

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of General Sessions
R. Scott Sprouse, Circuit Court Judge

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JAN 17 2018

SC Court of Appeals

Appellate Case No. 2015-001616

THE STATE,RESPONDENT,

v.

GEROME C. SMITH,APPELLANT.

RESPONDENT'S PETITION FOR REHEARING

On January 10, 2018, this Court issued an unpublished opinion in which it reversed Appellant Gerome Smith's conviction for distribution of crack cocaine and remanded his case for a new trial. State v. Smith, Op. No. 2018-UP-014 (S.C. Ct. App. filed January 10, 2018). In reversing Smith's conviction, this Court held the trial judge erred in allowing the admission of the criminal informant (CI)'s written statement at trial because the CI did not testify and the statement violated Smith's constitutional right to confrontation. Furthermore, this Court held it could not conclude the error in the admission of the CI's statement was not harmless because there was evidence at trial the CI may not have obtained the crack cocaine from Smith but, "instead, set it up to appear that way." Pursuant to Rule 221(a), SCACR, Respondent, the State, respectfully petitions for rehearing because the State believes this Court misapprehended and

overlooked the facts, law, and standard of review in finding the admission of the statement was not harmless.

Moreover, this Court failed to recognize Smith gained a net benefit from the admission of the CI's written statement: because the trial judge allowed the State to introduce the brief, non-descriptive statement he also allowed him to introduce into evidence the recording of an alleged phone call between Smith and the CI in which the latter claims to have fabricated the evidence. In a new trial, this evidence will be inadmissible.

**The Overwhelming Evidence at Trial Demonstrated the CI Could Only Have Obtained the
Drugs from Smith**

This Court, in its opinion, found admission of the CI's written statement was not harmless error because other evidence of Smith's guilt, the video recording of the controlled drug buy between Smith and the CI, did not "conclusively" show the latter obtaining drugs from the former. This Court also noted Smith testified at trial he did not give the drugs to the CI that night; instead, the money he received was owed from a prior debt and the "baggie" of the drugs shown in the video originated from the CI. Reviewing the portion of the video involving the controlled purchase, the Court determined both the State's and Smith's explanations of the events captured were fair interpretations of the recorded exchange. However, this Court failed to consider that recorded exchange in the context of the remainder of the video and the testimonies of Officers Sutherland and McClure, demonstrated there was no reasonable possibility that the CI obtained the drugs from anyone but Smith.

"A violation of the Confrontation Clause is not per se reversible but is subject to a harmless error analysis." State v. Gracely, 399 S.C. 363, 375, 731 S.E.2d 880, 886 (2012) (citing Delaware v. Van Arsdall, 475 U.S. 813, 822 (2006)). "Whether such an error is harmless in a

particular case depends upon a host of factors The factors include [1] the importance of the witness's testimony in the prosecution's case, [2] whether the testimony was cumulative, [3] the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, [4] the extent of cross-examination otherwise permitted, and, of course, [5] the overall strength of the prosecution's case." Id. (quoting Van Arsdall, 475 U.S. at 684 (emphasis added in Gracely)).

In the instant case, the State submitted substantial evidence that the recording was an accurate recording of the controlled purchase between the CI and Appellant. The officers testified at trial that: (1) prior to the controlled purchase, they searched the CI and his clothing; (2) they attached the video recording device and a separate audio recording device, the latter of which gave officers a live audio feed; (3) officers monitored the audio feed from the moment they dropped the CI off to the moment they met back up with him, and used the feed to confirm the drug transaction along with the CI's movements between leaving the officers and meeting back up with them; (4) officers removed the video recording device and downloaded the video immediately after the transaction; and (5) the video was not altered in any way. Thus, the State established the officers' knowledge of the events contained in the video, and used their testimony to properly authenticate the video.

The video is a continuous, twenty-four minute and fifty-three second recording which shows: (1) the officers preparing the CI for the controlled purchase and included a statement of the date and time (September 4, 2014, at 10:23 p.m.), Appellant's identity¹ as the target, and the terms of the transaction (the purchase of crack cocaine in exchange for \$200); (2) the officers dropping the CI off; (3) Appellant picking the CI up in his car; (4) the CI handing Appellant

¹ Officers initially misstated Appellant's first name at the beginning of the video, but the CI corrected them after meeting back up with police after the transaction. (State's Exhibit 4, 1:17 to 1:24; 23:03 to 23:12).

money and grabbing a small plastic bag in the same motion;² (5) the CI displaying the small plastic bag right in front of the camera;³ (6) the CI exiting the vehicle; (7) the officers picking up the CI; and (8) officers listing the new time as 10:42 p.m. and describing the transaction and drugs recovered.

The continuous, uncut video considered in tandem with the officers' testimonies prove the CI could not have planted the drugs in an effort to set Smith up. He was thoroughly searched when he met up with officers and the video shows he could not have obtained the drugs until after he entered Smith's car. Then, the video also shows the CI handing Smith the money and, in the same motion, pulling a small plastic bag back towards his body.⁴ Notably, Smith is looking straight at the CI's hand, which is still holding the plastic bag. The video demonstrates both Smith, and this Court, mischaracterized the moment when the controlled purchase occurred.⁵ This mistake, combined with the undisputed testimonies from the officers indicating the CI was searched prior to the arrest, was overwhelming proof of Smith's guilt independent of the written statement submitted into evidence. Thus, the admission of the statement, even if error, was not entirely harmless.

Further, admission of the written statement actually benefitted Smith's defense. As argued above, the video recording and officers' testimonies demonstrated Smith's guilt of the charged crime. The CI's statement read as follows:

I met with agents with the Seneca Police Department at a confidential location to buy crack cocaine under the direction of agents. Upon meeting with agents I was searched, wired and

² State's Exhibit 4, 13:33 to 13:39.

³ State's Exhibit 4, 13:50; 14:38 to 14:44.

⁴ State's Exhibit 4, 13:33 to 13:39.

⁵ In its opinion, this Court claimed the video showed the CI's hand "[went] beside his leg and [came] back up with a baggie cuffed in his hand as if the CI was trying to hide or plant something."

briefed and provided documented funds to purchase crack. I left the confidential location and went to East South 6th Street within Seneca where I met Gerome Smith and purchased crack with the document funds. I then left the location where I purchased the crack and went back to the confidential location to meet with agents. Upon returning, I turned over crack to Agent McClure and was debriefed and searched again with negative results.

(R.p.18). Notably, the written statement added little to the State's case because it was merely a brief summary and cumulative to the information provided in the video and the officers' testimonies. However, because he admitted the written statement, the trial judge allowed Smith to introduce the alleged phone call between him and the CI. Notably, the phone call contained a conversation between Smith and the CI in which the latter admitted to framing him for the charged crime. If, as this Court has found, the invocation of the Fifth Amendment right against self-incrimination is a non-statement, the alleged phone call between Smith and the CI could not be admitted as extrinsic evidence of a prior inconsistent statement pursuant to Rule 613, SCRE. This was the sole exculpatory evidence for Smith outside of his own self-serving testimony, and similar to the written statement will not be available in a retrial of his case. This further demonstrates admission of the written statement was not just harmless, but actually a net-benefit for Smith's defense.

Accordingly, for the foregoing reasons combined with the all the reasons raised in the Final Brief of Respondent and during oral argument before this Court, the State respectfully urges this Court to rehear this matter pursuant to Rule 221, SCACR, reconsider its decision in light of the controlling deferential standard of review, vacate its previous opinion, and ultimately affirm Smith's convictions and sentence.


Conclusion

For the reasons stated above, Respondent petitions for rehearing pursuant to Rule 221(a), SCACR, and requests this Court reinstate Appellant's conviction and sentence distribution of crack cocaine, second offense.

Respectfully submitted,

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Attorney General

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January 17, 2018

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PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Respondent's Petition for Rehearing on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Lara M. Caudy, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

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

This 17th day of January, 2018.



Angela Bennett
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ALAN WILSON
ATTORNEY GENERAL

January 17, 2018

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The Honorable Jenny Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: State v. Gerome C. Smith – Appellate Case No. 2015-001616

Dear Ms. Kitchings:

Enclosed please find the original and six copies of Respondent's Petition for Rehearing, along with proof of service, for filing in the above-referenced appeal.

Sincerely,

William F. Schumacher, IV
Assistant Attorney General
Bar Number 100231

WFS/
Enclosures

cc: Lara M. Caudy, Esquire
Victim Advocacy Division