ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Anderson County

Honorable R. Scott Sprouse, Circuit Court Judge

DAVID MARIO JOHNSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001878

JOHNSON PETITION FOR WRIT OF CERTIORARI

David Alexander
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INDEX

INDEX i

ISSUE PRESENTED 1

STATEMENT 2

STANDARD OF REVIEW 3

ARGUMENT

The PCR court erred in finding trial counsel adequately objected and preserved for appellate review the admission of crack cocaine where the State failed to prove a chain of custody sufficient for admissibility 4

CONCLUSION 9

PETITION TO BE RELIEVED AS COUNSEL 10

ISSUE PRESENTED

Whether the PCR court erred in finding trial counsel adequately objected and preserved for appellate review the admission of crack cocaine where the State failed to prove a chain of custody sufficient for admissibility?

STATEMENT

An Anderson County grand jury indicted petitioner for trafficking crack cocaine and possession of marijuana. App. 6, ll. 9 – 17. On March 31, 2010, petitioner was tried before the Honorable R. Lawton McIntosh and a jury. App. 1. Bruce Byrholdt represented petitioner and T. Matthew Bradley represented the State. App. 1. The jury convicted petitioner. App. 188, ll. 4 – 11. Judge McIntosh sentenced petitioner to thirty years' imprisonment for trafficking and a concurrent sentence of one year's imprisonment for possession of marijuana. App. 190. The Court of Appeals affirmed petitioner's convictions. State v. Johnson, Op. No. 2012-UP-264 (S.C. Ct. App. May 2, 2012).

On April 12, 2013, petitioner filed a PCR application. App. 192. On February 27, 2017, the Honorable R. Scott Sprouse held a hearing. App. 221. Robert Mills Ariail represented petitioner and Lindsey McCallister represented the State. App. 221. On July 21, 2017, Judge Sprouse denied petitioner's application. App. 253. This petition follows.

STANDARD OF REVIEW

The appellate court defers to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). Questions of law are reviewed *de novo*, with no deference to the PCR court. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)). See also Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018).

ARGUMENT

The PCR court erred in finding trial counsel adequately objected and preserved for appellate review the admission of crack cocaine where the State failed to prove a chain of custody sufficient for admissibility.

No dispute existed at trial that the police lost critical evidence in this case. App. 126, l. 2 – 128, l. 9. The lost evidence was a plastic bag that the police alleged contained crack cocaine. App. 125, ll. 20 – 22. Trial counsel asked the Anderson County Sheriff's Department's evidence custodian, "So, we've got evidence that was lost or destroyed?" App. 125, ll. 20 – 22. The evidence custodian answered, "Yes, that is correct. It was—the package that the original suspected narcotics came in is not on hand today." App. 125, ll. 20 – 22. Despite this admission, trial counsel failed to argue that a gap existed in the chain of custody and told the trial judge he held the evidence custodian "in the highest esteem." App. 154, l. 20 – 155, l. 22. Had trial counsel made a proper objection and an argument with specificity, petitioner's conviction would have been reversed on appeal.

Officer Bradley Mosher ("Mosher") testified he was on patrol in Anderson when he noticed petitioner. App. 65, l. 12 – 66, l. 9. Petitioner began hurriedly walking away from the police. App. 66, ll. 6 – 15. Officer Mosher saw appellant throw away a plastic bag. App. 66, ll. 11 – 19. The police got out of their car and detained petitioner. App. 66, ll. 11 – 25. Officer Mosher found "a plastic baggie tied up in a little, like a little bundle with an off-white rock-like substance which I believed to be crack cocaine." App. 66, ll. 11 – 25.

None of the State's witnesses knew what happened to the plastic baggie Officer Mosher found. App. 82, ll. 8 – 21 (Officer Mosher). App. 107, ll. 10 – 22 (Officer Mark Gregory). App. 137, ll. 4 – 7 (Officer Belinda Lee). App. 123, l. 22 – 124, l. 8 (Officer Tommy Clamp).

App. 145, ll. 6 – 7 (Officer Meredith Lanford). Officer Mosher testified he turned the baggie and the crack over to Officer Mark Gregory, but did not know what ultimately happened to the baggie. App. 82, ll. 8 – 17. Officer Gregory testified he put the baggie with the crack cocaine into the evidence locker with a request that the baggie be fingerprinted. App. 105, l. 17 – 107, l. 22. He did not know what happened to the baggie. App. 107, ll. 19 – 22. The baggie was never fingerprinted. App. 107, ll. 17 – 18.

Officer Belinda Lee testified she took the drugs from the evidence locker to the lab. App. 133, l. 19 – 135, l. 2. Officer Lee also testified she picked it up from the lab and put it back into storage in the evidence room. App. 135, ll. 10 – 22. She brought the evidence to court. App. 135, ll. 18 – 22. Officer Lee claimed the plastic baggie was in the package she delivered to the lab. App. 136, ll. 11 – 21. She did not know what happened to the baggie. App. 137, ll. 4 – 16. She did not look inside the evidence bag to see if the baggie was inside when she picked it up from the lab. App. 137, ll. 12 – 14.

Officer Meredith Lanford worked in Anderson County's lab. App. 139, ll. 7 – 13. When she took possession of the drugs, the drugs were inside the baggie. App. 140, l. 18 – 141, l. 17. She removed the suspected crack cocaine from the baggie, analyzed the substance and determined it was cocaine base, and noted that the officers had requested fingerprinting of the baggie. App. 142, l. 1 – 143, l. 16. She did not know what happened to the plastic baggie and testified, "to my knowledge, it was sent back over." App. 143, l. 17 – 19. Officer Lanford agreed that Officer Gregory reported a weight of 15.2 grams, but admitted that when she weighed the drugs (without the baggie) the drugs only weighed 13.52 grams. App. 145, ll. 12 – 23. Over the course of her career, she estimated she performed over 500 laboratory tests on crack cocaine. App. 140, ll. 13 – 17.

Officer Tommy Clamp was the supervisor of the property and evidence department for Anderson County. App. 128, ll. 6 – 9. App. 118, ll. 5 – 17. He did not know why the plastic baggie was missing. App. 123, l. 22 – 124, l. 8. He testified, "I failed in my duty in that aspect." App. 124, ll. 6 – 8. He admitted that when evidence is transferred to the lab, "there may be ten to twenty transfers of evidence at one time." App. 124, ll. 9 – 17. Officer Clamp went through each of the cases that went to the lab on the same day as the evidence in petitioner's case looking for the lost baggie, but could not find it. App. 124, ll. 9 – 17.

Officer Clamp, when asked how the jury could know that the drugs at the trial were the same items that were found when petitioner was arrested, answered "I can't attest to that. I can only attest to my initials and all other persons' corresponding initials there." App. 126, ll. 16 – 19. Officer Clamp also admitted that looking in the evidence bag for the plastic baggie after it returned from the forensic lab was not standard procedure. App. 127, ll. 8 – 17. He stated the seals were intact and none of the packaging showed evidence of tampering. App. 128, l. 10 – 129, l. 11.

When the solicitor moved the crack cocaine into evidence, the trial judge excused the jury. App. 149, l. 22 – 150, l. 4. Trial counsel argued the evidence was inadmissible because "it was contaminated when Officer Clamp went in there and opened it up looking for the missing plastic baggie we have no record of." App. 150, ll. 16 – 21. The trial judge then heard extensive argument from the solicitor regarding the chain of custody. App. 150, l. 22 – 154, l. 19. The court asked trial counsel to respond to the solicitor's argument that the missing baggie affected the weight of the evidence, not its admissibility. App. 154, ll. 2 – 19. Trial counsel only argued that Officer Clamp erred in breaking the seal on the evidence without contacting him or getting the court's permission. App. 154, l. 20 – 155, l. 7. Trial counsel then said he "would stipulate"

that Officer Clamp did nothing improper or illegal and that he held Officer Clamp "in the highest esteem." App. 155, ll. 8 – 22. After a break, the trial judge ruled the drugs were admissible and cited State v. Carter, 344 S.C. 419, 544 S.E.2d 835 (2001). The PCR court ruled that trial counsel did not provide ineffective assistance because he objected to the admission of the drugs and also held that petitioner did not prove prejudice. App. 256–58.

Trial counsel failed to make any argument with specificity that would distinguish petitioner's case from Carter. Trial counsel admitted at the PCR hearing that he saw no way to distinguish Carter. App. 242, l. 23 – 243, l. 1. General objections are not sufficient and specific grounds must be given to preserve a specific issue for appeal. State v. Nichols, 325 S.C. 111, 123, 481 S.E.2d 118, 120-21 (1997). "An issue may not be raised for the first time on appeal, but must have also been raised to the trial judge to be preserved for appellate review." Id. "A general objection which does not specify the particular ground on which the objection is based is insufficient to preserve a question for review." State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997) (internal quotations and citations omitted).

Trial counsel failed to argue that the chain of possession was incomplete. Had he done so, Carter and its progeny would have been distinguished and the error preserved for appeal. In Carter, this Court held that "we have found evidence inadmissible only where there is a missing link in the chain of possession. . . ." Carter at 424, 544 S.E.2d at 837. "In other words, where there is a weak link in the chain of custody, as opposed to a missing link, the question is only one of credibility and not admissibility." Id. In Carter, no missing link existed because all of the custodians testified.

In petitioner's case, the missing link is whoever removed the baggie. While every person whose name appeared on the paperwork testified, all of them said the baggie was present and

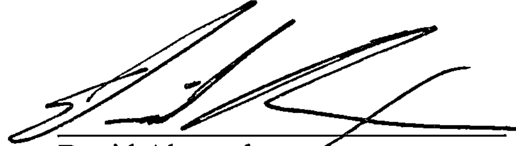
none could explain its absence. The missing link likely existed because the baggie was supposed to be submitted for fingerprinting. No fingerprint report was presented by the State. The State did not present evidence regarding who opened the bag to retrieve the baggie for fingerprint testing. The clear inference to be drawn is that the baggie was removed for fingerprint testing, but that the results were unfavorable to the State. Trial counsel failed to make this argument, which would have shifted the question from one of weight to one of admissibility.

Cases following Carter do not change this result. While in State v. Hatcher, 392 S.C. 86, 95, 708 S.E.2d 750, 755 (2011), this Court stated 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 was concerned with identifying every single handler at SLED, not with a situation where crucial and possibly exculpatory evidence was missing. The Court specifically stated in Hatcher that the record did not indicate any evidence of "alteration, tampering, or substitution." Hatcher at 95, 708 S.E.2d at 755. But see State v. Trapp, 420 S.C. 217, 232, 801 S.E.2d 742, 750 (Ct. App. 2017) (holding questions about chain involved only weight, not admissibility, where razor blade and straw collected at scene were missing).

Unlike Hatcher, in petitioner's case it is undisputed that evidence was missing and the State could not explain its absence. The weight of the drugs was different by more than a gram. Had trial counsel argued with specificity that a missing link in the chain existed, he would have preserved this argument for appeal and petitioner's conviction would have been reversed. This Court should grant certiorari and reverse petitioner's conviction and sentence.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and reverse petitioner's trafficking conviction.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of May, 2018.

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RESPONDENT

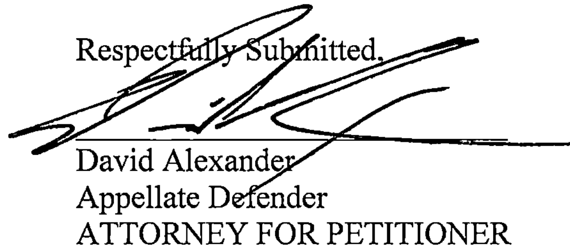
PETITION TO BE RELIEVED AS COUNSEL

Counsel for David Mario Johnson states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's trial before Judge R. Scott Sprouse, which was held on February 27, 2017, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for David Mario Johnson.

Respectfully Submitted,

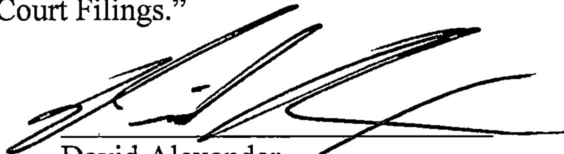


David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

This 30th day of May, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari 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."



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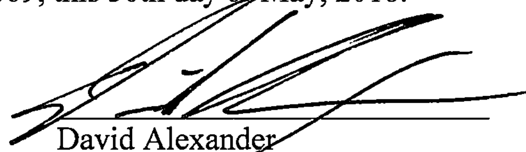
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Lindsey McCallister, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on David Mario Johnson, #269185, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 30th day of May, 2018.



David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 30th day of May, 2018.

____________________ (L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023