

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Laurens County

Honorable Eugene C. Griffith, Circuit Court Judge

RECEIVED

JAN 19 2017

S.C. SUPREME COURT

Opinion No. 2016-UP-424 (S.C. Ct. App. Filed October 12, 2016)

10-GS-30-01918

THE STATE,

RESPONDENT,

V.

DANIEL MARTINEZ HERRERA,

PETITIONER

APPELLATE CASE NO 2016-002523

APPENDIX

JOHN H. STROM
Appellate Defender

ALAN WILSON
Attorney General

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

MEGAN HARRIGAN JAMESON
Assistant Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201

ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT

INDEX

INDEX.....i

UNPUBLISHED OPINION NO. 2016-UP-424..... 1

PETITION FOR REHEARING.....4

ORDER DENYING PETITION FOR REHEARING9

**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.

Daniel Martinez Herrera, Appellant.

Appellate Case No. 2014-001299

Appeal From Laurens County
Eugene C. Griffith, Jr., Circuit Court Judge

Unpublished Opinion No. 2016-UP-424
Submitted September 1, 2016 – Filed October 12, 2016

AFFIRMED

Appellate Defender John Harrison Strom, of Columbia,
for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Megan Harrigan Jameson, both of
Columbia; and Solicitor David Matthew Stumbo, of
Greenwood, for Respondent.

PER CURIAM: Daniel Martinez Herrera appeals his conviction for trafficking marijuana and his sentence of five years' imprisonment with credit for time served. On appeal, Herrera argues the trial court erred by (1) refusing to grant a directed

verdict when the State failed to present any evidence that the weight of the marijuana at issue was ten pounds or more and (2) allowing expert testimony regarding the weight of six vacuum-sealed bags of marijuana when the State failed to establish that the methodology used to weigh the marijuana was scientifically reliable. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

As to Issue 1: *State v. Hewins*, 409 S.C. 93, 102, 760 S.E.2d 814, 819 (2014) ("In criminal cases, the appellate court sits to review errors of law only." (quoting *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001))); *State v. Gracely*, 399 S.C. 363, 371-72, 731 S.E.2d 880, 884 (2012) ("When reviewing the denial of a motion for a directed verdict, [appellate courts] employ[] the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the non-moving party."); *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006) ("A defendant is entitled to a directed verdict when the [S]tate fails to produce evidence of the offense charged."); *id.* at 292-93, 625 S.E.2d at 648 ("If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the [appellate court] must find the case was properly submitted to the jury."); *State v. Bennett*, 415 S.C. 232, 237, 781 S.E.2d 352, 354 (2016) ("Accordingly, in ruling on a directed verdict motion where the State relies on circumstantial evidence, the [trial court] must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt."); S.C. Code Ann. § 44-53-370(e)(1)(a) (Supp. 2015) ("Any person who knowingly sells, manufactures, cultivates, delivers, purchases, or brings into this [s]tate, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, cultivate, deliver, purchase, or bring into this [s]tate, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of . . . ten pounds or more of marijuana is guilty of a felony which is known as 'trafficking in marijuana' and, upon conviction, must be punished as follows if the quantity involved is . . . ten pounds or more, but less than one hundred pounds . . . for a first offense, a term of imprisonment of not less than one year nor more than ten years, no part of which may be suspended nor probation granted, and a fine of ten thousand dollars . . ."); *State v. Mollison*, 319 S.C. 41, 45, 459 S.E.2d 88, 91 (Ct. App. 1995) ("The knowledge element may be proved circumstantially by evidence of acts, declarations, or conduct of the accused from which an inference may be drawn that the accused knew of the existence of the prohibited substance."); S.C. Code Ann. § 44-53-110(27)(a)-(b) (Supp. 2015) (defining "Marijuana" as "all species or variety of the marijuana plant and all parts thereof whether growing or not" and "the seeds

of the marijuana plant," but excluding "the mature stalks of the marijuana plant or fibers produced from these stalks . . . [and] the sterilized seed of the marijuana plant which is incapable of germination"); S.C. Code Ann. § 44-53-392 (2002) ("Notwithstanding any other provision of this article, the weight of any controlled substance referenced in this article is the weight of that substance in pure form or any compound or mixture thereof.").

As to Issue 2: *State v. Cope*, 405 S.C. 317, 334-35, 748 S.E.2d 194, 203 (2013) ("The trial [court] has considerable latitude in ruling on the admissibility of evidence and [its] decision should not be disturbed absent prejudicial abuse of discretion." (quoting *State v. Clasby*, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009))); *State v. White*, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009) ("All expert testimony must satisfy the Rule 702 criteria, and that includes the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration."); Rule 702, SCRE ("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."); *State v. Martin*, 391 S.C. 508, 513, 706 S.E.2d 40, 42 (Ct. App. 2011) ("Before a witness is qualified as an expert, the trial court must find (1) the expert's testimony will assist the trier of fact, (2) the expert possesses the requisite knowledge, skill, experience, training, or education, and (3) . . . the expert's testimony is reliable."); *White*, 382 S.C. at 274, 676 S.E.2d at 688 ("The foundational reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach, for the *Council*¹ factors for scientific evidence serve no useful analytical purpose when evaluating nonscientific expert testimony.").

AFFIRMED.²

WILLIAMS, THOMAS, and GEATHERS, JJ., concur.

¹ *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999).

² We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

DANIEL MARTINEZ HERRERA,

APPELLANT

APPELLATE CASE NO 2014-001299

Appeal from Court of Appeals County
Honorable Eugene C. Griffith, Circuit Court Judge

Opinion No. 2016-UP-424

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Appellant Daniel Herrera respectfully petitions the Court for a rehearing of its Opinion No. 2016-UP-424 filed on October 12, 2016 based upon the following points overlooked or misapprehended by the Court:

The opinion cites to *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009), for the proposition that “the foundational reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach . . . factors for scientific evidence serve no useful analytical purpose when evaluating nonscientific expert testimony.”

However, in this case, Officer Jared Hunnicutt was allowed to give expert opinion testimony on the weight of six vacuumed sealed bags purporting to contain marijuana. R. 119, ll. 19 – R. 120, ll. 22. Determining the accurately determining weight of a particular item is an area of scientific expertise, that was how the issue was presented to the trial court and that is how the issue was raised on appeal.

Trial courts are required to establish whether: (1) the expert has the requisite qualifications, experience, and/or credentials; (2) the methodology by which the evidence is obtained is reliable; and (3) the evidence will assist the trier of fact. *Id.* Evaluating the reliability of the proposed expert testimony is the central concern of Rule 702 admissibility. *State v. Jones*, 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147, 119 S.Ct. 1167 (1999).

With respect to reliability of scientific expert testimony and evidence, the trial court must examine the following factors: (1) publications and peer reviews of the technique used by the expert; (2) prior application of the method to the type of evidence involved in the case; (3) quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. *State v. Jones*, 273 S.C. at 731-732, 259 S.E.2d at 124-125.

Appellant specifically argued in its brief that that the methodology used by Hunnicutt to weigh the marijuana was not scientifically reliable under *State v. Jones*, 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001). Ap.'s Br. p. 18 - 22. Specifically, Hunnicutt admitted that he did not weigh the vacuum sealed bags independently from the marijuana to determine their weight, but rather selected a different, unrelated bag - not produced at trial - that he believed was sufficiently similar so as to approximate weight of the packaging. R. 123, ll. 8-25.

This method of determining the weight of a substance is not scientifically valid. It is incapable of repetition. There are no quality control measures and Hunnicutt did not ask any other officers to weigh the marijuana to check his accuracy. Hunnicutt never identified any training, authoritative text, or law enforcement policy that supported his informal method of weighing marijuana as scientifically reliable. This slipshod method is particularly egregious in this case because the marijuana weighed only 1.7% above the minimum trafficking weight. R. 124, ll. 11 – R. 125, ll. 10.

In fact, Hunnicutt's method of weighing the marijuana has been heavily criticized in reports evaluating detailing the many scandals at state crime labs because of the risk that weighing the drugs with the packaging will result in an artificially high weight. *See* Inspector General Glenn A. Cunha, *Investigation of the Drug Laboratory at the Williams A. Hinton State Laboratory Institute 2002-2012*, 87 - 104 (Office of the Inspector General Commonwealth of Massachusetts) (2014) (concluding that arbitrary weight sampling methods risk underestimating the weight of the packaging and “thereby overstate the weight of the contents.”).

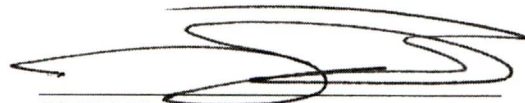
Hunnicutt also lacked the necessary skill, training, education, and experience to reliably determine the weight of marijuana. R. 108, ll. 18 – R. 109, ll. 22; R. 119, ll. 19 – R. 120, ll. 21. Hunnicutt provided no evidence that he had received any technical certifications in marijuana analysis or had experience in proper crime lab methodology. *Id.* Instead, Hunnicutt simply stated that he had attended a two-day, sixteen hour marijuana field identification course. *Id.* He candidly admitted that he had no training or education relating to marijuana analysis. *ID.*

When pressed at trial Hunnicutt was unable to cogently identify whether certain parts of the marijuana at issue qualified as statutorily excludable materials such as “mature stalks” and “non-

germinating seeds.” Hunnicutt was, in fact, ignorant of the statutory definition of marijuana. . R. 127, ll. 7 – R. 128, 19.

Most respectfully, this Court misapprehended the nature of Appellant’s argument when ruling that determining the weight of marijuana was an area of non-scientific expertise and that Hunnicutt had the necessary qualifications to be an expert in weighing marijuana using reliable methodology. *State v. Jones*, 273 S.C. at 731-732, 259 S.E.2d at 124-125.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "JOHN H. STROM", written over a horizontal line.

JOHN H. STROM
Appellate Defender

This 27th day of October, 2016.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Laurens County

Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DANIEL MARTINEZ HERRERA,

APPELLANT

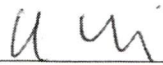
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Daniel Martinez Herrera, #360380, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 27th day of October, 2016.



John H. Strom
Appellate Defender
ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 27th day of
October, 2016.

 (L.S)
Notary Public for South Carolina
My Commission Expires: 5/12/2025

The South Carolina Court of Appeals

The State, Respondent,


v.

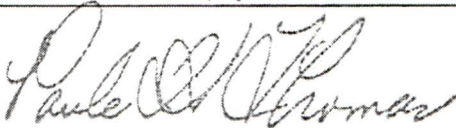
Daniel Martinez Herrera, Appellant.

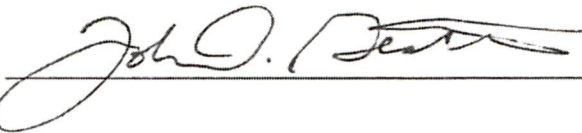
Appellate Case No. 2014-001299

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.

	J.

	J.

	J.

Columbia, South Carolina

cc: Alan McCrory Wilson, Esquire
John Harrison Strom, Esquire
Megan Harrigan Jameson, Esquire
David Matthew Stumbo, Esquire

FILED

November 17, 2016

RECEIVED
NOV 17 2016