

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Saluda County

Honorable William P. Keesley, Circuit Court Judge

RECEIVED

AUG 19 2016

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

LEO ABNEY

APPELLANT

APPELLATE CASE NO. 2016-000314

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court abused its discretion by admitting the drugs into evidence where the chain of custody was incomplete where SLED Agent Omri Mota was the key link in the chain of custody, and the State failed to call him as a witness?

STATEMENT OF THE CASE

On February 8, 2016, the Saluda County Grand Jury indicted Appellant for distribution of crack cocaine. R. *. Appellant's case proceeded to a jury trial before the Honorable William P. Keesley. Tr. 1. Erik J. Drylie and Bennett E. Casto represented Appellant. Ervin J. Maye represented the State. Tr. 1.

Appellant was found guilty as charged. Tr. 382, ll. 8 – 13. Judge Keesley sentenced Appellant to five years' imprisonment suspended to three years' imprisonment pursuant to S.C. Code Ann. §44-53-375(B). Tr. 398, ll. 21 – 25.

Appellant appealed his conviction and sentence. This appeal follows.

STATEMENT OF FACTS

Timothy Irving was suffering from a severe crack cocaine addiction in June 2014. Tr. 106, ll. 19 – 22. Irving contacted Police Chief Jared Goldman in Ridge Spring, South Carolina, in Saluda County. Tr. 201, ll. 17 – 22. Irving asked Goldman for help conquering his drug addiction. Tr. 106, l. 24 – Tr. 107, l. 2. Goldman agreed to get Irving help for his drug problem in exchange for Irving assisting him in setting up drug dealers as a confidential informant. Tr. 107, ll. 21 – 25.

On June 19, 2014, Irving, Chief Goldman, and SLED Agents Charles Miles and Omri Mota, met at the town hall in Ridge Spring to prepare for a controlled drug transaction. Tr. 108, l. 12 – Tr. 109, l. 11. Irving was fitted with audio and video surveillance equipment and given twenty dollars to purchase crack cocaine. Tr. 109, ll. 12 – 24. Officers later discovered that the video equipment did not record the transaction. Tr. 157, ll. 13 – 15.

According to Irving, a few of the drug dealers he knew in the area would not “serve” him because they suspected he worked for the police. Tr. 109, ll. 12 – 24. Irving told the officers that Appellant “would probably serve [him].” Tr. 109, l. 25 – Tr. 110, l. 1. After officers placed the surveillance equipment on Irving, they dropped him off on Main Street in Ridge Spring. Tr. 110, ll. 13 -15. Irving walked to Appellant’s mother’s home, where Appellant was living, to purchase the drugs. Tr. 110, ll. 16 – 22.

When Irving reached the yard, he encountered four men standing there. Tr. 112, ll. 11 – 23. Irving asked the men where Appellant was because he wanted to buy “a doub” – twenty dollars’ worth of crack. Tr. 114, l. 1 – Tr. 115, l. 19. One of the men outside, Montez Quattlebaum, told Irving that Appellant was upstairs inside the house. Tr. 113, ll. 4 – 9. Irving gave the money to Quattlebaum, who then walked inside the residence. Tr. 115, ll. 13 – 19.

Irving stepped inside the residence and stood in the doorway at the bottom of the stairs. Tr. 117, ll. 12 – 20. Irving claimed to see Appellant walk out of the room and give Quattlebaum the crack for Irving's twenty dollars. Tr. 117, l. 21 – Tr. 118, l. 14. Quattlebaum then gave Irving the crack. Tr. 117, l. 21 – Tr. 118, l. 14. Irving left the home and walked back to where the officers dropped him off to make the purchase. Tr. 119, ll. 20 – 24. Irving told officers that Appellant gave him the drugs. Tr. 128, l. 1 – Tr. 129, l. 17.

The drugs were tested positive as crack cocaine. Tr. 184, ll. 16 – 21. Appellant was arrested and charged with distribution of crack cocaine in September of 2014. Tr. 312, ll. 1 – 5. Chief Golden located a drug rehabilitation facility for Irving to check into and purchased Irving a bus ticket. Tr. 121, ll. 6 – 25.

Trial

At trial, Irving testified that when he returned to the drop-off location to meet the officers, he gave the crack cocaine to Agent Mota, the lead agent on the case. Tr. 119, l. 23 – Tr. 120, l. 4. Agent Miles, who was also present, testified that Irving placed the drugs in the evidence kit to be transported to SLED for testing. Tr. 141, l. 12 – 143, l. 8. However, Miles could not recall the condition of the drugs or how they were packaged when Irving brought them to the officers. Tr. 160, l. 22 – Tr. 161, l. 5. Miles stated that Mota transported the drugs to SLED. However, Miles was not with him. Tr. 143, ll. 9 – 19.

SLED Agent Larry Zivkovich, the chemist who tested the drugs, stated that the drugs were delivered to SLED on June 20, 2014, by Agent Mota, and given to Doris Yarbrough, the forensic technician. Tr. 171, ll. 17 – 23. Yarbrough logged the drugs into SLED that same day and placed them into the "evidence intake storage." Tr. 171, ll. 17 – 23. On June 23, 2014, Jennifer Aycock, also a SLED employee, pulled the drugs from the evidence storage and gave

them to Agent Zovkovich to be tested. Tr. 181, ll. 9 – 18. Agent Mota was not called as a witness by the State.¹

Defense counsel Drylie objected to the chain of custody when the State offered the drugs into evidence. Tr. 186, ll. 7 – 10. Counsel Drylie argued that the State was trying to offer the chain of custody completely through the chemist. Tr. 174, ll. 9 – 22. Counsel explained that Agent Miles could not recall how the drugs were packaged when Irving handed them over and the Agent who sealed the evidence bag and took it to SLED was readily available to testify. Tr. 186, l. 16 – Tr. 187, l. 7. Counsel contended that it created a “big gap in the chain.” Tr. 187, ll. 2 – 7. Further, the State was “trying to establish the chain without using the first person from law enforcement who took possession of the drugs.” Tr. 190, ll. 6 – 17.

The solicitor, citing State v. Hatcher, 392 S.C. 86, 708 S.E.2d 750 (2011), responded that there was evidence of SLED coming into possession of the drugs in the sealed evidence bag, which was sealed in Agent Miles’ presence. Tr. 188, l. 15 – Tr. 189, l. 2. The solicitor contended that every link in the chain had been established and there was no possibility that the drugs were tampered with. Tr. 189, ll. 11 – 18.

Despite recognizing the inconsistency in Agent Miles’ testimony regarding who placed the drugs in the evidence bag immediately after the controlled drug buy, the court admitted the drugs into evidence. Tr. 194, ll. 13 – 25.

¹ At trial, the solicitor and defense counsel discovered that Agent Omri Mota had been fired from SLED for failing to obey a direct order and dishonesty. The State did not call Agent Mota as a witness in its case-in-chief.

ARGUMENT

The trial court abused its discretion by admitting the drugs into evidence where the chain of custody was incomplete where SLED Agent Omri Mota was the key link in the chain of custody, and the State failed to call him as a witness.

South Carolina case law has long established 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 State v. Joseph, 328 S.C. 352, 491 S.E.2d 275 (Ct. App. 1997), this Court concluded that the State’s chain of custody was “fatally deficient” where the chemist, who analyzed the drugs and retained possession of the drugs for six months, was “the critical link in the State’s chain of custody” but did not testify at trial. In State v. Glenn, 328 S.C. 300, 492 S.E.2d 393, 395 (1997), the South Carolina Supreme Court 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 who 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.]

If 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 of 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.]

While weak links in the chain of custody are typically a question of credibility for the jury to determine, "[e]vidence 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." State v. Hatcher, 392 S.C. 86, 95, 708 S.E.2d 750, 755 (2011). The manner of handling must still be demonstrated. Id. at 91, 708 S.E.2d at 753. "Whether the chain of custody has been established as far as practicable clearly depends on the unique factual circumstances of each case." South Carolina Dep't of Soc. Servs. v. Cochran, 364 S.C. 621, 629 n. 1, 614 S.E.2d 642, 646 n. 1 (2005).

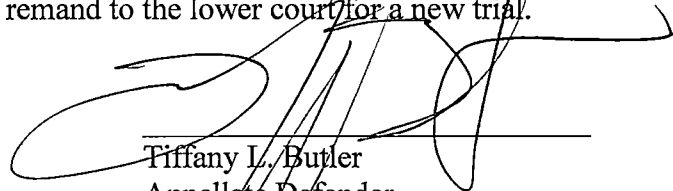
Here, the State failed to establish a chain of custody of the drugs purchased during the controlled drug buy. While Irving stated he returned to the agents immediately after purchasing the drugs, there was no evidence about the condition of the drugs or how they were packaged. Agent Miles could not consistently say what Irving did with the crack cocaine. Miles could not say whether Irving gave the drugs directly to Agent Mota or whether Irving placed them in the evidence bag himself. Moreover, Miles was **not** with Mota when the drugs were taken to SLED for testing.

Agent Mota, as the lead agent on the case, the first law enforcement officer to handle the drugs, and the person who transported the drugs to SLED, was the "critical link" in the chain of custody. See Joseph, 328 S.C. at 364 – 65, 491 S.E.2d at 281 – 82. Mota had been subpoenaed and was available to testify. However, the State refused to call Mota due to the discovery of the

agent's termination from SLED. The State merely presented the testimony of the SLED chemist to establish the chain. Because the chain of custody was incomplete, the drug evidence was inadmissible and should have been excluded by the trial court.

CONCLUSION

For the reasons argued above, Appellant Leo Abney respectfully requests this Court to reverse his conviction and sentence and remand to the lower court for a new trial.



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of August, 2016.

STATE OF SOUTH CAROLINA

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CERTIFICATE OF SERVICE

The undersigned 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 J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Leo Abney, #310056, at Catawba Pre-Release Center, 1030 Millen Road, Rock Hill, SC 29730, this 19th day of August, 2016.


Tiffany L. Butler
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 19th day of August, 2016.

Christian Fack (L.S)

Notary Public for South Carolina

My Commission Expires: