STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County
Honorable Robin B. Stilwell, Circuit Court Judge
Appellate Case No. 2013-002752

THE STATE,

RESPONDENT,

v.

MICHAEL LEVANT MEALOR,

APPELLANT.

RETURN TO PETITION FOR REHEARING

Respondent, State of South Carolina, by and through the undersigned counsel, responds to Appellant's Petition for Rehearing as follows:

I. The Court correctly interpreted the South Carolina Supreme Court's holding in State v. Cain as it related to the directed verdict issue.

Appellant contends this Court failed to properly consider and apply the Supreme Court's holding in State v. Cain, 419 S.C. 24, 795 S.E.2d 846 (2017), in affirming the circuit court's denial of Appellant's directed verdict motion. To the contrary, the Court thoroughly, and correctly, analyzed Cain and distinguished it from the instant case.

Of particular significance is the Cain opinion's comparison of the evidence regarding the defendant's knowledge of, and participation in, the manufacturing of methamphetamine, to the evidence presented in United States v. Eide, 297 F.3d 701 (8th Cir. 2002), which Appellant virtually ignores. In affirming the defendant's conviction for attempting to manufacture five

grams or more of methamphetamine, the Eide court found the particularized nature of the government's expert witness' explanation of the methamphetamine manufacturing processes, "combined with additional evidence suggesting Eide was experienced in the manufacture of methamphetamine, were sufficient for a jury to find beyond a reasonable doubt that Eide was a good cook capable of producing a 40 to 50 percent yield." 297 F.3d at 705. The Supreme Court compared the Eide evidence to the evidence presented in Cain's trial, and found the State failed to produce **any** evidence the defendant **ever** manufactured **any** amount of methamphetamine, much less the theoretical yield presented by the State's expert witness. 419 S.E.2d at 850-851.

In the instant case, this Court thoroughly analyzed the evidence presented at trial through the lens of Cain, Eide, as well as cases from other jurisdictions, involving the manufacturing of methamphetamine, and found the State's evidence was sufficient to present the case to the jury. State v. Mealor, ____ S.C. ____, ____ S.E.2d ____, 2018 WL 3862993 at **9-14 (S.C.Ct.App. 2018). Appellant's attempt to cherry-pick certain pieces of evidence in isolation, while ignoring the evidence presented in its entirety, is unavailing. As in Eide, '[t]he combined effect of [the government expert's] particularized testimony and the strong and detailed circumstantial evidence linking Eide to the manufacture of methamphetamine were enough for the jury to conclude that [the expert's] calculations were an accurate estimate of Eide's manufacturing capabilities." 297 F.3d at 706.

At trial, the State presented the following evidence:

1. NPLEX records documented numerous purchases of pseudoephedrine by Appellant and his co-defendants at multiple pharmacies between January and December 2011. (State's Exhibits 1-40; R., pp. 756-934);

2. Co-defendant Rebecca Crisp testified she gave all the Sudafed she purchased during that time (10.8 grams) to another co-defendant who lived in the home with Appellant and Greenfield, she saw methamphetamine used in that home, as well

as plastic bottles and batteries with the labels peeled off, and she detected a "toxic" smell there a few times. (TT, pp. 138-147; R., pp. 131-140);

3. Co-defendant Steven Hurley testified he purchased Sudafed for Greenfield, who told him the legal limits he could purchase, and gave one-half (15.12 grams) of what he purchased in 2011 to Greenfield in exchange for methamphetamine. (TT, pp. 213-216; R., pp. 206-209);

4. Co-defendant Kelley McCall testified she gave her 2011 Sudafed purchases (17.28 grams) to Appellant and Greenfield, and a few days later they gave her a bag of methamphetamine; Greenfield told her they could make methamphetamine cheaper and cleaner than what they could buy on the street; she saw many plastic bottles where Appellant lived, and Appellant said they could feel the plastic bottles expand better than glass bottles; and when she noticed a strong odor in the home, Greenfield told her the less she knew, the better. (TT, pp. 241-252; R., pp. 234-245);

5. Co-defendant Angela Armstrong testified she purchased 12.81 grams of Sudafed in 2011, gave all but 1.77 grams (11.04 grams) to Appellant and Greenfield, and several days later, she received methamphetamine in return; Appellant and Greenfield told her they were making methamphetamine, and said they could make it cheaper and better. (TT, pp. 275-280, 294-296; R., pp. 268-273, 287-289);

6. Co-defendant Melissa Wardlaw testified she gave one-half (22.32 grams) of the Sudafed she purchased in 2011 to Appellant, who gave her the money to buy it and she kept the change; she knew other people were also buying it for him, and she saw Greenfield with Sudafed at times; she knew Appellant was making methamphetamine; she saw him purchase ether and batteries; and she heard Appellant and Greenfield talking about cooking methamphetamine and saying they could do it. (TT, pp. 312-331, 346; R., pp. 305-324, 339).

7. Co-defendant Thomas Rooney testified he gave at least two boxes (5.76 grams) of his 2011 Sudafed purchases to Appellant and Greenfield, in exchange for methamphetamine and money; he saw Appellant and Greenfield use the shake and bake method to make methamphetamine in their bedroom "quite a few" times; he saw plastic bottles, big bottles of Coleman fuel, and cut open batteries at the home; and he smelled a strong ammonia type smell in the home when they were making the methamphetamine. (TT, pp. 361-371; R., pp. 354-364);

8. Co-defendant Billy Miller testified he gave all his 2011 Sudafed purchases (17.28 grams) to Appellant and Greenfield in exchange for methamphetamine, and they told him they were making methamphetamine. (TT, pp. 384-397; R., pp. 377-390);

9. Co-defendant Lauren Summerall testified she and her husband purchased Sudafed (7.2 grams) for Appellant and Greenfield in 2011 in exchange for money and methamphetamine, and they knew Appellant and Greenfield were making methamphetamine with the Sudafed they provided. (TT, pp. 393-397; R., pp. 386-390);

10. Co-defendant Michael Hayes testified he gave all of his 2011 Sudafed purchases (60.74 grams) to Appellant in exchange for methamphetamine, which he picked up a few days after he provided the Sudafed. (TT, pp. 407-414; R., pp. 400-407);

11. Co-defendant Amanda Hurley testified Appellant and Greenfield gave her and her husband money to purchase Sudafed in 2011, and they gave about one-half (23.02 grams) of their 2011 Sudafed purchases to Appellant and Greenfield. (TT, pp. 516-521; R., pp. 509-514).

12. In addition to the pseudoephedrine they received from the co-defendants, Appellant and Greenfield each purchased over sixty-five grams of pseudoephedrine in 2011. (State's Exhibits 1 [Appellant] and 2 [Greenfield]; R., pp. 756-760; 761-765); and

13. Capt. Brooks testified pseudoephedrine, ether, Coleman fuel and lithium (from cut open batteries) are used in the shake and bake method of making methamphetamine; plastic bottles are used rather than glass bottles because the plastic expands more the person can feel when the pressure builds, and they are less likely to explode so they are generally safer; methamphetamine manufacturers use other people to purchase pseudoephedrine for them in order to avoid the legal limitations (smurfing); based on his training and experience, the yield rates of pseudoephedrine to methamphetamine are from 40% to 92%; bottles used in the shake and bake method are easy to clean or discard so they are very portable for use as a methamphetamine lab; and the manufacturing process creates a very strong ammonia smell (TT, pp. 439-462; R., pp. 432-455).

14. According to the NPLEX records and co-defendants' testimony, Appellant received a total of 234 grams of pseudoephedrine in 2011. If Appellant's personal purchases were all for medicinal purposes, he received a total of 164.64 grams of pseudoephedrine.

Thus, there was ample evidence establishing Appellant engaged in a year long conspiracy resulting in the actual manufacturing and trafficking of methamphetamine.[1] In addition to the

[1]South Carolina Code §44-53-375 provides that a person who knowingly sells, manufactures, delivers or purchases, or otherwise aids, abets, **attempts or conspires** to sell, manufacture, deliver or purchase ten grams or more of methamphetamine is guilty of the felony

direct evidence, there was significant circumstantial evidence regarding the amount of pseudoephedrine the co-defendants supplied to Appellant for the express purpose of manufacturing methamphetamine. Considered in its entirety, the direct and circumstantial evidence was sufficient for the jury to find beyond a reasonable doubt that Appellant conspired to traffick between twenty-eight and one hundred grams of methamphetamine during the course of the 2011 conspiracy.

Appellant also asserts a directed verdict was warranted because the State failed to present evidence regarding "any specific amounts of the additional ingredients of methamphetamine" he ever possessed. This assertion is likewise unavailing.

In Varble v. Commonwealth, 125 S.W.3d 246 (Ky. 2004), the Kentucky Supreme Court rejected the defendant's argument he could not be convicted of manufacturing methamphetamine because no anhydrous ammonia or coffee filters were recovered. The court noted testimony about an odor of anhydrous ammonia from two air tanks and disclosure of brass fittings likely caused by anhydrous ammonia was circumstantial evidence of possession of the precursor. In rejecting the defendant's argument, the Kentucky Supreme Court commented: "Appellant's argument is akin to claiming that his possession of twenty-two Sudafed blister packs would not support his conviction because the blister packs were empty." Id. at 254. *See also* United States v. Beshore, 961 F.2d 1380, 1383 (8th Cir.) (noting an approximation of a drug quantity "does not require that every precursor chemical be present").

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of trafficking in methamphetamine. Contrary to Appellant's contention the State's theory was "one of attempt," the State contended that in furtherance of a continuing criminal conspiracy between January and December 2011, Appellant knowingly manufactured, or conspired to manufacture, between twenty-eight and one hundred grams of methamphetamine. For purposes of the directed verdict analysis, this Court found the State "presented evidence from which the jury could find [Appellant] **manufactured or attempted to manufacture** over twenty-eight grams of methamphetamine." Mealor, ____S.E.2d at _____, 2018 WL 3862993 at *13 (emphasis added).

As this Court found, there was testimony from co-defendants regarding first-hand observations of Appellant participating in "activities related to the manufacturing of methamphetamines at [Appellant's} residence," as well as the presence of odors associated with manufacturing methamphetamine, plastic drink bottles, Coleman fuel, and cut open batteries. This evidence established Appellant not only possessed the necessary precursor ingredients for manufacturing methamphetamine, he actually used those ingredients to manufacture methamphetamine over the course of the year long conspiracy.[2]

Taken to its logical conclusion, Appellant's assertion that proof of not only the actual possession of precursor ingredients is required, but evidence of the amount of each ingredient possessed is required, leads to the absurd result that people (such as Appellant) engaged in a lengthy conspiracy to manufacture methamphetamine, during which they actually manufacture methamphetamine, can only be charged for the methamphetamine they actually possess at the time of their arrest, if any, and only the precursor ingredients they possess at that time may be used to determine the amount of methamphetamine they manufactured during the entire conspiracy. Given the extremely portable and disposable nature of most clandestine methamphetamine labs, particularly those using the shake and bake manufacturing method Appellant used, law enforcement will rarely be able to make a trafficking case, which essentially nullifies the legislative intent of §44-53-375.

Finally, Appellant's contention the jury could only speculate about the amount of methamphetamine he manufactured over the course of the continuing conspiracy ignores the express language of the statute and the evidence presented. The statute provides a trafficking

[22]The yield rates used by the federal government, and most experts in the field, only consider the amount of pseudoephedrine at issue, and the yield rates differ according to the cook's expertise, including the type and amount of precursor ingredients (other than pseudoephedrine) the cook uses.

charge arises in cases involving ten or more grams of methamphetamine, an amount easily established by the methamphetamine Appellant gave his co-defendants after they supplied him with pseudoephedrine. Further, even assuming Appellant was not a skilled methamphetamine cook, and could only produce a yield rate of twenty percent pseudoephedrine to methamphetamine, the amount yielded by the pseudoephedrine he received in 2011 still exceeded twenty-eight grams. Final Brief of Respondent, p. 21, n. 7.

In affirming the denial of Appellant's directed verdict motion, this Court properly considered the Supreme Court's holding in Cain, and thoroughly analyzed the law in other jurisdictions regarding the admissibility of testimony regarding theoretical pseudoephedrine to methamphetamine yield rates,. Accordingly, Appellant's Petition for Rehearing on this issue should be denied.

II. The record amply supports the Court's holding that Appellant's challenge to admissibility of the NPLEX logs was not preserved for appellant review; but even if preserved, the challenge is meritless under applicable law.

Appellant contends this Court should reconsider its holding he failed to preserve for appellate review the issue of alleged error in admitting the NPLEX logs under the business records exception to hearsay, the lack of a proper foundation, and Rule 403, SCRE.[3] The record citations Appellant submits as support of his contention the issue was preserved amply demonstrate and support the Court's preservation holding.

Appellant correctly points out the circuit court's pre-trial statement Appellant and his co-defendants would have the opportunity during trial to object to introduction of the NPLEX logs under the business records exception, stating: "unless y'all (sic) tell me otherwise, I assume that whoever responds is responding for everyone," and then instructing the defendants to let the

[3]Appellant's Petition for Rehearing does not seek reconsideration of the Court's finding the Rule 403 issue was not preserved.

court know if "that's an inappropriate assumption." (R., p. 29). He then tries to avoid the significance of this instruction in relation to his objection to the NPLEX logs when they were offered as evidence during trial.

The State presented the custodian of records for the company that collects and maintains the records pharmacies are required by statute to submit regarding pseudoephedrine purchases in their stores. When the NPLEX logs of Appellant's and the co-defendant's 2011 pseudoephedrine purchases were offered as evidence, the solicitors and defense counsel had a bench conference with the court, and the jury was excused. (R., pp. 103-108).

Appellant's counsel then stated: "Your Honor, first off, I believe **we all three have separate arguments to make**." (R., p. 108) (emphasis added). In light of the court's initial instruction to counsel to let the court know if the assumption an objection made by one was made by all was inappropriate, counsel's statement immediately informed the court the initial assumption **was** inappropriate, and each co-defendant was making his/her own objections regarding the NPLEX logs. Appellant's only stated objection was to the records' "trustworthiness and reliability" because the documents "have no date range of purchase." (R., p. 108).

In the face of counsel's express indication the co-defendants had separate objections regarding admissibility of the NPLEX logs, Appellant now attempts to assign mind-reading capabilities to the circuit court, essentially arguing the court should have somehow known the earlier assumption still applied. This argument is grossly unfair to the circuit court, and contrary to the case law regarding preservation of objections by co-defendants. The mere fact the court subsequently noted "all parties' objections," and admitted the records "subject to the same objections," does not mean the court was referencing the pre-trial assumption, especially in light

of counsel's statement to the contrary. Using Appellant's own words, allowing Appellant to prevail on this issue "would essentially be telling [the circuit court] to disregard [its own] specific instruction" regarding application of the pre-trial instruction. Pet. For Reh., p. 7. Accordingly, the Petition for Rehearing should be denied on this issue.[4]

III. The Court correctly applied the law regarding expert witness qualification in affirming the circuit court's qualification of Captain Brooks as an expert regarding clandestine methamphetamine labs, and allowing his testimony in that capacity.

Appellant also seeks rehearing on the issue of Captain Brooks' qualification as an expert in clandestine lab manufacturing and the reliability of his testimony, particularly on the issue of theoretical pseudoephedrine to methamphetamine yield rates from such labs. Appellant does not dispute Captain Brooks' qualification "as an expert in investigation and detection of methamphetamine labs," but contends Captain Brooks' expert qualifications did not allow him to testify "to chemical processes such as methamphetamine production." (Pet. for Rehg., p. 10).

In affirming the admission of Captain Brooks' testimony, this Court thoroughly reviewed and discussed the testimony regarding Captain Brooks' qualifications, as well as federal and state case law and other authoritative sources, on the issue of admissibility of testimony regarding theoretical yield rates. Mealor, _____ at _____, 2018 WL at **5-8. Appellant literally ignores the analysis of the authorities cited by the Court, contending they are distinguishable simply because the defendants possessed precursor ingredients at the time of their arrests. Rather than address the legal analysis of those decisions, Appellant instead cites to cases in which the police experts were **not** called to testify about theoretical yield rates, with one of the cited cases

[4]Assuming for purposes of argument only that Appellant's contentions regarding admissibility of the NPLEX logs as business records was preserved, that issue is discussed in depth in the Final Brief of Respondent, and incorporated herein by reference in its entirety. (Final Brief of Respondent, pp. 7-13).

essentially finding manufacturing methamphetamine is not "rocket science," and "methamphetamine cooking is relatively easy and is done by numerous persons without a higher education." State v. McPherson, 111 Wash.App. 747, 46 P.3d 284, 292 (2002). The cases cited by this Court, however, directly address and analyze the admissibility of theoretical yield testimony.

Appellant contends the Supreme Court's Cain decision indicates a chemistry expert is required to testify about theoretical yield rates because they are calculated using a scientific theory and involve chemical processes and reactions, and therefore, Captain Brooks' testimony about the rates was unreliable and inadmissible. He also asserts (again) the testimony was unreliable because it could not assist the jury in determining how much methamphetamine Appellant could produce in the absence of evidence regarding the amount of precursor ingredients he ever possessed.

The Cain decision is not as broad as Appellant asserts, and it is factually distinguishable from the instant case. In Cain, the **only** evidence regarding the quantity of methamphetamine the defendant produced was the chemist's testimony regarding the theoretical yield of methamphetamine based on empty pseudoephedrine packages found in his residence. Significantly, the Supreme Court found there was no evidence the defendant "even knew how to manufacture methamphetamine," and the chemist's testimony provided "no basis for calculating the level of efficiency [the defendant] could actually have reached under the circumstances that existed in the house." 419 S.E.2d at 850.

As set forth in this Court's opinion in the instant case, unlike Cain, there was evidence Appellant had successfully manufactured methamphetamine on multiple occasions in 2011. According to the co-defendants' testimony, Appellant himself bragged that he could produce

methamphetamine better and more efficiently than could be obtained from other street sources. Thus, there was ample evidence regarding Appellant's ability to manufacture methamphetamine from pseudoephedrine using the "one pot" method, and his actual production of methamphetamine.[5]

The Court's analysis of the expert testimony issue in this case is thorough and well-reasoned. Appellant's grounds for rehearing are meritless, and the Petition for Rehearing should be denied on this issue.

Based on the foregoing and the arguments set forth in the Final Brief of Respondent, which are incorporated herein in their entirety by reference, Respondent respectfully submits the Petition for Rehearing should be denied as to each issue raised therein.

Respectfully submitted,

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By: _____
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November 26, 2018

[5]Appellant emphasizes the Court's statement there was no evidence he was a "good cook" of methamphetamine. While no witness used that particular term, Appellant's own statements indicated he was a good methamphetamine cook.

STATE OF SOUTH CAROLINA

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THE STATE,

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MICHAEL LEVANT MEALOR,

APPELLANT.

PROOF OF SERVICE

I, Sally Ellison, certify I served the Return to Petition for Rehearing on Appellant by depositing copies in the United States mail, postage prepaid, addressed to:

Robert M. Dudek, Esquire (one copy)
Chief Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

Ryan Christopher Andrews, Esquire (one copy)
222 W. Coleman Boulevard
Mt. Pleasant, SC 29464

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

This 26th day of November 2018.

Sally Ellison

SALLY ELLISON
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ALAN WILSON
ATTORNEY GENERAL

November 26, 2018

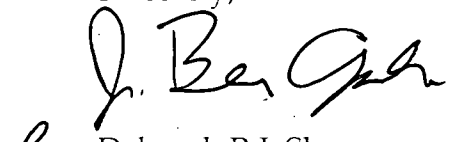
HAND-DELIVERY
The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: The State v. Michael Levant Mealor
Case No. 2013-002752

Dear Ms. Kitchings:

Enclosed are an original and six (6) copies of the Return to the Petition for Rehearing, with proof of service, in the above-referenced case.

Sincerely,



for Deborah R.J. Shupe
Senior Assistant Deputy Attorney General

DRJS/se
Enclosures

cc: Robert M. Dudek, Esquire (w/enclosure)
Ryan Christopher Andrews, Esquire (w/enclosure)
Victim Advocacy Division (w/enclosure)