STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
APPEAL FROM OCONEE COUNTY
Court of General Sessions
Honorable R. Scott Sprouse, Circuit Court Judge

Opinion No. 2018-UP-014 (S.C. Ct. App. Filed January 10, 2018)

Appellate Case No. 2015-001616

THE STATE, ... PETITIONER,

v.

GEROME CHRIS SMITH, ...RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON CERTIORARI

The Court of Appeals erred in finding the trial judge did not commit harmless error in admitting the non-testifying criminal informant's written statement into evidence because: (1) the statement was cumulative to the other evidence of Respondent's guilt, including a video recording of the drug transaction; and (2) Respondent benefitted from the trial judge's error; relying on the same justification he used in admitting the written statement, the trial judge allowed Respondent to introduce into evidence an otherwise inadmissible phone call recording in which Hunter denied purchasing crack cocaine from Respondent.

STATEMENT OF THE CASE

On April 13, 2015, Respondent was indicted for distribution of crack cocaine, second offense. (2015-GS-37-00399). On July 13 and 15, 2015, Respondent proceeded to a jury trial before the Honorable R. Scott Sprouse. Gregory Lee Cole, Jr., Esquire represented Respondent; Assistant Solicitor Lindsey Satterfield Simmons represented the State. The jury found Respondent guilty as indicted. The trial judge sentenced him to eighteen years' incarceration. Respondent then timely filed and perfected an appeal.

Thereafter, on January 10, 2018, the Court of Appeals issued an opinion in which it reversed Petitioner's conviction and remanded his case for a new trial. State v. Smith, Op. No. 2018-UP-014 (S.C. Ct. App. filed January 10, 2018) (App.p.225–App.p.228). The State then petitioned the Court of Appeals for rehearing. (App.p.229–App.p.234). On February 8, 2018, the court denied the State's petition. (App.p.236). This petition for a writ of certiorari to the Court of Appeals follows.

STATEMENT OF FACTS

Investigation

On August 7, 2014, Brandon Hunter entered into a formal agreement with the Seneca Police Department ("Department") to act as a confidential informant. At that time, Hunter was a street-level drug dealer charged with six counts of distributing crack cocaine and marijuana. The Department was attempting to "mov[e] up the chain" to arrest Hunter's supplier, Respondent, and needed Hunter to act as its informant because drug dealers typically do not sell to people with whom they are unfamiliar. The Department paid Hunter for his assistance and Officer B.J. McClure agreed to inform the solicitor that Respondent cooperated with the police and such cooperation could be taken into consideration when the solicitor prosecutes his charges. (App.p.42, lines 2–9;App.p.43, lines 2–6;App.p.55, line 3–App.p.57, line 4; App.p.66, lines 10–18; App.p.151–App.p.159).

On September 4, 2014, Hunter participated in a controlled purchase of crack cocaine. Immediately prior to the controlled purchase, Hunter met with Officers McClure and Jason Sutherland. McClure searched Hunter's body and clothing and made sure that Hunter did not possess any hidden drugs. The officers attached a body-worn camera with night vision capabilities along with a "wire" to Hunter. Although the camera was incapable of broadcasting a live feed to the officers, the wire provided a live audio stream the moment it was attached to Hunter. The officers gave him $200 for the purchase of crack cocaine and Hunter brought money of his own to pay off a prior debt he owed Respondent. (App.p.29, line 25–App.p.30, line 13; App.p.33, lines 10–19; App.p.39, lines 8–12; App.p.44, line 7–App.p.45, line 6).

The officers dropped Hunter off in a neighborhood near the location of the controlled purchase, and monitored the audio stream from that moment until he returned. When officers

met back up with Hunter, Officer Sutherland removed his wire and Officer McClure downloaded the audio and video recordings to a computer hard drive, which he then copied onto a DVD. Officer McClure also collected the drugs from Hunter and searched him again to ensure that he turned over all illegal drugs to the officers. Officer McClure sealed the evidence in a bag, signed and dated the bag, placed it in a safe that night, and kept it in the safe until it was transferred to an evidence locker and then the evidence lab days later. (App.p.33, line 20–App.p.34; App.p.39, lines 8–12; App.p.44, line 7–App.p.46, line 6; App.p.46, line 18–App.p.47, line 3; App.p.50, line 25–App.p.51, line 6; App.p.52, line 7–App.p.53, line 16; State's Exhibit 4).

Shortly after performing the controlled purchase, Hunter was dismissed from his position as an informant. Officer McClure discovered Hunter was wanted for a burglary charge, and took him to other officers to be prosecuted for the offense. (App.p.59, line 16–App.p.60, line 1; App.p.63, line 6–App.p.64, line 4).

Trial

At trial, the solicitor called Hunter to testify about his involvement in the controlled purchase. However, Hunter invoked his Fifth Amendment right against self-incrimination and refused to testify. The trial judge asked whether Hunter had any pending or anticipated charges, and both Hunter and the solicitor confirmed Hunter's prior charges had all been resolved. Still, Hunter refused to testify about his involvement in the drug transaction. As a result of Hunter's refusal to testify, the solicitor sought to introduce Hunter's prior written statement, made to Officer McClure immediately after completing the drug transaction with Respondent. The solicitor claimed the statement should be admitted under Rule 613(b), SCRE, which allows a party to introduce extrinsic evidence of a witness's prior inconsistent statement if a witness does

not admit to making the statement.[1] Citing to State v. Carmack, 388 S.C. 190, 694 S.E.2d 224 (Ct. App. 2010), the solicitor argued that anything less than an unequivocal admission to making the prior statement permitted her to introduce the written statement. (App.p.11, line 12–App.p.17, line 17).

Counsel objected to the use of the prior statement, contending that Rule 613(b) and Carmack do not apply to a defendant invoking his Fifth Amendment rights. The trial judge disagreed, stating he felt Hunter was improperly invoking his Fifth Amendment rights because he had no pending charges at the time of his testimony. The trial judge ruled the solicitor could impeach Hunter with his written statement. (App.p.17, line 20–App.p.20, line 18).

The solicitor impeached the CI by reading the following from his written statement:

> On 9-4-14, 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, briefed and provided documented funds to purchase the Crack. I left the confidential location and went to E[ast] S[outh] 6th S[treet] within Seneca where I met with [Respondent] and purchased the Crack with the documented funds. I then left the location where I purchased the Crack and went straight back to the confidential location to meet back with agents. Upon returning I turned over the Crack to [A]gent Mc[C]lure and was debriefed and searched again with negative results.
>
> I have read each page of this statement consisting of 1 page(s), each page of which bears my signature, and corrections, if any, bear my initials, and I certify that the facts contained herein are true and correct. I received a copy of this statement.

(App.p.21, line 6–App.p.22, line 14; App.p.166).

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[1] In relevant part, Rule 613(b), SCRE provides:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible. However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible.

However, the trial judge did not permit the solicitor to formally introduce the CI's statement into evidence, insisting that another witness would have to lay the foundation for the statement. Later, the solicitor admitted the statement through the testimony of Officer Sutherland. Trial counsel renewed his prior objections and also objected on the basis of the Confrontation Clause. Despite Counsel's protests, the trial judge allowed the statement to be formally entered into evidence. (App.p.29, line 11–App.p.32, line 23).

Counsel attempted to cross-examine Hunter about whether he made a phone call to Respondent a few weeks prior to trial in which he stated he did not purchase drugs from Respondent during the controlled buy. Again, Hunter invoked his Fifth Amendment right against self-incrimination. The jury was sent out from the courtroom, and Counsel presented the court with a thirty-second phone call recording which contained a man claiming to be Hunter telling Respondent he did not buy drugs from him during controlled purchase. Counsel claimed it was admissible as a prior inconsistent under Rule 613(b), due to the trial judge admitting Hunter's written statement. The solicitor objected, noting Counsel did not provide the recording during discovery and made no mention of it until that moment and arguing such actions were a violation of the reciprocal discovery rules. The trial judge informed Counsel that another party with knowledge of the recording would have to authenticate it, similar to his ruling on Hunter's written statement. (App.p.23, line 9–App.p.28, line 10).

Respondent ultimately decided to testify at trial. He claimed that on the night in question, he received a call from the CI in which the latter claimed he wanted to pay back a personal loan; he expressly denied that a drug transaction took place. Additionally, Counsel replayed State's Exhibit 4 while Respondent provided his own personal narration of the video. Notably, Respondent claimed the "baggie" seen in the video is first observed after the CI hands

him the money and then the CI's hand reaches down by his leg and then reappears holding the bag. (App.p.100, line 22–App.p.108, line 9; App.p.112, line 11–App.p.113, line 24).

Additionally, Respondent testified that a few weeks before trial, the CI called him and said he had "nothing to worry about." Through Respondent's testimony, Counsel entered a recording of the alleged phone call as evidence of a prior inconsistent statement. The State objected, claiming the phone call was hearsay. However, after an off-the-record bench conference, the trial judge allowed Counsel to introduce the recorded call into evidence. In the call, a voice identifying itself as the CI claims he did not buy drugs from Respondent on the alleged date. (App.p.108, line 24–App.p.112, line 10; Defense Exhibit 4).

ARGUMENT

The Court of Appeals erred in finding the trial judge did not commit harmless error in admitting the non-testifying criminal informant's written statement into evidence because: (1) the statement was cumulative to the other evidence of Respondent's guilt, including a video recording of the drug transaction; and (2) Respondent benefitted from the trial judge's error; relying on the same justification he used in admitting the written statement, the trial judge allowed Respondent to introduce into evidence an otherwise inadmissible phone call recording in which Hunter denied purchasing crack cocaine from Respondent.

The State agrees with the Court of Appeals' finding the trial judge's admission of the CI's written statement as evidence of a prior inconsistent statement pursuant to Rule 613(b), SCRE was error, but respectfully disagrees with the court's conclusion said admission was not harmless because the CI's written statement was cumulative, inferior evidence of Respondent's guilt. Moreover, Respondent actually benefitted from the trial judge's error because he was permitted to introduce the recording of an alleged phone call between him and the CI which, due to issues with authentication of the recording and Rule 613(b), SCRE, cannot be introduced into evidence in a retrial. Thus, while the State can present nearly an identical case in any subsequent trial, Respondent will be unable to present the strongest evidence of his innocence.

The CI's Statement was Cumulative and the Overwhelming Evidence at Trial Demonstrated the CI Could Only Have Obtained the Drugs from Respondent

The Court of Appeals, in its opinion, found admission of the CI's written statement was not harmless error because other evidence of Respondent's guilt, the video recording of the controlled drug buy between Respondent and the CI, did not "conclusively" show the latter obtaining drugs from the former. The court also noted Respondent 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 Respondent's explanations of the events captured were fair interpretations of the recorded exchange. However, the Court of Appeals failed to consider that recorded exchange in the context of the remainder of the video and the testimonies of Officers Sutherland and McClure, which demonstrated there was no reasonable possibility that the CI obtained the drugs from anyone but Respondent.

"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)).

Initially, the State notes the CI's statement was a brief, paragraph summary of the controlled purchase which did not contain any substantive information that was not presented either through the officers' testimonies of the video of the controlled purchase. The only specific allegations in the statement were: (1) the CI met with the officers at a confidential location; (2) he was searched, wired, briefed on the operation, and provided with funds to complete the transaction; (3) he met with Respondent and bought drugs with the supplied funds; and (4) he rendezvoused with officers after the meeting, gave them the drugs, and was searched again.

Even without the admission of the written statement, the State submitted substantial evidence at trial that the video recording was an accurate representation of the controlled purchase between the CI and Respondent. 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.

Further, the video itself 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.), Respondent's identity[2] 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) Respondent picking the CI up in his car; (4) the CI handing Respondent money and grabbing a small plastic bag in the same motion;[3] (5) the CI displaying the small plastic bag right in front of the camera;[4] (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.

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[2] Officers initially misstated Respondent'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).

[3] State's Exhibit 4, 13:33 to 13:39.

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

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 Respondent 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 Respondent's car. Then, the video also shows the CI handing Respondent the money and, in the same motion, pulling a small plastic bag back towards his body.[5] Notably, Respondent is looking straight at the CI's hand, which is still holding the plastic bag. The video demonstrates both Respondent and the Court of Appeals mischaracterized the moment when the controlled purchase occurred.[6] This mistake, combined with the undisputed testimonies from the officers indicating the CI was searched prior to the arrest, was overwhelming proof of Respondent's guilt independent of the written statement submitted into evidence. Thus, the admission of the statement, even if error, was entirely harmless. See Gracely, 399 S.C. at 375, 731 S.E.2d at 886.

Respondent Benefitted From the Admission of the CI's Statement

Further, admission of the written statement actually benefitted Respondent's defense. As argued above, the video recording and officers' testimonies demonstrated Respondent's guilt of the charged crime and the CI's written statement was cumulative and inferior to that evidence. However, because the trial judge admitted the written statement, he permitted Respondent to introduce a recording of the alleged phone call with the CI. Notably, the brief phone call contained a conversation between Respondent and the CI in which the latter admitted to framing him for the charged crime. If, as the Court of Appeals has found, the invocation of the Fifth Amendment right against self-incrimination is a non-statement, the alleged phone call between

[5] State's Exhibit 4, 13:33 to 13:39.

[6] In its opinion, the Court of Appeals 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."

Respondent 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 Respondent outside of his own self-serving testimony, and similar to the CI's 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 Respondent's defense.

CONCLUSION

Based on the foregoing reasons, Respondent submits this Court should grant the petition for a writ of certiorari. In requesting this relief, counsel for Petitioner certifies a petition for rehearing was made and finally ruled upon by the Court of Appeals.

Respectfully submitted,

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March 12, 2018

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
APPEAL FROM OCONEE COUNTY
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Honorable R. Scott Sprouse, Circuit Court Judge

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Appellate Case No. 2015-001616

THE STATE, ... PETITIONER,

v.

GEROME CHRIS SMITH, ...RESPONDENT.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Petition for Writ of Certiorari and Appendix on Respondent by sending two copies of the same 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 12th day of March, 2018.

Angela Bennett

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ALAN WILSON
ATTORNEY GENERAL

March 12, 2018

Lara M. Caudy, Esquire
S.C. Commission on Indigent Defense
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Columbia, SC 29211

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

Dear Mr. Caudy:

I am enclosing two (2) copies of the Petition for Writ of Certiorari and Appendix, along with proof of service, in the above-referenced case.

Sincerely,

William F. Schumacher, IV
Assistant Attorney General

WFS/
Enclosures

cc: Honorable Daniel E. Shearouse (original and six enclosed)
Honorable Jenny A. Kitchings
Victim Advocacy Division