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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Union County
John C. Hayes, III, Circuit Court Judge

Opinion No. 2014-UP-324 (S.C. Ct. App. filed 8/20/2014)
10-GS-44-1039

THE STATE,

RESPONDENT,

V.

RANDY JARROD CROSBY,

PETITIONER

APPELLATE CASE NO. 2014-002244

APPENDIX

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Randy Jarrod Crosby, Appellant.

Appellate Case No. 2011-205207

Appeal From Union County
John C. Hayes, III, Circuit Court Judge

Unpublished Opinion No. 2014-UP-324
Heard April 8, 2014 – Filed August 20, 2014

AFFIRMED

Dayne C. Phillips, of Lexington, and Appellate Defender
Carmen Vaughn Ganjehsani, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Mark Reynolds Farthing, both of
Columbia, for Respondent.

PER CURIAM: Randy Jarrod Crosby appeals his conviction for possession with intent to distribute crack cocaine. Crosby argues the trial court erred in: (1) refusing to suppress the evidence seized during the search of the vehicle when law enforcement did not have reasonable suspicion to justify the traffic stop; (2)

refusing to suppress the evidence seized during the search of the vehicle because law enforcement did not have probable cause to believe the vehicle contained evidence of criminal activity and no exigent circumstances existed to justify the warrantless search; and (3) finding a sufficient chain of custody existed to admit the evidence seized during the search of the vehicle and the drug evidence found in the police car. We affirm pursuant to Rule 220(b), SCACR, and *State v. Pope*, Op. No. 5261 (S.C. Ct. App. filed August 20, 2014) (holding in the appeal of Crosby's co-defendant, the trial court did not err in: (1) denying his motion to suppress the evidence seized during the search of the vehicle because law enforcement had reasonable suspicion to justify the traffic stop; (2) denying his motion to suppress the evidence seized during the search of the vehicle because law enforcement had probable cause to believe the vehicle contained evidence of criminal activity; and (3) admitting the scales found in search of the vehicle and the drugs found in the police car because the scales were a non-fungible item and the officer identified it as the set he found in the vehicle, and a complete chain of custody was established for the drugs, which were a fungible item).

AFFIRMED.

FEW, C.J., and SHORT and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Union County
John C. Hayes, III, Circuit Court Judge

Opinion No. 2014-UP-324 (S.C. Court of Appeals filed August 20, 2014)

THE STATE,

RESPONDENT,

V.

RANDY JARROD CROSBY,

APPELLANT.

APPELLATE CASE NO. 2011-205-207

PETITION FOR REHEARING

The Appellant, Randy Jarrod Crosby, respectfully petitions the Court for a rehearing of its Opinion No. 2014-UP-324 pursuant to Rule 221(a), SCACR based upon the following points overlooked or misapprehended by the Court:

On August 20, 2014, this Court affirmed the conviction and sentence of Appellant for possession with intent to distribute crack cocaine. Appellant argued on appeal that the Trial Court erred in: (1) refusing to suppress the evidence seized during the search of the vehicle when law enforcement did not have reasonable suspicion to justify the traffic stop; (2) refusing to suppress the evidence seized during the search of the vehicle because law enforcement did not have probable cause to believe the vehicle contained evidence of criminal activity and no exigent circumstances existed to justify the warrantless search; and

(3) finding a sufficient chain of custody existed to admit the evidence seized during the search of the vehicle and the drug evidence found in the police car.

ISSUE ONE: In Appellant's case, law enforcement did not have reasonable suspicion to justify the traffic stop because: (1) the information provided by Harris, the drug dealer, is inherently unreliable because Harris was not known by law enforcement; (2) this was not a high crime area; (3) the car was traveling legally and no citations were issued; (4) there was no evidence of attempted flight; (5) there was no evidence of evasive behavior; (6) the hour was not late as it was 6:00 PM on June 24th; (7) the Trial Court relied on incorrect information that Captain McNeil saw the Ford Expedition at the Lighthouse, when he was actually a mile down the interstate; and (8) law enforcement failed to verify any information regarding the black Ford Expedition prior to the stop. *See State v. Woodruff*, 344 S.C. 537, 544 S.E.2d 290 (Ct. App. 2001). Therefore, the Trial Court erred in refusing to suppress the evidence seized by law enforcement. R. 157, l. 10 – 9, l. 1; *See Wong Sun v. United States*, 371 U.S. 471, 484 (1963); *see also State v. Nelson*, 336 S.C. 186, 519 S.E.2d 786 (1999).

This Court relied on *State v. Driggers*, 322 S.C. 506, 511, 473 S.E.2d 57, 60 (Ct. App. 1996) in affirming the Trial Court's decision that Harris was not a confidential informant (CI). In *Driggers*, the court held that a non-confidential informant should be given a 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. This reliance was in error because Harris acted as a CI because he had already incurred criminal charges and was trying to reduce those charges by supplying additional information to law enforcement.

This Court also relied on *Lopez v. State*, 664 S.E.2d 866, 869 (Ga. Ct. App. 2008) for the rule that in providing probable cause for an arrest, the informant's admissions against penal interest are valuable facts indicating the informant is reliable and telling the truth. This reliance by the Court is also in error because Harris was caught selling crack cocaine to a CI. He was not making an admission against penal interest; he was trying to get out of jail. R. 14, l. 9-15, l. 5.

State v. Peters, 271 S.C. 498, 248 S.E.2d 475 (1978), relied on by this Court, is also distinguishable because in that case the officer was well acquainted with the informant, the informant having previously given him information on four or five occasions. The officers in Appellant's case knew nothing about Harris; *see also Miller v. State*, 780 So.2d 151 (Fla. Ct. App. 2000) (holding information given by confidential informant who had never been used by the investigating officers before and who was only arrested a day earlier, was not sufficiently reliable so as to provide the officers with the reasonable suspicion needed to stop the defendant's vehicle).

This Court also affirmed the corroboration of Harris's information by Captain McNeil's validation that he saw Pope at the Lighthouse when Harris said Pope would be there. This reliance was in error because the testimony revealed that Captain McNeil did not actually see the Ford Expedition at the Lighthouse, but rather was a mile down the same highway before the Lighthouse. *See id.* (observing that the defendant did not stop at the meeting place that the CI described to the officers and finding no reasonable suspicion for stop). When defense counsel renewed his motion to suppress, R. 311, l. 7 – 312, l. 2, the Trial Court admitted:

I'm very concerned about that because my corroboration was based, for lack of a better way to put it, kind of a three-legged

stool . . . they were expecting a black Ford Expedition; that there was more than one person in the car, which was confirmed by Officer Sherfield when he followed the car and saw somebody in the back; and that the car was coordinated to be at the Lighthouse when Mr. Pope said it was by an officer. . . . It's a crucial fact in the decision I reached.

R. 312, l. 14 – 313, l. 5. The Trial Court stated, “I am going to still not grant the motion to suppress. I am, as you can probably tell, disturbed about the way this has fallen into place.”

R. 318, ll. 16-18. The Trial Court subsequently ruled, “I still find it is sufficient . . . nexus in time and place to establish the settlement corroboration or Harris’s testimony . . . [the] motions to suppress are again denied on behalf of all three defendants.” R. 319, ll. 15-21.

Traffic stops are reviewed under the standard set forth in *Terry v. Ohio*, 392 U.S. 1 (1968) because a traffic stop is more analogous to an investigative detention than a custodial arrest. See *United States v. Rusher*, 966 F.2d 868, 875 (4th Cir. 1992). In *Terry*, the United States Supreme Court outlined a two-prong test for analyzing the constitutionality of a traffic stop: (1) whether the police officer's action was justified at the inception of the traffic stop; and (2) whether the police officer's subsequent actions were reasonably related in scope and duration to the circumstances that justified the stop. *Rusher*, 966 F.2d at 875. Notably, temporary detention of individuals during a traffic stop by police, even if only for a brief period and for a limited purpose, constitutes a seizure of the persons within the meaning of the Fourth Amendment. See *Whren v. United States*, 517 U.S. 806, 809–10 (1996); see also *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (noting the Fourth Amendment's protection against “unreasonable searches and seizures” extends to “brief investigatory stops of persons or vehicles”).

In *Brendlin v. California*, 551 U.S. 249, 127 S.Ct. 2400 (2007) the United States Supreme Court ruled that passengers of vehicles may challenge the constitutionality of a

stop. The court noted that “the stopping of a vehicle and the detention of its occupants constitute a “seizure” within the meaning of the Fourth Amendment.” 551 U. S. at 256, 127 S.Ct. at 2406 quoting *Colorado v. Bannister*, 449 U.S. 1, 4, n. 3, 101 S.Ct. 42 (1980). In *Brendlin* the court ruled that the passenger was seized from the moment the driver’s car came to a halt on the side of the road. In our case, Appellant was seized when their car was detained. “Inarticulate hunches” do not support detentions. *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391 (1979); *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968).

“To justify a brief stop [or] detention, the police officer must have a reasonable suspicion that the person has been involved in criminal activity.” *State v. Robinson*, 306 S.C. 399, 402, 412 S.E.2d 411, 413 (1991). The term “reasonable suspicion” requires a particularized and objective basis that would lead one to suspect another of criminal activity. See *United States v. Cortez*, 449 U.S. 411 (1981); see *State v. Woodruff*, 344 S.C. 537, 544 S.E.2d 290 (Ct. App. 2001). In determining whether reasonable suspicion exists, the whole picture must be considered. See *United States v. Sokolow*, 490 U.S. 1 (1989). The burden is on the State to articulate facts sufficient to support reasonable suspicion. See *State v. Butler*, 343 S.C. 198, 539 S.E.2d 414 (Ct. App. 2000); see also *State v. Pichardo*, 367 S.C. 84, 104, 623 S.E.2d 840, 851 (Ct. App. 2005).

The United States Supreme Court created the exclusionary rule to safeguard Fourth Amendment rights. *United States v. Calandra*, 414 U.S. 338 (1974). The exclusionary rule prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure under the fruits of the poisonous tree doctrine. See *Wong Sun v. United States*, 371 U.S. 471, 484 (1963); see also *State v. Nelson*, 336 S.C. 186, 519 S.E.2d 786 (1999) (finding evidence is not admissible under the “fruit of the poisonous

tree" doctrine when the police exploit an unlawful search to seize evidence that would not have otherwise come to light). The Fourteenth Amendment incorporates the rule of excluding evidence obtained through an illegal search or seizure and makes it applicable to the states. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

"The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" *United States v. Mendenhall*, 446 U.S. 544, 553-54 (1980) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976)). The United States Supreme Court and the Supreme Court of this State have recognized and applied the principle that police officers are not granted under *Terry*, "a general warrant to rummage and seize at will" and that any evidence seized from an unlawful detention must be excluded as "fruit of the poisonous tree." *State v. Woodruff*, 344 S.C. 537, 549, 544 S.E.2d 290, 296-97, n. 1 (citing *Texas v. Brown*, 460 U.S. 730, 748 (1983) (Stevens, J., concurring) (The United States Supreme Court "has been sensitive to the danger . . . that officers will enlarge a specific authorization, furnished by a warrant or an exigency, into the equivalent of a general warrant to rummage and seize at will") (emphasis added)).

The Court of Appeals misapprehended this issue. The Court relied on incorrect information that Captain McNeil had a visual sighting of Pope's car at the lighthouse Fish Camp when Captain McNeil actually was a mile before the Lighthouse. This Court also relied on the finding that Harris was not a CI when the record was clear that Harris expected a benefit and did receive one.

ISSUE TWO: Law enforcement did not have probable cause to believe that the vehicle in which Appellant was a passenger contained evidence of criminal activity. *See Carroll*, 267 U.S. at 153. This is because law enforcement failed to conduct an investigation to gain probable cause; instead, the officers handcuffed the occupants and immediately searched the car without consent. The incident does not meet the automobile exception because the car was not mobile once the men were removed. The men did not have drugs nor weapons on them.

Notably, this instant case is distinct from our Supreme Court's decision in *Weaver*, where the murder suspect's Jeep smelled of bleach and had a wet interior after the murder. *Weaver*, 374 S.C. 313, 649 S.E.2d 479(2007). The officers had only the unreliable information provided by the recently arrested drug dealer who was facing serious jail time. Accordingly, the Trial Court erred in refusing to suppress the evidence seized by law enforcement. R. 159 I. 2 – 160, I. 3; *See Wong Sun*, 371 U.S. at 484; *see also Woodruff*, 344 S.C. 537, 549, 544 S.E.2d 290, 296-97, n. 1 (citing *Brown*, 460 U.S. 730, 748 (1983 (Stevens, J., concurring)).

This Court of Appeals relied again on the misconception that Captain McNeil saw Pope's car at the lighthouse for probable cause. The Trial Court had found that law enforcement had probable cause to stop the vehicle:

Not a lot of information, that's true, but enough, I think, to establish probable cause to make the stop, and that corroboration is that a black Ford Expedition would be coming from Spartanburg to Union on 176 out of Spartanburg. That alone would not be enough . . . [Harris] gave information that he had been contacted by whoever was on the other end of that phone, whether it was Pope or not, that the car in question was passing the Lighthouse fish camp, and that was confirmed by Mr. McNeil, Officer McNeil. So I think that's enough to create probable cause for

the stop.

R. 158, l. 10 – 9, l. 1.

This Court found there was probable cause based on the automobile exception. The automobile exception to the search warrant requirement is based on: (1) the ready mobility of automobiles and the potential that evidence may be lost or destroyed before a warrant is obtained and (2) the lessened expectation of privacy in motor vehicles which are subject to government regulation. *State v. Cox*, 290 S.C. 489, 351 S.E.2d 570 (1986). The automobile exception does not contain a separate exigency requirement. *See Dyson*, 527 U.S. 465 (1999).

“[U]nder the automobile exception, probable cause *alone* is sufficient to justify a warrantless search.” *State v. Cox*, 290 S.C. 489, 351 S.E.2d 570 (1985). “The standard for probable cause to conduct a warrantless search is the same as that for a search with a warrant.” *State v. Bultron*, 318 S.C. 323, 332, 457 S.E.2d 616, 621 (Ct. App. 1995).

This Court again relied, in error, we respectfully submit, on the information provided by the CI, Harris to provide probable cause. When a confidential informant is involved, it is necessary to examine the reliability and credibility of the informant for determining the existence of probable cause. *Illinois v. Gates*, 462 U.S. 213, 230-235 (1983). This Court, for probable cause, further relied on the fact that the officer saw the co-defendant Appellant look at the officer and bend down in the car. This was in error because no drugs were found in the car nor on the three defendants. The only item found near Appellant was the scale with residue of cocaine.

ISSUE THREE: The Court of Appeals affirmed the Trial Court's finding that the scales seized from Pope's car were a non-fungible item and a chain of custody was not required. This Court misapprehended the issue.

"[Our Supreme] Court has long held that a party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable." *State v. Sweet*, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007). In Appellant's case, the "unique factual circumstances" of the case establish that a sufficient chain of custody did not exist. Our Supreme Court has noted, "[T]he mere fact that evidence is sealed upon presentation for testing does not, in itself, establish a sufficient chain of custody." *State v. Hatcher*, 392 S.C. 86, 94-95, 708 S.E.2d 750, 754-55 (2011).

The scales had not been in a secured evidence bag and one of its batteries was missing when it was retrieved—not when it was placed in the drawer. The scales were kept in a drawer with a hundred other scales in a vault, and the original bag in which the scales were contained was broken. R. 36, ll. 1 – R. 38, ll. 11. There was also no chain of custody for the scales – Lieutenant Sherfield just collected the scales and kept it and admitted there was no chain. R. 54, ll. 3-5.

As to the crack cocaine, the officers provided false information on the accompanying affidavit of the evidence bag. Therefore, the Trial Court erred in finding a sufficient chain of custody existed. R. 160, ll. 9-25; R. 390, l. 24 – 391, l. 19; *See Carter*, 344 S.C. at 424, 544 S.E.2d at 837 ("Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete.").

State v. Glenn, 328 S.C. 300, 492 S.E.2d 393, 395 (1997), succinctly summarizes the chain-of-custody law:

Because fungible items such as drugs or blood samples are not readily identifiable and may be easily tampered with, the party offering such items into evidence must establish a chain-of-custody as far as practicable. [Citations omitted.] Where the analyzed substance is passed through several hands, the evidence must not leave it to conjecture as to had it and what was done with it between the taking an analysis. However, the proof of chain-of-custody need not negate all possibility of tampering, but instead must only establish a complete chain of evidence as far as practicable. [Citations omitted.]

While the chain of custody requirement is strict where fungible evidence is involved, where the issue is the admissibility of non-fungible evidence – that is evidence that is unique and identifiable – the establishment of a strict chain of custody is not required ... [i]f the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the item is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit nearly on the basis of testimony that the item is the one in question and is in a substantially unchanged condition. On the other hand, if the offered evidence is of such a nature as not to be readily identifiable, or to be susceptible to alteration by tampering or contamination, the sound exercise of the trial court's discretion may require a substantially more elaborate foundation. A foundation of the latter sort will commonly entail testimony tracing the "chain-of-custody" of the item with sufficient completeness to render it reasonably probable that the original item has neither been exchanged with another nor been contaminated or tampered with. [Citations and quotation marks omitted.]

See also, State v. Freiburger, 366 S.C. 125, 620 S.E.2d 737 (2006).

The scales, in this case, do not fit the description of non-fungible items as stated in *State v. Glenn, id.* because they were not unique and identifiable. They were thrown in a drawer with other scales. The original bag was broken. A chain of custody was necessary to determine if these were the scales found in the car. If the State could not prove that, the

scales should have been suppressed. The issue is not whether it can be tampered with; it is can it be uniquely identified.

In addition, the crack cocaine was allegedly found in Vinson's patrol car. Lieutenant Sherfield testified that he took the crack cocaine from the three individuals in the traffic stop which was false. Vinson says he took the crack cocaine from his patrol car and gave it to Lieutenant Sherfield, but there is no report stating that the drugs were given to Sherfield. Appellant has been charged with possession of these drugs and yet the officers cannot even keep their stories straight of where they found this evidence.

While weak links in the chain of custody are typically a question of credibility for the jury, what happened to the evidence, how it was taken and collected and by whom and where it was taken from, cannot be left to conjecture. The manner of handling must still be demonstrated. "Evidence is still required as to how the item was obtained and how it was handled to ensure that it is, in fact, what it is purported to be." *Hatcher*, 392 S.C. at 95, 708 S.E.2d at 755. There is no proper evidence as to this issue on either the scales or the drugs, and therefore, the scales and drug evidence should be suppressed.

CONCLUSION

For the reasons set forth herein, Appellant Randy Jarrod Crosby respectfully requests that the Opinion of the Court of Appeals be withdrawn, his conviction be reversed, and the case remanded to the Trial Court for a new trial with instructions to suppress the evidence seized by law enforcement.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

This 4th day of September, 2014.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Union County
John C. Hayes, III, Circuit Court Judge

Opinion No. 2014-UP-324 (S.C. Court of Appeals filed August 20, 2014)

THE STATE,

RESPONDENT,

V.


RANDY JARROD CROSBY,

APPELLANT.

APPELLATE CASE NO. 2011-205-207

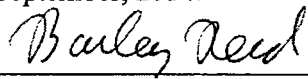
CERTIFICATE OF SERVICE

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. Randy Jarrod Crosby, #348909, Walden Correctional Institution, 4340 Broad River Road, Columbia, SC 29210, this 4th day of September, 2014.


Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 4th day
of September, 2014.


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

CRIMINAL

SEP - 8 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

SC OFFICE OF
APPELLATE DEFENDANT

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,

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September 8, 2014

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,

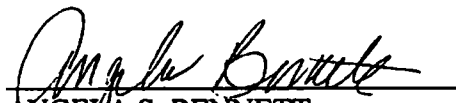
Appellant.

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.


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The South Carolina Court of Appeals

The State, Respondent,

v.

Randy Jarrod Crosby, Appellant.

Appellate Case No. 2011-205207


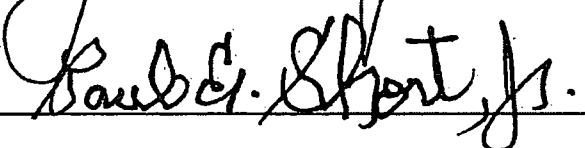

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ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

	C.J.
	J.
	J.

Columbia, South Carolina

cc:

Dayne C. Phillips, Esquire
Mark Reynolds Farthing, Esquire
Carmen Vaughn Ganjehsani, Esquire
The Honorable J. Mark Hayes, II

FILED

Sept 18, 2014