

STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM SALUDA COUNTY

SC Court of Appeals

Court of General Sessions

The Honorable William P. Keesley, Circuit Court Judge

Appellate Case No. 2016-000314

THE STATE,

Respondent,

v.

LEO ABNEY,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

I.

The trial judge properly admitted the crack cocaine into evidence where, notwithstanding the State's decision not to call former SLED agent Omri Mota as a witness, testimony was presented during the State's case-in-chief establishing the identity of each person who was in custody of the crack cocaine and the progression of the crack cocaine as it was transported to SLED for testing. Furthermore, Appellant suffered no prejudice by the State's strategic decision not to call Omri Mota as a witness where the defense subsequently called him as a witness and he personally detailed his involvement in the chain of custody.

STATEMENT OF THE CASE

Appellant was indicted at the February 2016 term of the Grand Jury for Saluda County for distribution of crack cocaine (2016-GS-41-054). Appellant proceeded to a trial by jury from February 9-11, 2016, in Saluda, South Carolina before the Honorable William P. Keesley. At the conclusion of trial, Appellant was found guilty as indicted. He was sentenced by Judge Keesley to imprisonment for a term of five years suspended to three years' imprisonment pursuant to S.C. Code Ann. §44-53-375(B). Appellant timely filed a notice of appeal and subsequently submitted a brief. This Brief of Respondent follows.

STATEMENT OF FACTS

In June of 2014, Timothy Erving contacted Jared Goldman, the Chief of Police of Ridge Spring, South Carolina, to request the Chief's assistance in dealing with a crack cocaine addiction. Tr. pp. 106-07. Chief Goldman agreed to help Erving in exchange for Erving becoming a confidential informant (CI) to help combat a drug problem identified by the police in the Ridge Springs area. Tr. pp. 107-08. Erving agreed to wear electronic audio and visual monitoring and conduct purchases of illegal narcotics as a CI in order to identify and collect evidence of illicit narcotics sales by individuals in Ridge Springs. Tr. p. 108.

On June 19, 2014 Erving met with Chief Goldman and Agent Charles Miles and former SLED agent Omri Mota of the South Carolina Law Enforcement Division (SLED) to prepare for a controlled purchase of narcotics. Tr. p. 108. Agent Miles and Mota searched Erving to ensure he had no narcotics on his person. Tr. p. 109; see also Tr. p. 139, Tr. pp. 209-10. As part of the controls implemented by SLED, Erving was given twenty dollars by Mota; the serial numbers and identifying characteristics of the money were recorded in order to track the money. Tr. pp. 152-53.

Erving informed Chief Goldman and Agents Miles and Mota that he believed Appellant would sell him crack cocaine. Tr. pp. 109-10. The law enforcement officers dropped off Erving next to a church on Main Street in Ridge Spring out of the sight of Appellant's residence. Tr. p. 110. Erving then proceeded to Appellant's residence. Tr. p. 110. Upon arriving at Appellant's residence, Erving encountered four men in Appellant's yard, identified as Lucious O'Conner, Derrick Cyrus, D.J. Abney (Appellant's brother), and Montez Quattlebaum. Tr. p. 112. Erving asked the men where Appellant could be located because he wanted to purchase twenty dollars' worth of crack cocaine from Appellant, commonly called a "doub" in street terminology. Tr. p.

113. Erving was informed that Appellant was upstairs. Tr. p. 113. Quattlebaum offered to sell crack cocaine to Erving which Quattlebaum claimed to have in his possession. Tr. p. 114. Erving declined Quattlebaum's offer, stating, "I don't want your garbage. I want [Appellant's] because I don't want garbage. I want the real thing." Tr. p. 114. Eventually Quattlebaum consented to the sale, and Erving gave him the twenty dollars for the crack cocaine. Tr. p. 115. Quattlebaum then entered Appellant's home to secure the crack cocaine for Erving. Tr. p. 115.

Erving followed Quattlebaum into the doorway of the residence, where he observed Appellant walk out of a room and give Quattlebaum crack cocaine and taking the twenty dollars. Tr. pp. 118-19. Erving testified it was broad daylight outside and he could clearly see Appellant. Tr. p. 119. Quattlebaum then walked downstairs and handed the crack cocaine to Erving. Tr. p. 119. Erving left Appellant's residence and returned to where the Agents and Chief Goldman had originally dropped him off next to the church on Main Street. Tr. p. 119. When Erving rejoined the agents, the agents conducted a second search of his person. Tr. p. 120. The SLED agents directed Erving to take the suspected crack cocaine and immediately place it inside a SLED Best Evidence Sample Testing (BEST) kit, which Erving did as witnessed by the SLED agents and Chief Goldman Tr. p. 141. The agents then took the BEST kit and sealed, signed, and dated the kit. Tr. p. 143. Agent Miles testified the kit was sealed in his presence. Tr. p. 143. Chief Goldman also testified that the suspected crack cocaine was immediately placed into the BEST kit by Erving, and was sealed and signed by the SLED agents in his presence. Tr. pp. 213-14. Chief Goldman further affirmed the substance recovered by Erving in the transaction was the substance placed and sealed into the BEST kit. Tr. p. 214.

SLED Agent Charles Miles testified that on June 20, 2014 Agent Mota took the BEST kit to the SLED laboratories for forensic testing and drug identification. Tr. p. 143. Agent Mota

submitted the BEST kit to Doris Yarbrough, a SLED Forensic Technician, who logged the kit into the SLED system on that date. Tr. p. 171. The kit was placed into the evidence intake storage by Yarbrough to await pick-up from laboratory personnel. Tr. p. 171. On June 23, 2016, Jennifer Aycock of SLED was directed to pull the kit for testing by SLED chemist Larry Zivkovich. Tr. 181. Agent Zivkovich testified that when the kit was delivered to him the tamper-resistant seals were all intact. Tr. p. 181. Agent Zivkovich stated there was no evidence of any tampering to the BEST kit, the serial numbering of the kit matched the paperwork sealed inside the kit provided by the SLED Special Agents, and SLED policy does not allow for testing of any kits that show any potential signs of tampering without the approval of the SLED laboratory director. Tr. p. 182. Forensic testing conducted by Agent Zivkovich subsequently identified the substance in question within the BEST kit as 0.12 grams of cocaine base/crack cocaine. Tr. p. 184.

During Agent Zivkovich's testimony, the defense offered an objection, asserting that it objected to the chain of custody being offered entirely through Agent Zivkovich's testimony. Tr. p. 174. Defense Counsel argued:

We've got, allegedly, Agent Mota putting it into the BEST kit package and then taking it up to SLED that day. So we have a big gap in the chain here where - - we're not asking him to account for every hand-to-hand that happened while it was in SLED, but the person who takes the crack cocaine from the CI and then puts it into SLED's possession hasn't testified, and he's readily available.

Tr. pp. 186-87. The trial judge found:

What I've got is I've got a SLED Agent Miles who testified that the drugs were placed into the BEST evidence kit, the evidence was sealed in his presence. He testified that they have not been tampered with. And he testified - - he identified who took them to SLED. And this witness has also identified who transported them to SLED. The BEST evidence kit was not tampered with when it was received. And there is an inconsistency in his testimony, but it's not enough, in my view, to warrant exclusion of the evidence. So my ruling is that under State versus Hatcher, State's Exhibit Number 1 can come into evidence.

Tr. p. 194.

Defense Counsel subsequently called Omri Mota as the defense's first witness. Tr. p. 282. Mota testified he worked at SLED in June of 2014 and was the chief agent on Appellant's case. Tr. p. 282. Mota stated he was no longer employed at SLED. Tr. p. 293. Mota was terminated "for failure to obey a direct order and for truthfulness in a matter that dealt with SLED personnel."¹

During cross-examination by the State, Mota testified in depth about his role in the chain of custody. Tr. pp. 298-99. Mota testified when Erving handed him the crack cocaine, he sealed the BEST kit in the presence of the other two officers with him. Tr. p. 298. Mota stated the other officers were instructed not to sign the BEST kit unless it was sealed in their presence. Tr. p. 298. Mota testified he took the BEST kit to SLED the next day and gave it to Doris Yarbrough. Tr. p. 298. Mota stated he did not change or alter the substance in any way while it was in his possession. Tr. pp. 298-99.

¹ During an *in camera* hearing, Mota stated his termination was based on a later investigation he conducted at his gym involving potential use of banned substances. Tr. pp. 133-34. There were never any accusations of Mota tampering with evidence. The Solicitor maintained at trial that the evidence of Mota's termination was more prejudicial than probative and was not relevant to the facts at issue in the case. Tr. p. 261. The Solicitor stated his intention not to call Mota as a witness during the State's case-in-chief, stating, "I would intend to rest and I will leave it to them. I don't intend to purposely embarrass this officer or attempt to do that. We have the evidence that we need to go forward in this case, if they want to call him as a defense witness. When the jury comes out, we would intend to rest." Tr. pp. 263-64.

ARGUMENT

I.

The trial judge properly admitted the crack cocaine into evidence where, notwithstanding the State's decision not to call former SLED agent Omri Mota as a witness, testimony was presented during the State's case-in-chief establishing the identity of each person who was in custody of the crack cocaine and the progression of the crack cocaine as it was transported to SLED for testing. Furthermore, Appellant suffered no prejudice by the State's strategic decision not to call Omri Mota as a witness where the defense subsequently called him as a witness and he personally detailed his involvement in the chain of custody.

Appellant asserts the trial judge abused his discretion by admitting the crack cocaine into evidence because Omri Mota was the key link in the chain of custody and the State failed to call him as a witness. Specifically, Appellant contends, "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." Br. of Appellant p. 7. This argument lacks merit. During its case-in-chief, the State presented adequate testimony establishing the identity of each person who was in custody of the crack cocaine and the progression of the crack cocaine as it made its way from Appellant's hands to SLED for testing. Moreover, Appellant later called Mota as a witness where he detailed his role in the chain of custody, thus eliminating any potential prejudice to Appellant.

"The 'chain of custody' rule is but a variation of the principle that real evidence must be authenticated prior to its admission into evidence." United States v. Howard-Arias, 679 F.2d 363, 366 (4th Cir. 1982). "The ultimate goal of chain of custody requirements is simply to ensure that the item is what it is purported to be." State v. Hatcher, 392 S.C. 86, 95, 708 S.E.2d 750, 755 (2011); see Howard-Arias, 679 F.2d at 366 ("The purpose of this threshold requirement is to establish that the item to be introduced, i.e., marijuana, is what it purports to be, i.e.,

marijuana seized from the ‘Don Frank.’”). Notably, “[c]ourts have abandoned inflexible rules regarding the chain of custody and the admissibility of evidence in favor of a rule granting discretion to the trial courts.” Hatcher, 392 S.C. at 94, 708 S.E.2d at 754.

A complete chain of custody must be established as far as practicable when a party seeks the admission of fungible evidence like drugs or a blood sample during trial. State v. Governor, 362 S.C. 609, 612, 608 S.E.2d 474, 475 (Ct. App. 2005); see Hatcher, 392 S.C. at 95, 708 S.E.2d at 755 (“The State need not establish the identity of every person handling fungible items in all circumstances; rather, the standard is whether, in the discretion of the trial judge, the State has established the chain of custody as far as practicable.”). However, the proof of the chain of custody need **not** exclude every possibility of tampering. State v. Smith, 326 S.C. 39, 41, 482 S.E.2d 777, 778 (1997); see State v. Rogers, 361 S.C. 178, 187, 603 S.E.2d 910, 915 (Ct. App. 2004) (“South Carolina law does not require testimony as to the exclusion of any possibility of tampering.”). Instead, in order to satisfy the requirements for establishing the chain of custody, the evidence and testimony presented during trial must simply not leave to conjecture who was in possession of the fungible item and what was done with it between its seizure and analysis. State v. Johnson, 318 S.C. 194, 196, 456 S.E.2d 442, 443 (Ct. App. 1995). “[I]f the identity of each person handling the evidence is established, and the manner of handling is reasonably demonstrated, no abuse of discretion by the trial court is shown in admitting the evidence absent proof of tampering, bad faith, or ill-motive.” State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205-206 (2007).

In South Carolina Dep’t of Soc. Servs. v. Cochran, 364 S.C. 621, 629, 614 S.E.2d 642, 646 (2005), the South Carolina Supreme Court found the chain of custody was sufficient even

though the courier who transported blood evidence to the testing site was never identified, stating:

The testimony presented by DSS indicates the blood samples were secure when Kejales took the samples at the collection site. The testimony also indicates the samples arrived at the testing facility sealed and intact. Additionally, each person involved in the actual testing procedure once the samples arrived at the facility, testified as to their handling of each respective sample and the chain of custody. Generally, we will uphold the chain of custody if the safeguards instituted ensure the integrity of the evidence, even if every person associated with the procedure is not personally identified.

In Appellant's case, the testimony of Erving, Agent Miles, Chief Goldman, and Agent Zivkovich firmly establish establishes the chain of custody, as it fully accounts for what was done with the evidence between seizure and analysis. The testimony presented by the State during its case-in-chief established that upon Erving's rendezvous with the officers, at the officer's instruction, he immediately placed the crack cocaine inside a BEST evidence bag. Mota subsequently sealed the BEST kit in the presence of the other officers. Both Agent Miles and Agent Zivkovich testified Mota transported the BEST kit to SLED the next day. Upon his arrival at SLED, Mota submitted the BEST kit to Jennifer Yarbrough, who logged the kit into the SLED system and placed the evidence into evidence intake storage to await pick-up by laboratory personnel. On June 23, 2016, Jennifer Aycock pulled the kit for testing by Agent Zivkovich. Agent Zivkovich testified there was no evidence of any tampering to the BEST kit, the serial numbering of the kit matched the paperwork sealed inside the kit provided by the SLED agents. The above testimony fully establishes the progression of the crack cocaine as it moved from Ervin to the SLED laboratory for testing. Despite the fact that Mota was not called as a witness by the State, the other officers who testified were present for everything aside from the evidence's transportation to SLED by agent Mota. However, there was no "gap" in the chain of custody regarding the transportation of the drugs to SLED by Mota, as Miles and Zivkovich both

testified Mota transported the drugs to SLED for testing and Zivkovich testified the evidence arrived with its tamper-proof seal intact. Therefore, the trial judge properly found the State's testimony fully accounted for the drug evidence at all stages.

Even if the chain of custody was somehow insufficient at the time the trial judge made his ruling, any potential prejudice from Mota not being called during the State's case-in-chief was eliminated because the defense subsequently called Mota as a witness. During cross-examination, the State was able to thoroughly question Mota regarding his transportation of the evidence to SLED and the collection and packaging of the crack cocaine from Ervin. Mota's testimony on cross-examination cured any potential prejudice towards Appellant, as his testimony filled any conceivable gaps that were left in the chain of custody following the testimony of Ervin, Agent Miles, Chief Goldman, and Agent Zivkovich. Appellant's conviction and sentence should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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October 3, 2016

STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM SALUDA COUNTY

Court of General Sessions

The Honorable William P. Keesley, Circuit Court Judge

Appellate Case No: 2016-000314

THE STATE,

Respondent,

v.

LEO ABNEY,


Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record Tiffany L. Butler, Esquire, S.C. Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589.

I further certify that all parties required by Rule to be served have been served.

This 3rd day of October, 2016.


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ATTORNEY GENERAL

October 3, 2016

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29201

Re: The State v. Leo Abney
Appellate Case No: 2016-000314

Dear Ms. Kitchings:

Enclosed please find an original and one (1) copies of the Initial Brief of Respondent and Designation of Matter, including proof of service, in the above-referenced case.

Sincerely,

V. Hencry Gunter, Jr.
Assistant Attorney General
S.C. Bar No: 102259

VHG/aam
Enclosures

cc: Tiffany L. Butler (with two copies)
Ms. Trisha Allen