

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Laurens County

Donald B. Hocker, Circuit Court Judge

RECEIVED

MAR 26 2015

SC Court of Appeals

THE STATE,

RESPONDENT,

V

MAURICE ANTHONY ODOM,

APPELLANT

APPELLATE CASE NO. 2014-001340

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by admitting dog tracking evidence when the state failed to establish a sufficient foundation for admission of the evidence, specifically the state failed to show the dog handler satisfied the qualifications of an expert under Rule 702, SCRE, and that by experience the dog had been found to be reliable?

STATEMENT OF THE CASE

A Laurens County Grand Jury indicted Appellant at the February 24, 2012 term of General Sessions for second degree burglary, grand larceny, and criminal conspiracy. R. *. His case was called to trial on June 9, 2014 before the Honorable Donald B. Hocker, and a jury. Tr. 1. Assistant Solicitors Warren Mowry and Christopher Scott appeared on behalf of the state, and Elizabeth Wiygul represented Appellant. Tr. 1.

On June 11, 2014, the jury found Appellant guilty. Tr 371, ll 13-22. Judge Hocker sentenced him to fifteen years imprisonment for second degree burglary, five years concurrent for grand larceny, and five years concurrent for criminal conspiracy. Tr. 402, ll. 10-16.

This appeal follows.

ARGUMENT

The court erred by admitting dog tracking evidence when the state failed to establish a sufficient foundation for admission of the evidence, specifically the state failed to show the dog handler satisfied the qualifications of an expert under Rule 702, SCRE, and that by experience the dog had been found to be reliable.

Relevant Facts

The state alleged at trial that Appellant and his co-defendant Christopher Mixon burglarized a BP gas station located off of Interstate 26 in Clinton, South Carolina during the early morning hours of November 11, 2011. Sometime after midnight, Sergeant Nick Moyer of the Laurens County Sheriff's Office heard an "audible alarm" coming from the BP gas station as he passed by during his routine patrol. He immediately notified dispatch and was informed that the alarm company had just reported the incident and that the City of Clinton Police had been dispatched to the scene. Tr. 76, l. 7 – 77, l. 7.

After notifying dispatch, Moyer pulled into the parking lot and noticed one of the windows on the side of the building was broken. Tr. 81, ll. 1-9. He claimed he observed a male subject climb out of the broken window and run around to the back of the store. Moyer chased after the man, but lost sight of him when he entered a wooded area behind the building. Tr. 83, ll. 2-17. After losing sight of the man, Moyer went back to the store to "secure the scene" and wait for "backup units" to arrive. Tr. 83, ll. 21-24.

The owners of the BP store were notified by the alarm company and arrived at the store shortly after the police. Tr. 93, l. 3 – 94, l. 6. The owners provided law enforcement with access to the security footage which showed two male suspects wearing pants, long sleeved shirts, gloves, and masks inside the store. Tr. 98, l. 10 - 99, l. 8; Tr. 101, l. 19 –

102, l. 5. The suspects had broken the window with a large rock and were loading cash and cartons of cigarettes into black trash bags when they suddenly fled the store leaving the trash bags behind. Tr 104, l. 3 – 107, l. 7.

Officers with the Clinton Police Department who responded to the scene discovered a black Chrysler 300 parked on the eastbound side of Interstate 26 near the BP gas station Tr. 263, l. 13 – 264, l. 6. The engine was still warm suggesting the vehicle had not been parked there for very long Tr. 265, ll. 22-24. There were no other vehicles in the area. The officers ran the vehicle's tag and learned the car was registered to Appellant Tr. 267, ll. 8-24. A patrol officer was instructed to watch the vehicle in case it had any connection to the burglary Tr. 268, l. 24 – 269, l. 1. This officer left his post without permission and about two hours later the police discovered the car was gone. Tr. 286, l. 18 – 287, l. 14.

The SLED bloodhound tracking unit was called to the scene to attempt to track the male suspect Sergeant Moye had seen flee through the wooded area behind the store. The handler was shown the last known location of the suspect July, a bloodhound and bluetick coonhound mix named Judy tracked around the area for nearly two hours, but allegedly lost the trail in close proximity to where the Chrysler 300 had been parked on the side of the interstate Tr. 285, l. 23 – 288, l. 5.

After the initial investigation, law enforcement had no suspects. However, they learned through the Department of Motor Vehicles (DMV) that Appellant, who was the registered owner of the Chrysler 300, had a listed address in Barnwell, South Carolina. Tr. 288, ll. 12-18. The lead investigator on the case, Tyrone Goggins, travelled to Barnwell to attempt to speak with Appellant. Officers with the Barnwell Police Department accompanied Goggins to Appellant's listed address since the home was in that agency's

jurisdiction. Tr. 291, l. 2 – 292, l. 6 While Appellant was not home when law enforcement arrived, officers from Barnwell noticed Christopher Mixon in the vicinity of Appellant's house and, knowing he had outstanding warrants, arrested him. Tr. 292, ll. 7-25. Mixon lived on the same street as Appellant. Tr. 295, ll. 13-19. Goggins interviewed Mixon that day and, as a result of the interview, he obtained arrest warrants for Appellant and Mixon for the burglary of the BP gas station in Clinton. Tr. 295, l. 20 – 296, l. 6.

Christopher Mixon testified for the state At the time of his testimony, he had six prior convictions for second degree burglary and his charges related to this case were still pending. Tr. 152, ll. 8-18. Mixon claimed that on November 11, 2011, he and Appellant drove from Barnwell to Clinton in Appellant's Chrysler 300 Tr. 155, l. 9 – 156, l. 5. They dropped a large rock off at the BP store and then parked their vehicle on the edge of the eastbound side of Interstate 26. Tr. 158, l. 6 – 159, l. 18. Mixon claimed that after parking the car, they walked to the store and Appellant busted the window with the large rock they had dropped off Tr. 160, l. 12 – 162, l. 18. The men then entered the store and began loading cigarettes and tobacco products into black trash bags. Tr. 162, l. 19 – 163, l. 23. Mixon testified that as he was loading up the trash bags he noticed a police car out front. According to Mixon, Appellant climbed out the window first and took off running Mixon followed and ran into a wooded area Tr. 166, l. 1 – 168, l. 13.

Mixon claimed that he was in the woods for about two hours. He was trying to make his way back to the car. Once he reached the car, he noticed a police officer nearby so he remained hidden in the woods Mixon maintained that Appellant eventually met him at the car and they left the scene. Tr. 168, l. 1 – 170, l. 15.

Dog Tracking Evidence and Objection

Reid Creswell, who worked for SLED for twenty-two years, testified that he held numerous positions throughout his career, including security detail for multiple governors, vice and narcotics, and bloodhound tracking. At the time of trial, Creswell worked at the statehouse and provided security detail for the lieutenant governor. Tr. 188, ll. 7-24. Despite his lengthy career, Creswell only spent three years in the bloodhound tracking unit. Tr. 188, l. 25 – 189, l. 3 He was part of the unit during November 2011 and was the handler who participated in this case. Tr. 189, ll 6-21.

Creswell testified that he received a call to report to Clinton around 3:45 am on November 11, 2011. After getting dressed, he headed to the SLED headquarters on Broad River Road where the dogs were housed in a kennel. Creswell chose to take Judy, a bloodhound and bluetick coonhound mix, who he considered to be SLED's "number one dog" Tr 189, l. 19 – 190, l 21 He maintained that SLED often acquires bloodhounds mixed with a redbone coonhound or a bluetick coonhound to give the animals "more heat endurance" because pureblood bloodhounds do not do well in South Carolina due to the heat Tr 191, ll. 8-11. Creswell testified that both bloodhounds and bluetick coonhounds "have an acute sense of smell." Tr 191, l. 16.

According to Creswell, Judy was trained and used solely to track human scent. She did not engage in drug detection or any other activities. Tr. 192, ll 10-13. Creswell testified that SLED acquired Judy in 2002 or 2003 at eight weeks of age and that she developed into "an on-line dog" around 2004 By November 2011, Judy had eight or nine years of experience Tr. 192, l. 14 – 193, l. 6.

Creswell testified that in November 2011 he had two years of experience working with the bloodhound tracking unit. He explained that all of his training was done “in-house” at SLED and that he simply learned from the senior members of the unit. Tr. 193, ll. 7-20. He maintained that he had been on approximately fifty “tracking excursions” with Judy. Tr. 194, ll. 6-8.

The state then sought to have Creswell qualified as an expert in K9 handling in order to testify about Judy’s tracking in this case and “to give an opinion as to the reliability of Judy.” Tr. 194, l. 9 – 195, l. 3. Defense counsel objected and the jury was excused from the courtroom. During in-camera testimony, Creswell revealed that he had no recognized training in South Carolina, had never attended any certified classes, had never published any articles related to bloodhound tracking or training, and had never read any publications or articles regarding the subject. Tr. 196, l. 9 – 197, l. 11. He further admitted that he had never been qualified as an expert in K9 handling before in any court of law. Tr. 201, ll. 14-16

When questioned by the court regarding Judy’s reliability, Creswell testified that he knew Judy was involved in two recent cases with the solicitor’s office in Laurens County, but that he did not know the outcome. The solicitor maintained that one of the cases resulted in a conviction, but the other did not. Tr. 203, l. 4 – 205, l. 8. Creswell admitted that outside Laurens County he was not aware of any cases that Judy had been involved in that resulted in a conviction. Tr. 205, ll. 10-13. However, he still maintained that in November 2011 Judy was “SLED’s number one dog” because of her “success in tracking people.” Tr. 205, l. 14 – 206, l. 16

Additionally, Creswell claimed that Judy was placed on the trail in this case within “a matter of hours” from when the male suspect was last seen, which he considered to be a reasonable amount of time for a bloodhound. Tr. 207, l. 20 – 208, l. 13. He also testified that he was not aware of any contamination on the trail and maintained that no one else had entered the trail after the suspect fled Tr. 208, l. 21 – 209, l. 3.

Before the court determined whether to qualify Creswell as an expert in K9 handling, he said he wanted to hear the rest of Creswell’s testimony in-camera Tr. 214, ll. 4-12 After listening to all of the testimony in-camera, the court ruled that it would qualify Creswell as an expert in “K-9 handling for purposes of tracking human scent.” Tr. 233, ll. 23-35. The court stated, “Probably in some respects *this is a close call*, but I am going to deem Agent Creswell as an expert based upon his experience and training and his testimony could be an aid to the jury to determine the facts in this case.” He commented further that there “could be some good arguments to attack this part of the State’s case.” The court also found that all of the factors set forth in State v. White, 382 S.C. 265, 676 S.E 2d 684 (2009) had been met. Tr. 233, l. 14 – 234, l. 7 (emphasis added).

Creswell’s testimony before the jury was similar to his testimony in-camera. He testified that he received the call to report to Clinton at 3:48 am and he ultimately arrived at the BP gas station around 5:00 am. Tr. 237, ll. 14-17. He put Judy on the trail where Sergeant Moye had last seen the suspect and she tracked for approximately an hour and a half before the trail ended at the edge of Interstate 26 Tr. 237, l. 18 – 238, l. 7; Tr. 245, l. 11 – 247, l. 23. Creswell maintained that based on his experience as a K9 handler he believed Judy was on a trail that morning. He further opined that Judy was a reliable bloodhound tracking dog Tr. 248, l. 1 – 249, l. 5

During his closing argument, the solicitor used the dog tracking evidence in support of his case. He argued, “[T]he track basically went into the woods, came out about here, lo and behold, almost directly across the street or road from the car. And whose car was that? Well, it was a 2005 Chrysler that, lo and behold, came back registered to his Defendant [Appellant]” Tr 332, l 18 – 33, l. 1.

Discussion

The court erred by admitting the dog tracking evidence through the testimony of Reid Creswell over defense counsel’s objection since the state failed to establish a sufficient foundation for admission of this evidence. Most significantly, the state failed to show Creswell satisfied the qualifications of an expert under Rule 702, SCRE, and that the dog had been found to be reliable.

Rule 702, SCRE, articulates guidelines for admissibility of expert testimony in South Carolina. “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Rule 702, SCRE “The party offering the expert testimony has the burden of showing the witness possesses the necessary learning, skill, or practical experience to enable the witness to give opinion testimony” State v White, 372 S.C. 364, 375, 642 S.E.2d 607, 612 (Ct. App. 2007), *aff’d in result*, 382 S.C. 265, 676 S.E.2d 684 (2009).

“South Carolina courts have repeatedly acknowledged dog handling as an area of expertise in the criminal context.” Id. at 377, 642 S.E.2d at 613. “Testimony of a dog handler based upon his observation of a tracking dog may be properly admitted into

evidence.” Id. (quoting State v. Johnson, 306 S.C. 119, 127, 410 S.E.2d 547, 552 (1991)) (internal quotation marks omitted).

Our Supreme Court has held that “a sufficient foundation for the admission of dog tracking evidence is established if: (1) the evidence shows the dog handler satisfies the qualifications of an expert under Rule 702; (2) the evidence shows the dog is of a breed characterized by an acute power of scent; (3) the dog has been trained to follow a trail by scent; (4) by experience the dog is found to be reliable; (5) the dog was placed on the trail where the suspect was known to have been within a reasonable time; and (6) the trail was not otherwise contaminated.” State v. White, 382 S.C. 265, 272, 676 S.E.2d 684, 687 (2009).

The K9 handler in White was a “Senior Master K9 Handler,” which is the highest level of K9 handling that can be acquired. He had been with the K9 unit for approximately fourteen years and had been working with the dog involved in the case for eight years. Additionally, the handler and dog had run a total of 750 tracks throughout the dog’s career and met the standards to qualify with the American Association of K9 Trainers every year. Moreover, the handler had been qualified as an expert before in Richland County. White, 372 S.C. at 371, 642 S.E.2d at 610. This Court held that the handler’s “testimony verified he had acquired, by training and experience, such knowledge and skill in the area of dog handling and tracking that rendered him better qualified than the jury to form an opinion on the particular subject of dog tracking.” Id. at 384, 642 S.E.2d at 617. However, our Supreme Court never discussed the handler’s qualifications, noting that White conceded the

handler met the Rule 702, SCRE, qualifications due to his training and experience¹ White, 382 S.C. at 269, 676 S.E.2d at 686.

In State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989), our Supreme Court held that a sufficient foundation was established for the admission of dog tracking evidence when the K9 handler testified that he had eleven to twelve years of experience “running” bloodhounds, he had been qualified as an expert witness between ten and fifteen times in prior court proceedings, the dogs used “had the characteristics of acuteness in scent as well as the power of discrimination between human and other scents,” and he found the dogs to be reliable. Id. at 476-477, 385 S.E.2d at 842-843.

Here, the evidence failed to establish that Creswell satisfied the qualifications of an expert under Rule 702, SCRE. Creswell admitted that he had no formal training and had never attended any certified classes. He simply went out and “learn[ed] from the other guys” in the bloodhound tracking unit. See Tr. 193, ll. 18-20. At the time of this case, he had only two years’ experience in the field. He also testified that he had never published any articles nor had he read any periodicals on the subject. Moreover, Creswell had never been qualified as an expert before. His lack of qualifications is readily apparent when compared to the experts in White and Childs. For example, the expert in White had been with the K9 unit for fourteen years, met standards annually, and had run approximately 750 tracks with the involved dog. The expert in Childs had eleven to twelve years of experience and had been qualified as an expert between ten and fifteen times.

Moreover, the state failed to establish the reliability of Judy. While Creswell

¹ The objection in White was to the dog’s reliability and not to the handler’s qualifications. See White, 382 S.C. at 269-270, 676 S.E.2d at 686.

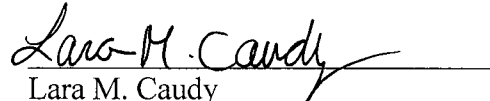
testified that he had been on approximately fifty tracks with Judy, there was no evidence regarding the total numbers of tracks she had been on and her overall success rate with locating suspects or other missing persons. While the solicitor, who was not a witness, stated that one of the cases Judy was involved in in Laurens County resulted in a conviction, he did not indicate that Judy's work contributed to the conviction. There was also no evidence that her work had resulted in convictions in other counties in South Carolina. Moreover, there was no testimony that Judy had been certified in any areas of tracking unlike the dog in White who had been certified in several areas of tracking. See White, 382 S.C. at 271, 676 S E 2d at 687.

Because the state failed to establish that Creswell satisfied the qualifications of an expert under Rule 702, SCRE and that by experience Judy was found to be reliable, the trial court erred by qualifying Creswell as an expert and admitting the dog tracking evidence. Because of this error, this Court should reverse Appellant's convictions and sentence and remand for a new trial

CONCLUSION

Based on the foregoing arguments, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,


Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of March, 2015.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Laurens County
Donald B Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

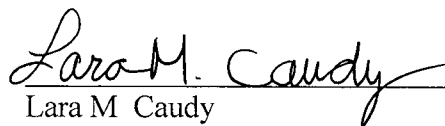
V.

MAURICE ANTHONY ODOM,

APPELLANT

CERTIFICATE OF SERVICE

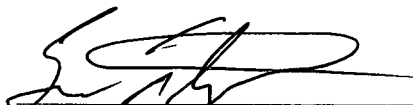
The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Maurice Anthony Odom, #199677, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 26th day of March, 2015.



Lara M Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 26th day of March, 2015

 (L S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022