(a), SCRE ("The requirement of authentication or identification 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."). That requirement can be satisfied in numerous ways, including through the presentation of the testimony of a witness with knowledge the matter is what it is purported to be. Rule 901(b)(1), SCRE. Significantly, direct proof is **not** required in order to authenticate a particular piece of evidence, and, instead, evidence can be authenticated through indirect or circumstantial evidence. Winburn v. Minnesota Mut. Life Ins. Co., 261 S.C. 568, 576-577, 201 S.E.2d 372, 376 (1973). Once the threshold requirement of authentication has been met, the evidence can then properly be admitted during trial. State v. Rich, 293 S.C. 172, 173, 359 S.E.2d 281, 282 (1987).

In the case sub judice, the Court of Appeals properly affirmed the trial judge's decision to admit the recording of the narcotics transaction because the testimony of Detective Cothran sufficiently established the recording was a true and accurate depiction of the transaction. Critically, although Detective Cothran did not personally see the transaction as it was taking place, Detective Cothran **heard** the transaction as it was occurring through the use of a listening device. Because Detective Cothran heard the entire transaction as it was taking place, he had direct, personal knowledge of the events that occurred during the transaction and was able to confirm the audio and video recording of the transaction was a true and accurate representation of what he had heard. Cf. Aragon, 354 S.C. at 336, 579 S.E.2d at 627 (finding an audio recording of a telephone conversation was properly authenticated and admitted where a person who heard the conversation testified the recording fairly and accurately represented the conversation). Specifically, Detective Cothran testified during trial he installed audio and video

recording equipment on Grant, the recording equipment was functioning properly at the time, he monitored and heard the transaction as it occurred by using a listening device, he was familiar with the area where the transaction occurred based on his patrol experience, and the recording of the transaction offered into evidence was a true and accurate depiction of the transaction captured by the recording equipment and had not been altered in any way. Cf. Crutcher v. State, 68 So. 3d 724, 733 (Miss. Ct. App. 2011) (holding a videotape of a narcotics transaction was sufficiently authenticated **solely** by the testimony of officers involved in the investigation that were not physically present when the transaction took place because their testimony established the officers installed recording equipment on a confidential informant prior to the narcotics transaction, the officers were familiar with scene where the transaction occurred, and the officers heard the transaction as it occurred by using a listening device); Brooks v. Commonwealth, 15 Va. App. 407, 410-411, 424 S.E.2d 566, 569 (Va. Ct. App. 1992) (finding a videotape of a narcotics transaction was properly authenticated despite the fact no officers actually observed the transaction occur where testimony was presented establishing the tape accurately reflected the events officers listening to the transaction heard and the tape included an on-screen display of the passage of time in seconds). Notably, Detective Cothran was even able to confirm a telephone conversation he personally had with Grant in the moments leading up to the narcotics transaction was depicted in the recording. As a result, there was sufficient evidence from which the trial judge, the jury, and the Court of Appeals could conclude the recording was exactly what it was purported to be – a recording of Ivery’s drug transaction with Grant.

In arguing the recording was not properly authenticated, Ivery contends the recording could only be properly authenticated by Grant because Detective Cothran did

not personally see the transaction as it was occurring and was not familiar with Ivery's voice. However, such a contention ignores the fact evidentiary items like recordings can be authenticated in a broad variety of ways by both direct and circumstantial evidence. See Rule 901(b), SCRE (containing a non-exhaustive list of ways in which evidence can properly be authenticated, including through the testimony of a witness with knowledge that a matter is what it is claimed to be); see also Winburn, 261 S.C. at 576-577, 201 S.E.2d at 376 (instructing evidence can be authenticated by indirect or circumstantial evidence). In Ivery's case, Detective Cothran's testimony was more than sufficient to authenticate the recording of the narcotics transaction because it established the recording of the transaction was captured on properly-functioning recording equipment, depicted exactly what the officer personally heard occurring, and had not been altered in any way. As a result, the trial judge did not abuse his broad discretion in admitting the recording of Ivery's transaction with Grant even though Detective Cothran only heard the events depicted in the recording, and the Court of Appeals committed no error in affirming the trial judge's evidentiary ruling. Ivery's petition for a writ of certiorari should be denied.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 26, 2014

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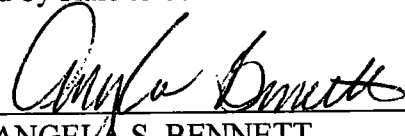
Petitioner.

PROOF OF SERVICE

I, Angela S. Bennett, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner 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
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I further certify that all parties required by Rule to be served have been served.
This 26th day of September, 2014.



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