STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Charleston County

Honorable D. Garrison Hill, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

MARK LORENZO BLAKE,

APPELLANT

APPELLATE CASE NO 2016-001364

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# FINAL BRIEF OF APPELLANT

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KATHRINE H. HUDGINS
Appellate Defender

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

ATTORNEY FOR APPELLANT

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1. Did the trial judge err admitting the second chemist's report, testimony and drug evidence when the State failed to establish an adequate chain of custody for the substance tested?

2. Did the trial judge err in refusing to suppress evidence obtained as a result of an unreasonable search of Appellant's home?

## STATEMENT OF THE CASE

In June of 2013, the Charleston County Grand Jury indicted Appellant Blake for possession with intent to distribute heroin, indictment #2013-GS-10-2729. On June 14, 2016, Appellant proceeded to jury trial before the Honorable D. Garrison Hill. Jason King and Tamara Vanpala represented Appellant at trial. Stephanie Linder and Lauren Frierson prosecuted the case. The jury returned a verdict of guilty and Judge Hill sentenced Appellant to twelve (12) years in prison. A timely notice of intent to appeal was served on June 24, 2016. This appeal follows.

## ARGUMENTS

1. The trial judge erred admitting the second chemist's report, testimony and drug evidence when the State failed to establish an adequate chain of custody for the substance tested.

The jury found Appellant guilty of possession with intent to distribute heroin. A substance was found in Appellant's home during the execution of a search warrant. The substance was first tested on March 11, 2013, by Elizabeth Mitchell, a chemist with the Charleston City Police Department. (R. p. 251, line 22 – p. 252, lines 1-2). Mitchell's report indicates that the substance was 2.46 of heroin. (R. p. 257, lines 20-22). The substance was then transported to the Charleston County Sheriff's Office on April 1, 2013, by Ashley Carr Earl. (R. p. 252, lines 3-5). Neither the chemist nor Ashley Carr Earl testified at trial.

The substance remained at the Charleston County Sheriff's Office until June 1, 2015, when it was again transferred to the Charleston City Police Department. (R. p. 252, lines 6 – 20). On June 8, 2015 the substance was returned to the Charleston County Sheriff's Office and received by either Christopher Hockrighter, according to the Charleston City Police Department lab chain of custody, or Jason Riley, according to the Charleston County Sheriff's Office chalin of custody. (R. p. 252, lines 9 – 25; R. p. 258, line 9 – p. 292, lines 1-2). Hockrighter did not testify at trial. The substance remained at the Charleston County Sheriff's Office until November 23, 2015, when the substance was transferred to the Charleston City Police Department lab for a third time. (R. p. 253, lines 1-16). The substance was tested a second time by Renee Hilton, another chemist with the Charleston City Police Department. Hilton reported the substance as 1.12 grams of heroin. (R. p. 257, lines 22-23).

Appellant objected to the admission of Hilton's report based on the State's failure to establish an adequate chain of custody. (R. p. 241, lines 12-15). After hearing arguments from both sides, (R. pp. 261-266), the judge found that the chain had been adequately established, "assuming the foundation is further laid that Ms. Frierson just assured me it would concerning the heat sealing and the basis of Ms. Hilton's knowledge of the initials of the chemist Ms. Mitchell who is unavailable, who first tested the drugs ..." (R. p. 266, lines 18-25). The judge later elaborated on his ruling citing State v. Hatcher, 392 S.C. 86, 708 S.E.2d 750 (2011); and State v. Taylor, 360 S.C. 18, 598 S.E.2d 735 (S.C. Ct.App. 2004) in addition to State v. Williams, 297 S.C. 290, 376 S.E.2d 773 (1989). (R. p. 286, lines 1-21). Appellant renewed the objection prior to the testimony of the chemist. (R. p. 268, lines 1-12). Appellant renewed the objection when the drugs were admitted in evidence. (R. p. 279, lines 16-18). Appellant again renewed the objection at the close of the case and after the jury returned a verdict. (R. p. 286, line 25 – p. 287, lines 1-12; p. 352, lines 11-14). The trial judge abused his discretion in admitting the testimony, report and drugs tested by the second chemist when the State failed to establish an adequate chain of custody.

As correctly argued by counsel for Appellant, the missing link in the chain in the present case is the first chemist, Elizabeth Mitchell, and not simply a custodian who received and/or stored a sealed package. (R. p. 242, lines 5-25). In State v. Hatcher, 392 S.C. 86, 708 S.E.2d 750 (2011), the missing link was simply a witness from the South Carolina Law Enforcement division [SLED] Log- In Department who received a double sealed package from an officer with the Marlboro County Sheriff's Office. The SLED chemist testified that when she retrieved the evidence from the Log-In Department, the evidence was still sealed in a best evidence kit. The

Court in Hatcher found that the judge did not abuse his discretion in admitting drug evidence writing:

> Courts 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. United States v. De Larosa, 450 F.2d 1057, 1068 (3d Cir.1971). "The trial judge's exercise of discretion must be reviewed in the light of the following factors: '... the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it.' " Id. (citation omitted). "If upon the consideration of such factors the trial judge is satisfied that in reasonable probability the article has not been changed in important respects, he may permit its introduction in evidence." Gallego v. United *States*, 276 F.2d 914, 917 (9th Cir.1960).
>
> Considering those factors here, we find no abuse of discretion in the trial judge's admission of the drug evidence in Hatcher's case. We agree with the Court of Appeals that the mere fact that evidence is sealed upon presentation for testing does not, in itself, establish a sufficient chain of custody. **Evidence 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.** However, we have consistently held that the chain of custody need be established only as far as practicable, and we reiterate that every person handling the evidence need not be identified in all cases.

Hatcher, 392 S.C. at 94–95, 708 S.E.2d at 754–55 (bold added). The first chemist in the present case is a critical part of the chain, unlike the missing witness in Hatcher. Evidence is lacking in the present case as to how the first chemist obtained and handled the substance.

In State v. Williams, 297 S.C. 290, 376 S.E.2d 773 (1989), the Court found that the chain of custody for a blood sample was sufficient although the nurse who drew the blood did not testify at trial. The Court wrote, "Nurse Yorke testified she removed the blood sample from a locked refrigerator on the morning after the accident and took it to the lab for testing. The vial was labeled with appellant's name, his patient number, his date of birth, and the date the blood was drawn. The hospital's internal chain of custody form was initialled by Nurse Burns indicating she had obtained the sample from appellant and then locked it in the refrigerator." Williams, 297 S.C. at 293, 376 S.E.2d at 774. Importantly, Williams challenged the chain of

custody **not** based on a missing chemist, but rather on the fact that the nurse who drew the blood sealed the vial and labeled it did not testify. The challenge in the present case is based on the fact that the first chemist who handled and tested the substance did not testify.

In State v. Taylor, 360 S.C. 18, 598 S.E.2d 735 (S.C. Ct.App. 2004), this Court found that the chain of custody for drug evidence was sufficient although an evidence custodian did not testify a trial. This Court found that the State introduced evidence to establish the identity of each person in the chain of possession and the manner of handling. Like the missing link in Hatcher, the missing link in Taylor was simply the evidence custodian who delivered the sealed evidence bag to SLED. Again, the missing link in the present case is the first chemist who tested the substance and the State did not introduce sufficient evidence to establish the manner of handling of the substance by the first chemist.

Additionally, the State failed to establish that the first chemist was unavailable as defined by the Rule 804, SCRE. The State simply argued that, "Ms. Mitchell is no longer with the lab. She chose another career, there's no unsavory circumstances or anything. She's just in another career and is unavailable to testify." (R. p. 245, lines 12-16). The State failed to show that they tried to procure Ms. Mitchell's testimony. This Court in Taylor wrote:

> A party offering into evidence fungible items such as drugs or blood samples must establish a chain of custody as far as practicable. See, e.g., Benton v. Pellum, 232 S.C. 26, 33, 100 S.E.2d 534, 537 (1957); State v. Cribb, 310 S.C. 518, 522, 426 S.E.2d 306, 309 (1992); State v. Joseph, 328 S.C. 352, 364, 491 S.E.2d 275, 281 (Ct.App.1997); State v. Johnson, 318 S.C. 194, 196, 456 S.E.2d 442, 443 (Ct.App.1995). Where the analyzed substance has 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 and the analysis. While the proof of chain of custody need not negate all possibility of tampering, it must establish a complete chain of evidence as far as practicable. State v. Williams, 297 S.C. 290, 293, 376 S.E.2d 773, 774 (1989); Johnson, 318 S.C. at 196, 456 S.E.2d at 443.

360 S.C. at 22–23, 598 S.E.2d at 737. The analyzed substance in the present case passed though many hands before finally being tested by the second chemist. The evidence leaves to conjecture what was done with the substance when it was in the hands of the first chemist. The State did not establish that the first chemist was unavailable. The State failed to establish a complete chain of custody as far as practicable.

In State v. Joseph, 328 S.C. 352, 491 S.E.2d 275 (S.C.Ct.App. 1997), this Court found the chain of custody for drug evidence was inadequate where the State offered an affidavit instead of the testimony of the chemist who tested the substances because the chemist had moved to Michigan. In reversing the conviction, this Court wrote:

> In the case at bar, we conclude that the State failed to establish an adequate chain of custody. Kilmer was the critical link in the State's chain of custody—it was Kilmer who retrieved the evidence from the drop box and first analyzed the evidence, and it was Kilmer who retained possession of evidence for six months. The fact that Kilmer had moved to Michigan does not render Kilmer unavailable or make it impracticable for the State to produce her for trial once Joseph objected to the use of her affidavit. Given Kilmer's importance in the chain of custody and the inconsistencies in the State's proof of the chain of custody, Joseph's right to cross-examine Kilmer cannot be abridged simply because she no longer lived in South Carolina. We therefore conclude that the State's evidence of the chain of custody was fatally deficient and that the trial court erred by admitting the drug evidence.

Joseph, 328 S.C. at 364–65, 491 S.E.2d at 281–82 (footnotes omitted).

In present case the State had the substance re-tested by a second chemist. The re-testing, however, did not cure the problem with the chain. The second chemist's recognition of the first chemist's initials on a sealed bag does not provide evidence of handling by the first chemist. As noted by the Court in Hatcher, "... the mere fact that evidence is sealed upon presentation for testing does not, in itself, establish a sufficient chain of custody." Hatcher, 392 S.C. at 94–95, 708 S.E.2d at 754–55. The first chemist was a critical link in the chain and not just a custodian.

The trial judge abused his discretion in admitting the report, testimony and drugs tested by the second chemist when the State failed to establish an adequate chain of custody.

2. The trial judge erred in refusing to suppress evidence obtained as a result of an unreasonable search of Appellant's home.

Prior to trial Appellant moved to suppress evidence found inside his home during the execution of a search warrant. (R. p. 13, lines 3-25). Appellant did not challenge the validity of the search warrant. Instead, Appellant argued that the search was conducted unreasonably. The State called three officers from the Charleston County Sheriff's Office to testify as to how the search warrant was executed. (R. pp. 14-61). Appellant also testified at the suppression hearing. (R. pp. 69-82). Counsel for Appellant argued that the excessive force used during the felony traffic stop in connection with the officers' actions during the search of Appellant's home, including their failure to provide Appellant with a copy of the search warrant, rendered the execution of the search warrant unreasonable. (R. pp. 83- 86; p. 91, line 11 – p. 92, lines 1-8, line 24 – p. 93, line 1). Appellant moved to suppress all evidence obtained as a result to the search warrant based on both the United States Constitution and the South Carolina Constitution. (R. p. 85, line 22 – p. 86, lines 1-4).

The judge denied the motion to suppress. (R. pp. 93-98). The judge found that the officers were justified in the manner in which they conducted the felony stop and later search of Appellant's home. (R. p. 95, line 18 – p. 96, lines 1-7). With regard to the failure to provide Appellant with a copy of the search warrant the judge stated, "I don't find that the failure to give a warrant – a copy of the warrant to Mr. Blake, put it in his hands when he was handcuffed

behind his back as I understand it is enough in and of itself to deem the search unreasonable within the meaning of the Fourth Amendment." (R. p. 96, lines 8-13).

During trial Appellant objected, based on the pre-trial suppression motion, to photos taken at the home on the day of the search (R. p. 121, line 14; p. 169, lines 4-6; p. 182, lines 9-11), and evidence seized at the home including the substance which the chemist testified was heroin. (R. p. 189, line 25 – p. 190, line 1; p. 191, line 1; p. 193, line 19; p. 196, lines 6-8; p. 279, lines 16-18). The judge overruled the objection each time. At the close of the case Appellant renewed the motion to suppress and the judge again denied the motions. (R. p. 286, line 22- p. 287, lines 1-12). Appellant renewed the motion to suppress after the jury returned the verdict. (R. p. 352, lines 11-18). The trial judge erred in refusing to suppress the evidence obtained as a result of an unreasonable search.

The Fourth Amendment to the United States Constitution protects a person's right to be free from unreasonable searches and seizures. U.S. Const. amend. IV. "In parallel with the protection of the Fourth Amendment, the South Carolina Constitution also provides a safeguard against unlawful searches and seizures." State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001); S.C. Const. art. I, § 10. "The relationship between the two constitutions is significant because '[s]tate courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution.' " Forrester, 343 S.C. at 643, 541 S.E.2d at 840 (quoting State v. Easler, 327 S.C. 121, 131 n. 13, 489 S.E.2d 617, 625 n. 13 (1997)). "Therefore, state courts can develop state law to provide their citizens with a second layer of constitutional rights." Id. "This relationship is often described as a recognition that the federal Constitution sets the floor for individual rights while the state constitution establishes the ceiling." Id. "Thus, this Court can interpret the state protection against unreasonable searches and

seizures in such a way as to provide greater protection than the federal Constitution." Id. at 644, 541 S.E.2d at 840.

As persuasive authority to support the argument that the officer's failure to provide Appellant with a copy of the search warrant rendered the search unreasonable, Appellant cited United States v. Thompson, 667 F. Supp. 2d 758, 763 (S.D. Ohio 2009). (R. p. 83, line 4 – p. 84, lines 1-8). In Thompson one of the factors the judge relied upon in finding that the search, pursuant to a warrant, was unreasonable, was the fact that officers refused to provide the defendant's wife with a copy of the search warrant. In Thompson the district judge wrote:

> The reasonableness of a search and seizure is evaluated based upon the totality of the circumstances. Ohio v. Robinette, 519 U.S. 33, 39, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996). "To satisfy the Reasonableness Clause, officers not only must obtain a valid warrant but they also must conduct the search in a reasonable manner." Baranski, 452 F.3d at 445. The willingness (or unwillingness) of officers to present a warrant to an occupant when asked goes to the reasonableness of a search. See id. at 443 (stating that "the decision of officers not to present an incorporated affidavit to the occupant upon request may be a relevant factor in determining the reasonableness of a search"). After all, an integral component of the Fourth Amendment's protection of the home is the requirement that a warrant must be obtained prior to a search. Karo, 468 U.S. at 715, 104 S.Ct. 3296.

S.C. Code Ann. § 17-13-150 provides that, "When any person is served with a search warrant, such person shall be furnished with a copy of the warrant along with the affidavit upon which such warrant was issued."

In Groh v. Ramirez, 540 U.S. 551, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004), the United States Supreme Court left open the question of whether it would be unreasonable under the Fourth Amendment for an officer executing a search warrant to refuse to provide an occupant, present at the scene, with a copy of the search warrant. The Court wrote in footnote #5, "Whether it would be unreasonable to refuse a request to furnish the warrant at the outset of the search when, as in this case, an occupant of the premises is present and poses no threat to the

officers' safe and effective performance of their mission, is a question that this case does not present." In Groh v. Ramirez, 540 U.S. 551, 562, 124 S. Ct. 1284, 1292, 157 L. Ed. 2d 1068 (2004).

In the present case Appellant was arrested pursuant to a felony traffic stop and taken back to his home where officers executed the search warrant. Appellant testified that he became agitated after he asked to see a copy of the search warrant and the officers refused. (R. p. 71, lines 3-16). Detective Frank Waddell admitted that he never personally gave Appellant a copy of the search warrant. (R. p. 41, lines 11-16; p. 42, lines 4-11). The detective admitted that the search warrant itself ordered the detective to serve Appellant with a copy of the search warrant. (R. p. 40, line 10 – p. 41, lines 1-14). Rather than providing Appellant with a copy of the search warrant, pursuant to S.C. Code §17-13-150 and the search warrant itself, the detective simply left the search warrant at the residence. (R. p. 36, lines 7-13). The detective admitted that Appellant would not have had an opportunity to see the search warrant because he was arrested and taken to jail at the conclusion of the search. (R. p. 41, lines 20-25).

As noted by the judge in Thompson:

> One of the purposes served by the warrant requirement is informing citizens that the executing agents are acting under proper authorization when they invade the sanctity of a citizen's home. That sentiment is succinctly but eloquently stated by the Supreme Court in Camara v. Mun. Ct., 387 U.S. 523, 530–33, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967):
>
> In our opinion, these arguments unduly discount the purposes behind the warrant machinery contemplated by the Fourth Amendment. Under the present system, when the inspector demands entry, the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization. That purpose cannot be served if executing officers arbitrarily decide to withhold presentation of the warrant until the conclusion of the search despite an occupant's repeated requests to view the warrant.

> See also United States v. Chadwick, 433 U.S. 1, 9, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977) (noting that "... a warrant assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search."), *abrogated on other grounds,* California v. Acevedo, 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991).

Thompson, 667 F. Supp. 2d at 764–65. As noted in footnote #3 in Thompson:

> In United States v. Grubbs, 547 U.S. 90, 126 S.Ct. 1494, 164 L.Ed.2d 195 (2006), the Supreme Court noted that "[t]he Constitution protects property owners not by giving them license to engage the police in a debate over the basis for the warrant, but by interposing, *ex ante,* the deliberate, impartial judgment of a judicial officer ..." *Id.* at 99, 126 S.Ct. 1494. This Court agrees that confrontations between the police and home occupants about the validity of a search should be as limited as possible. It appears to this Court that by *not* furnishing a warrant upon request, after the premises have been secured, the possibility that a confrontation will occur is *more* likely. Producing a warrant reassures an occupant that her Constitutional rights are not being violated, such that the search may proceed without incident.

Thompson, 667 F. Supp. 2d at 764. The trial judge in the present case noted, "I believe Mr. King has a good point that the reason for requiring showing the subject of the warrant a copy of it is to diffuse the tension to deescalate the confrontation between the police and the citizen." (R. p. 95, lines 1-5). The trial judge later stated, "Now, this is somewhat of a chicken and egg problem because as Mr. King points out had they simply given him the warrant he may have had his hostility diminished to the point where he did remain peaceful throughout the search, but that didn't happen." (R. p. 97, lines 11-15). The officer was unreasonable in not providing Appellant with a copy of the search warrant.

Based on the totality of circumstances, including the violation of S.C. Code §17-13-150 and the directive of the search warrant itself, the excessive force used, the search in the present case was unreasonable under the Fourth Amendment of the United States Constitution and the heightened privacy protection provided by the South Carolina Constitution art. I, § 10. The trial judge erred in failing to suppress the evidence seized as a result of the unreasonable search.

## CONCLUSION

Based on the above arguments, Appellant's conviction and sentence should be reversed.

Sarah B. Hackett for
Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of July, 2017.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

July 6th, 2017

Susan B. Hackett for

Kathrine H. Hudgins
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

ATTORNEY FOR APPELLANT