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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of General Sessions

The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Indictment No.: 2012-GS-36-0267

The State,.....Respondent,

v.

Toaby Alexander Trapp,.....Appellant.

FINAL REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

ARGUMENT

In her brief, the Respondent asserts some positions which are inconsistent with the record. The Appellant seeks to clarify those issues to comport with the record.

I. **The trial court erred in admitting the drugs into evidence as the Respondent failed to establish a strict chain of custody. This issue was preserved for review by this appellate court and the Appellant did not waive any objections to the admission of this drug evidence**.

The trial court admitted drug evidence into evidence over the repeated objections of the Appellant; the Appellant challenged the evidence for tampering. "A party offering fungible items, such as drugs, as evidence must establish a chain of custody as far as practicable," because fungible evidence can be easily tampered with and manipulated. *State v. Sweet*, 374 SC. 1, 647 S.E.2d 202 (S.C. 2007).

A decision regarding the admissibility of evidence is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *State v. Pagan*, 369 S.C. 201, 631 S.E.2d 262 (2006). This abuse occurs when the trial court lacks either evidentiary support for its decision or the decision is controlled by an error of law. See, *Pagan*. Our Supreme Court held in *State v. Hatcher*, 392 S.C. 86, 708 S.E.2d 750 (2011) that trial court should consider "the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it" when analyzing a challenge to the chain of custody evidence.

In *Hatcher*, our Supreme Court held that the trial court did not abuse its discretion in admitting the chain of custody evidence because the drug buyer who purchased the drugs from the Defendant, the officer who received the drugs from the drug buyer and transported the drug evidence to SLED in two sealed bags, and the chemist who

secured and tested the drugs "all testified about the chain of custody and their handling of the drugs, and the fact that there was no evidence of tampering." The Supreme Court went on to say that "the record here indicates the drugs received for testing were in fact, those taken from Hatcher without any alteration, tampering, or substitution;" in addition, each "determination will necessarily depend on the unique factual circumstances of each case." See *Hatcher*.

The Appellant's case is easily distinguishable from *Hatcher* in that neither the first investigator (Spreng) who allegedly discovered the drugs, or the investigator (Bouknight) who received the drugs from the first investigator and handled the drugs thereafter, or either of the two lab technicians (Kinard and Crooks) that received and handled the drugs from Bouknight testified in this case about the chain of custody and their handling of the drugs. The only true chain witness who testified at trial was the chemist Ms. Black and she testified she had no knowledge as to what happened with the drugs before they got to her. [R. p. 268, lines 17 - 19.] In addition, Ms. Black testified that the drug evidence came to her in four separate unsealed envelopes and that multiple items that were in the only one envelope collected by Investigator Bouknight at the scene were not received or tested by her in the best evidence kit; Ms. Black's testimony confirms that not only was the original one envelope from the scene not sealed, but also confirms that some unknown person added and took away items from the original evidence collected at the scene and confirmed that some unknown person took and added things from the sealed envelope after it left SLED's custody. [R. p. 268, line 25 – p. 272, line 4.]

Counsel for the Respondent failed to respond in its brief to the effect on the chain

of custody when someone added and who took away items from the original evidence collected at the scene and the effect of when someone took and who added things from the sealed envelope after it left SLED's custody. Counsel for the Respondent failed to respond in his brief to the State's argument in court that "We don't know what happened those five days they were in the locker room. You know, somebody else could have gone in there and added something or taken something from them." [R. p. 185, lines 16 - 25.] The Appellant contends that it's the State's burden to reasonably show the manner in which the drug evidence was stored before and after testing up until trial; furthermore, the Appellant contends the above-stated comments by the State at trial confirms that the State had no knowledge about either the identities of all the parties who handled the drug evidence, nor did the State have any knowledge about the manner in which this drug evidence was handled, and nor did the State have any knowledge about the rule of law concerning fungible evidence and the need to eliminate conjecture.

The trial court suppressed a drug item (1.6) from the same best evidence kit where all of the drug evidence was placed. [R. p. 282, line 5 – p. 284, line 22.] Counsel for the Respondent failed to indicate how the suppression of Item 1.6 in the best evidence kit affected the chain of custody for the remaining items in the kit. Item 1.6 drug evidence was added to the best evidence kit after the drug evidence was seized from the residence; Item 1.6 was not evidence handed to Investigator Bouknight by Captain Dennis nor was it on the Return from the search warrant. [R. p. 232, line 13 – p. 233, line 17.] The adding of drug evidence clearly indicates that the drug evidence seized at the scene has been "changed in important respects;" and therefore the trial

court erred and abused its discretion in admitting this evidence under the determination factors stated in *Hatcher*. The State argued at trial "who cares if we tamper with it now. We need to get it to her testing it." [R. p. 256, lines 11 - 14.] It is clear that our Supreme Court in *Hatcher* cares and requires that this evidence be without any alteration, tampering, or substitution; furthermore, it is clear that the above-stated comments should never be uttered in a trial by the State as it indicates a lack of concern for criminal justice.

Counsel for the Respondent cites *South Carolina Department of Social Services v. Cochran*, 364 S.C. 621, 614 S.E.2d 642 (2005) in his argument that the courts have never held that a chain of custody rule requires every person in the chain to testify. The Appellant has never sought to challenge that long held view of establishing chain of custody evidence as far as practicable; however, the Appellant clearly states that the State in this case presented insufficient testimony to establish chain of custody so far as practicable.

An actual review of *Cochran* reveals that at the first trial, DSS presented only the testimony of a witness who "testified generally as to who would have handled the samples and how the testing of the samples would have occurred." The witness also testified that "he did not handle the samples, nor did he know which employee handled them." Our Supreme Court reversed the decision of the trial court stating that the testimony was "insufficient to establish the chain of custody" because the witness presented "no direct evidence of how those specific blood samples were processed." See *Cochran*. When the case was remanded because of insufficient testimony to establish chain of custody, DSS provided additional testimony and evidence from

witnesses who testified they handled and tested the evidence and witnesses who described their respective procedure for handling and testing the evidence. See *Cochran*.

The Appellant's case is almost identical to the first *Cochran* trial where the testimony was insufficient to establish a strict chain of custody. The State presented testimony from Captain Dennis who was the signature on the Return at the scene but who also testified that he had no specific knowledge about the handling of the drug evidence after it left the scene; and, the State presented Ms. Black who testified about what the item was but who also testified that she had no specific knowledge about the handling of the drug evidence before it was tested by her. [R. p. 234, lines 5 – 22; p. 238, line 24 – p. 240, line 3; p. 268, line 17 – p. 269, line 11.] As cited in *Cochran*, our courts have held regarding fungible evidence that when evidence has passed through several different parties, the identity of those parties who handled the evidence and the manner in which the evidence was handled must not be left to conjecture. *State v. Williams*, 297 S.C. 290, 376 S.E.2d 773 (1989). The trial court erred in admitting this fungible chain of custody evidence because it left the identity of who handled and added to the drug evidence to conjecture and also left to conjecture the manner in which this drug evidence was handled.

Counsel for the Respondent's argument that the Appellant did not preserve this issue for review and waived his right to object to the drug evidence is without merit. The Appellant clearly stated that he was challenging the admission of the drug evidence [R. p. 187, lines 5 – 10; p. 255, lines 18 - 21.] The Appellant specifically disputed chain of custody evidence and evidence that drug evidence was in fact in his residence before

law enforcement arrived at the scene throughout the trial; the Appellant never sought to challenge that the items tested were not drugs, but the Appellant sought to challenge that he in fact possessed the drug evidence before Investigator Spreng arrived at the scene and the Appellant further sought to challenge the chain of custody thereafter.

Our Supreme Court has held that a failure to timely object does not waive an issue when further objections would have been futile. *State v. Pace*, 316 S.C. 71, 447 S.E.2d 186 (1994). Furthermore, this appellate court has held that there is no need to repeat objections after a trial court overrules the objection. *State v. McDaniel*, 320 S.C. 33, 462 S.E.2d 883 (Ct. App. 1995). In *McDaniel* the court stated that "as long as the judge had an opportunity to rule on an issue, and did so, it not incumbent upon defense counsel to harass the judge by parading the issue before him again.

In the Appellant's case, the trial court had already ruled before that it would allow the drugs into evidence after numerous objections. [R. p. 254, lines 10 – 17.] The Appellant in addition to his previous objections on the record to the admission of the chain evidence was merely pointing out that the State had also not presented an additional witness to allow the admission of the drugs into evidence. [R. p. 254, line 18 – p. 256, line 4.] The trial court in this case had an opportunity to rule on the issue and did so by overruling the Appellant's objections numerous times. [R. p. 54, line 13 – p. 94, line 20; p. 180, line 15 – p. 208, line 14.]

The trial court abused its discretion in admitting drug evidence seized from the Appellant's residence because the chain of custody was defective. The Respondent failed to establish a complete chain of custody as far as practicable as the Respondent failed to establish the identity of all of the individuals who handled the drug evidence in

this case and the Respondent failed to reasonably demonstrate the manner in which these same individuals handled the drug evidence in this case. The Respondent failed to fill in the gaps in the chain of custody by providing other evidence which would have reasonably demonstrated the identity of all of the individuals who both handled the drug evidence and reasonably demonstrate the manner in which the drug evidence was handled. The Appellant did not waive his right to challenge the admission of such drug evidence and timely objected throughout the trial in this case.

II. The trial court erred in admitting testimonial evidence in violation of the Appellant's right of confrontation and this issue was preserved.

The Sixth Amendment gives a defendant a fundamental right to confront the witnesses against him or her. U.S. Const. am. 6. The confrontation clause incorporated into the Sixth Amendment is designed to protect a defendant from the use of out of court or ex parte statements as evidence against the defendant in a criminal trial. *Id.*

The confrontation clause prohibits testimonial evidence made by witnesses outside of court against the defendant from being admitted into evidence unless the witnesses are unavailable and the defendant had a previous opportunity to cross examine that witness. *Crawford v. Washington*, 124 S.Ct. 1354, 158 L.Ed.2d 177, 541 U.S. 36 (2004).

Our courts have set out the following framework in analyzing *Crawford* issues:

1. "ex parte in court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;"

2. "extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; and
3. "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *State v. Davis*, 613 S.E.2d 760, 364 S.C. 364 (SC, 2005).

The trial court erred in admitting Form B chain of custody form into evidence and erred in allowing testimonial evidence about the search warrant, the Evidence Log In Form, the Form B, and the SLED Analysis Request Form into evidence at trial. The Appellant contends that the above-listed items met the criteria for all three factors under the *Davis* test and objected to the admission of all of the above-mentioned items throughout the trial. [R. p. 189, line 13 – p. 208, line 14; p. 273, line 20 – p. 275, line 20; p. 276, line 7 – p. 284, line 22; p. 292, line 21 – p. 296, line 4.] In addition, what makes these documents testimonial in nature is the trial court's reliance on these documents and the fact that without these testimonial documents the State would have no chain of custody evidence testimony regarding the identity of a handler of the drug evidence either before or after the drug evidence was tested at SLED; these testimonial documents still failed to answer or describe the manner in which the drug evidence was handled by either Investigator Spreng or Investigator Bouknight or Patricia Crooks or Selena Kinard.

Counsel for the Respondent erroneously asserts that the *Crawford* issue was not preserved for review and that the Appellant's *Crawford* objection was not made during trial; these arguments are without merit as the trial court returned the jury to the jury room each time the parties argued Crawford issues. [R. p. 275, line 22 – p. 280, line

20.]

The trial court erred and abused its discretion in admitting testimonial evidence from the search warrant, the Evidence Log In Form, the Form B (Rule 6) and the SLED Drug Analysis Request Form. The primary purpose of the above listed documents at the Appellant's trial was to establish and prove facts concerning where drug evidence would likely be found, to authorize the search for such drug evidence, to establish and prove facts concerning the identity of the individual who possessed the drug evidence and also used to establish and prove facts regarding the manner in which that individual handled the drug evidence. All of the documents were out of court testimonial statements and should have been excluded as the Appellant never had a chance to confront any of the witnesses against him regarding those testimonial documents; only Investigator Bouknight was unavailable for trial due to death. Neither Investigator Spreng or the Honorable Ron Halfacre or Patricia Crooks or Selena Kinard were called to testified at trial although they were available witnesses and the Appellant did not have an opportunity to cross-examine any of these witnesses before the admission of their testimonial evidence. The assertions by Counsel for the Respondent that these documents were merely "to provide testimony regarding the progress and process of the investigation" is not plausible considering that the State had no other way of proving chain of custody without these documents or proving probable cause to search the residence where this incident occurred.

The trial court's error was an abuse of discretion which resulted in numerous impermissible testimonial evidence being presented to the jury. This error was not harmless, and was extremely prejudicial to the Appellant. The prejudice from the

admission of this evidence resulted in the Appellant's conviction.

III. The trial court erred in admitting evidence of the search warrant without a Franks v. Delaware hearing.

The United States Supreme Court held that "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment, as incorporated in the Fourteenth Amendment, requires that a hearing be held at the defendant's request." *Franks v. Delaware*, 438 U.S. 154 (1978).

The Appellant requested a hearing on the admissibility of the search warrant pursuant to *Franks v. Delaware* and objected to the State's use of Captain Dennis for purpose of this hearing. [R. p. 6, line 21 – p. 13, line 11.] It was clear from his testimony that Captain Dennis had no personal knowledge about the search warrant or about what information was communicated to the magistrate court judge (Judge Halfacre). [R. p. 20, line 24 – p. 23, line 14; p. 68, lines 3 – 10; p. 227, line 5 – p. 228, line 6.] The Appellant was essentially denied a hearing on the search warrant because none of the witnesses who were involved in the determination of the probable cause for the search warrant testified at a pretrial hearing or at the trial. The trial court erred by allowing Captain Dennis to provide testimonial evidence as to all the facts regarding the search warrant even though Captain Dennis acknowledged that he played no role in the search warrant or in the communications between Investigator Spreng, Investigator Bouknight, and Judge Halfacre regarding probable cause; Captain Dennis also acknowledged that Investigator Bouknight brought the search warrant to the residence just shortly after he arrived at the scene. The Appellant made a preliminary showing of

the falsity of the statement because initial photos of the ransacked bedroom taken before law enforcement entered the bedroom and before Captain Dennis arrived showed a dresser which contained no pill bottle or razor. [R. p. 17, line 13 – p. 18, line 1; p. 41, lines 4 - 15.] When the Appellant made that preliminary showing, he was entitled to a hearing on the falsity of the warrant with the witnesses who participated in obtaining the search warrant; however, the only information that Captain Dennis knew was that the search warrant was based solely on the alleged pill bottle on the dresser; [R. p. 20, line 24 – p. 21, line 3; p. 23, lines 10 - 14.] Captain Dennis was not qualified to testify about the search warrant for purposes of a *Franks v. Delaware* hearing and the trial court erred in relying upon its determination as to the admissibility of the search warrant.

Counsel for the Respondent's argument that the Appellant consented to the search of the residence is without merit. There is nothing in the record that indicates that the Appellant consented to a search of the residence nor did the State argue consent in the discovery and admission of the drug evidence. The Appellant contends that a lack of consent to search the residence is clear and evident when it is considered that law enforcement obtained a search warrant; the affidavit in the search warrant does not indicate that the Appellant consented to a search of the residence and a search warrant would not have been necessary if the Appellant in fact consented to a search of the residence.

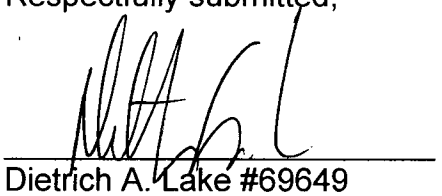
The trial court erred in failing to grant a hearing on the admissibility of the search warrant. The State offered an unqualified witness to provide testimonial evidence regarding the search warrant over the objections of the Appellant and the trial court

erred by allowing this type of testimonial evidence. The trial court's error was an abuse of discretion which resulted in impermissible testimonial evidence being presented to the jury. This error was not harmless, and the prejudice from the admission of this evidence resulted in the Appellant's conviction.

CONCLUSION

For all of the above-stated reasons and the reasons stated in the Appellant's primary brief, this court should reverse the result below and remand with instructions to suppress all of the drug evidence due to a defective chain of custody, to exclude all testimonial evidence regarding the Form B chain of custody form, the search warrant, the Evidence Log In Form, the Form B, and the SLED Analysis Request Form, and to suppress the search warrant and the fruits of that search warrant under the *Franks v. Delaware* analysis indicating that upon setting aside the false statement that a pill bottle and razor were located in plain view on the dresser that the affidavits remaining content is insufficient to establish probable cause.

Respectfully submitted,



November 27, 2015

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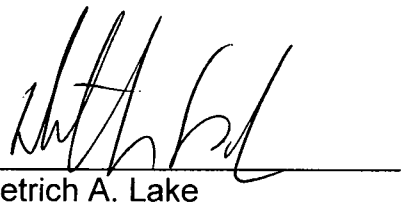
CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellant hereby certifies that this Final Reply Brief is identical to the Initial Reply Brief, except for inclusion of references to the Record and correction of typographical errors and/or misspellings, and it otherwise complies with Rule 211 (b) SCACR.



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PROOF OF SERVICE

The undersigned counsel for the Appellant hereby certifies hereby certifies that the Final Brief of the Appellant and the Final Reply Brief was served and delivered upon counsel for the Respondent by U.S. mail to: Alan Wilson and William M. Blitch, Jr., Office of the Attorney General, PO Box 11549, Columbia, SC 29211-1549; and David M. Stumbo, Eighth Circuit Solicitor's Office, PO Box 516, Greenwood, SC 29648.

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