

SCANNED

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)
)
Nathaniel Green, #307622)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2008-CP-42-3298

**ORDER OF DISMISSAL
APPLICANT'S 60(b) MOTION**

This matter comes before the Court by way of a 60(b) Motion filed on February 9, 2012, seeking relief from the Order of Dismissal in the above listed matter. The Respondent made its Return and Motion to Dismiss and a hearing was held on the Respondent's motion. Following the denial of the Respondent's motion, an evidentiary hearing into the matter was convened on January 21, 2014, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by J. Falkner Wilkes, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

Both Applicant and Respondent agreed to submit the records from a previous case, which addressed the issue at hand, as well as memoranda regarding the matter in place of testimony.¹ This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, trial transcript, and Applicant's appellate records.

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CLERK OF COURT
SPARTANBURG COUNTY
2014 AUG 28 PM 3:49
J. L. HAWKLEY

¹ Robert Rosenburg and Jane Millwood, current and prior Evidence Custodians for the Spartanburg County Sheriff's Department, both testified at the hearing for Gibson v. State, 2008-CP-42-6126. Applicant's Counsel was also present and questioned these witnesses at the Gibson hearing. Both Applicant and Respondent agreed to submit the record of their prior testimony in place of calling them as witnesses again because the issue was the same and testimony would be identical.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Applicant was indicted during the November 2004 term of the Spartanburg County Grand Jury trafficking in crack cocaine (04-GS-42-4993). Thomas A.M. Boggs, Esquire, represented the Applicant. On February 15, 2005, a bench trial was held before the Honorable J. Derham Cole. Judge Cole found the Applicant guilty and sentenced him to confinement for a period of twenty-five (25) years with credit for time served.

A timely notice of appeal was filed and Joseph L. Savitz, III, Esquire, submitted an Anders appeal on the Applicant's behalf. The Court of Appeals dismissed the appeal by order filed June 11, 2007. The remittitur was issued on June 27, 2007.

The Applicant filed an Application for Post-Conviction Relief on June 23, 2008. In his Application, the Applicant alleged that he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel;
2. Failure to argue "ambiguities in title 17-25-50;"
3. Failure to object to chain of custody;
4. Failure to challenge the credibility of drugs;
5. Failure to object to the State's line of questions on direct; and
6. Brady violation were the State withheld information.

An evidentiary hearing into the matter was convened on July 27, 2009, at the Spartanburg County Courthouse. The Applicant was present at the hearing and represented by Vanessa Cason, Esquire. Michelle Parsons Kelley of the South Carolina Attorney General's Office represented the State.

At this PCR hearing, the Applicant claimed the State had used a form that had been signed and notarized prior to being filed out. The Applicant alleged this violates the rule requiring personal signature. At the PCR hearing, Applicant submitted a memorandum alleging that the Form C in his case, dated 7-1-04 and with Control No. 5007684, bears the signature of Jane Millwood as the Evidence Officer and Robert Rosenberg as the Notary Public. Applicant alleged that the document was not personally signed by Jane Millwood in the presence of Robert Rosenberg. The Applicant also claimed Jane Millwood made errors to the form and failed to come to his trial and testify. The Applicant claimed Counsel was ineffective for disputing the chain of custody on these grounds. Counsel testified he did not know of any chain of custody issues at trial and was unaware of the chain of custody signature as a point of argument prior to the trial. Applicant failed to produce original forms or the testimony of anyone to support those allegations.

Following the hearing, the Honorable J. Mark Hayes II denied the application on November 2, 2009. A 59(e) motion was filed by Applicant and subsequently dismissed on December 2, 2009.

A timely notice of appeal and Johnson Petition were filed and while the matter was pending before the South Carolina Supreme Court, Counsel was substituted. Counsel then sought leave from the Supreme Court to hold the appeal in abeyance and file a 60(b) motion in the lower court. *Currently, Applicant's appeal from the denial of his post-conviction relief application is being held in abeyance pending this Court's ruling.* This motion was granted and Applicant filed a 60(b) Motion on February 9, 2012. The State filed a Return and Motion to Dismiss and a hearing on the State's Motion was held. The Honorable J. Derham Cole denied the State's motion and ordered an evidentiary hearing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has reviewed the submitted memoranda. As a result, set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

As to the relevant portions of the record, this Court finds it pertinent that at Applicant's trial, the State introduced the videotape of the confidential informant buy, a photo lineup with the Applicant identified as the person selling drugs, as well as the crack cocaine in the BEST bag and analysis report, including chain of custody documents. At trial, Investigator Raymond, the lead investigator on the controlled buy, identified the BEST bag, State's Exhibit #6, as the same bag he used to collect the drugs from Keith Pearson and identified his [Raymond's] signature on the bag. (ROA p. 18). Raymond testified that he placed the BEST bag in the Sheriff's Office Evidence Locker. (ROA p. 18-9). Raymond also identified his signature on the chain of custody documents, State's Exhibit #7. (ROA p. 18-9). Keith Pearson, the confidential informant, identified his signature on State's Exhibit #7 as his signature once he handed over the drugs to Investigator Raymond. (ROA p. 29).

Analyst Beth Vaughn testified as to her process for reviewing the BEST bag to ensure that there has not been any tampering with the evidence prior to her analysis. (ROA p. 34). Vaughn identified the BEST bag, State's Exhibit #6, with her initials and the date the bag was opened, as well as her initials and the date she resealed the bag following her analysis. (ROA p. 35). Vaughn also identified the chain of custody documents, State's Exhibit #7, including the Form A, which was signed by Vaughn following her analysis of the drugs. (ROA p. 36).

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Addressing the information provided by consent of both parties, which included the testimony of both Robert Rosenberg and Jane Millwood, evidence custodians at the time of Applicant's arrest and trial². Both Rosenberg and Millwood testified as to their policies and procedures for handling evidence transfer from the Drop off for the Sheriff's Office to the Chemical Analysis Drop off. The Form C from Applicant's case has the date the BEST bag was received by Jane Millwood from the drop box (7-1-04) and indicates that the BEST bag was submitted by Investigator Raymond. The form further indicates that Millwood then delivered the BEST bag to the drug vault of the Sheriff's office on 7-1-04. (Green - PCR Evidence p. 116).

This Court finds that although the testimony and evidence presented during the Gibson PCR hearing shows a practice of pre-notarizing the signature of the evidence custodian and then using copied forms to enter each piece of evidence, there is no indication that the evidence was ever tampered with or affected by this process in Applicant's case. The Applicant failed to meet his burden of proving that the outcome of his trial would have been different had Counsel known of this practice and objected to the chain of custody prior to trial. In fact, had Counsel made a pre-trial objection, the issue would have most likely been moot as soon as the State called Jane Millwood to testify.

Further, this Court finds that in actuality neither the Form C nor testimony of Millwood was necessary according to case law. The South Carolina Supreme Court held that "where all individuals in the chain are, in fact, identified and the manner of handling is reasonably demonstrated, it is not an abuse of discretion for the trial judge to admit the evidence in the absence of proof of tampering, bad faith, or ill-motive." State v. Hatcher, 392 S.C. 86, 93, 708 S.E.2d 750, 753-54 (2011). Further, the Court held that "[t]estimony from each custodian of

² As mentioned earlier, Robert Rosenberg and Jane Millwood both testified at the PCR hearing for Gibson v. State, 2008-CP-42-6126. Both Applicant and Respondent agreed to submit the record of their prior testimony in place of calling them as witnesses again because the issue was the same and testimony would be identical.

fungible evidence [] is not a prerequisite to establishing a chain of custody sufficient for admissibility. State v. Hatcher, 392 S.C. 86, 93, 708 S.E.2d 750, 753-54 (2011).

“The ultimate goal of chain of custody requirements is simple to ensure that the item is what it is purported to be.” State v. Hatcher, 392 S.C. 86, 95, 708 S.E.2d 750, 755 (2011); see Howard-Arias, 679 F.2d at 366 (“The purpose of this threshold requirement is to establish that the item to be introduced, i.e., marijuana, is what it purports to be, i.e., marijuana seized from the ‘Don Frank.’ ”). Notably, “[c]ourts have abandoned inflexible rules regarding the chain of custody and the admissibility of evidence in favor of a rule granting discretion to the trial courts.” Hatcher, 392 S.C. at 94, 708 S.E.2d at 754. In order to satisfy the requirements for establishing the chain of custody, the evidence and testimony presented during trial must simply not leave to conjecture who was in possession of the fungible item and what was done with it between its seizure and analysis. State v. Johnson, 318 S.C. 194, 196, 456 S.E.2d 442, 443 (Ct. App. 1995). The record clearly establishes that the evidence was obtained by the confidential informant (Keith Pearson), Investigator Raymond secured the evidence and submitted it for analysis, and it was subsequently analyzed and confirmed to be crack cocaine. This Court finds that even if counsel were deficient for failing to challenge the chain of custody on these grounds, there is no evidence that the Applicant was prejudiced by counsel’s failure to do so. The evidence submitted at trial was overwhelming and as such, this Court finds no prejudice. Therefore, this Motion is denied.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his Motion. Therefore, this Motion for Relief From Judgment, Rule 60(b)(2), SCRCP, must be

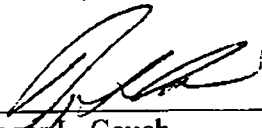
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denied and dismissed with prejudice.

IT IS THEREFORE ORDERED:

1. That the Motion for Relief From Judgment, Rule 60(b)(2), SCRCF, must be denied and dismissed with prejudice; and
2. Jurisdiction returns to the South Carolina Supreme Court for review of and determination of Applicant's pending appeal.

AND IT IS SO ORDERED this 28th day of August, 2014.



Roger L. Couch
Presiding Judge

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