THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions
Hon. Donald Hocker, Circuit Court Judge

Appellate Case No. 2018-000022

State of South Carolina ..... Respondent,

vs.

Adam Rowell ..... Appellant.

FINAL REPLY BRIEF OF APPELLANT

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Question I

Did the trial court err in admitting the blood test results from the 8:54 pm blood draw when the hospital records establish that Adam Martyn. Rowell did not arrive at the emergency room until 9:00 pm, the records do not establish whether the blood was drawn from his arm or a line, the blood is unaccounted for a 30 minute period and a person who allegedly received the blood from the nurse did not testify?

The State places little concern as to the time of the blood draw in this case. The factual impossibility of a patient who allegedly arrived at the hospital at 8:56 pm, the emergency room at 9:00 pm to have his blood drawn at 8:54 pm is dismissed by simply placing the word "approximately" before the times. Br. of Resp. at 3- 4. This issue is even more complicated when at the post trial motion hearing the State introduced a document that says Mr. Rowell arrived at the emergency room at 8:44 pm. Rec. on App. at 1450 (Post trial exhibit by State). This document shows that the triage time was 20:49 which was several minutes before the helicopter carrying Adam Rowell touched down at the hospital and some 11 minutes before the same document states Mr. Rowell arrived at the emergency room. Rec. on App. at 1450 (Post trial exhibit by State). To further complicate the matter, the document introduced by the State has the admission source for Mr. Rowell being Greenville County and not Greenwood County. The same document has Mr. Rowell arriving by LifeNet on the first page and he arrived by Life Flight on page three of the document. As noted in the opening brief, the testimony was that the blood was taken from a central line which was not placed in Mr. Rowell until after 9 pm, according to the medial record. The trial testimony was that blood was drawn from the central

line at 9:08.

These contradictory facts are ignored by the State and they simply state that Mr. Rowell at trial "did not question the reliability of the methods used to test Sample A at trial but merely differed with the result that were reached by the hospital." Br. of Resp. a t 10. This comment ignores the thrust of the argument of Mr. Rowell at trial and in his brief - the State failed to prove the blood tested by the hospital was in fact Mr. Rowell's blood. The times set forth above make the fact that the hospital tested Mr. Rowell's blood, impossible. As the State has failed to prove the blood tested was in fact Mr. Rowell's, then the reliability of the methods used to test the blood are simply not relevant. The first question to be answered is "Whose blood was tested?"

In determining the question of whose blood was tested, the chain of custody and the manner of sealing, handling and the names on the vial containing the blood become extremely important. The State has cited *State v. Sweet*, 374 S.C. 1, 647 S.E.2d 202 (2007) to support the admissibility of the blood analysis in this case. *Sweet* actually supports the position of Mr. Rowell. *Sweet* involved a case in which the State sought to admit the drugs allegedly purchased by the confidential informant when the informant, whose name was known, who allegedly received the drugs from defendant, did not testify. The State relied upon the observations of the officers to try and establish the complete chain of custody. In holding the chain of custody was not proven, the Court said, "[I]n the absence of testimony from the confidential informant, the State's proof of chain of custody is incomplete because it fails to establish the identity of each custodian and the manner of handling of the evidence." *Id.* at 8, 647 S.E.2d at 206. The same is true in this case. The State never produced the testimony of Bill Evans, who, according to the testimony, handled the blood. Rec. on App.. at 671, l 24 to 672, l 9. Without the testimony of

Mr. Evans, who was in possession of the blood for 30 minutes, the chain is not complete. We do not know what he did with the blood. We do not know if Mr. Rowell's name was on the container of blood he carried to the lab nor do we know how it was packaged or sealed. As the Court concluded in *Sweet*, "Although our courts have been willing to fill in gaps in the chain of custody where other evidence reasonably demonstrates the identity of each individual in the chain of custody and the manner of handling of the evidence, such circumstances are not present here." *Id.* at 8–9, 647 S.E.2d at 207. The same is true here. The other evidence required by our courts would be evidence of how it was sealed, evidence of lack of tempering of any sealing, and evidence of the labels contained on the vial. None of those factors are present here.

The error in this case is not harmless. The testimony in this case establishes that two blood draws were made. Both are highly questionable if not completely inadmissable. The hospital blood test is not subject to the inferences established in the implied consent law. *See*, *State v. Carrigan*, 284 S.C. 610, 328 S.E.2d 119 (Ct. App. 1985). If the jury rejected the SLED blood draw, then they improperly relied upon an inference charge as to the hospital blood draw which was not conducted pursuant to S. C. Code § 56-5–2950. In addition, Mr. Rowell has also questioned the admissibility of the second or SLED blood draw. The jury in this case easily could have used one test to support the validity of the other test when each test individually was not sufficient to satisfy the jury. Mr. Rowell was prejudiced by the admission of this test.

Question II

Did the trial court err in admitting into evidence the 8:54 pm blood draw when the testimony established that Adam M. Rowell had approximately 50% of the blood in his body replaced with either blood products or saline solution and the State produced no

evidence that the blood products transfusion and saline solution did not impact the reliability of the test administered?

The State acknowledges that Mr. Rowell had in fact received substantial amounts of blood, blood products and saline solution before the hospital blood test was conducted. The State simply does not respond to the argument of Mr. Rowell that the State must establish the reliability of a blood test under such circumstances. All the State has argued is that the machine that tested the blood of Mr. Rowell was reliable. The reliability of the machine has never been the issue. The question is, "Is a reading from a blood sample in which more than 50% of a person's blood volume has been replaced, reliable?" The State never offered any testimony as to the accuracy of a blood test taken under such circumstances. As noted in the opening brief, the State has the burden of proving the reliability of the test they seek to introduce.

Question III

Did the trial court err in admitting the test results from the SLED blood draw when the blood draw was conducted after more than 150% of the blood volume of Adam Martyn Rowell had been replaced and the test results contained a level of Benadryl which was near lethal and therefore brought into question the accuracy of the entire test?

The State in its brief ignores several points made in the brief of Mr. Rowell. A near lethal dose of Benadryl was contained in the blood sample submitted to SLED for analysis. According to expert testimony that the State never attempted to refute, such a level combined with a blood alcohol level of approximately .18 would make a person comatose. Over 150% of the blood volume of Mr. Rowell was replaced before the blood sample was taken. The State has not refuted these facts. The State simply argues Mr. Rowell did not attack the test used by SLED in

making this analysis. The State further argues that "The State is under no obligation to call rebuttal witnesses or contest the findings of a defense expert." As a general principle, this is correct. But in this case the "findings" are not the findings of the defense expert, but of the expert for the State. The expert for the State admitted that the level of Benadryl was 4.9. Rec. on App. at 1142, ll 9 - 14. The test was from a SLED test and not a test conducted by a defense laboratory. All the defense did as to the benadryl is adopt the result of the test conducted by SLED and as acknowledged by the experts for the State. No one disputes the benadryl level was 4.9. To make the test admissible, the State was under an obligation to explain how a near lethal dose of benadryl could have been found in the blood of Mr. Rowell. They did not. The fact that the blood tested contained a near lethal dose of benadryl is not an "alternative theory" but a fact which make the test result completely unreliable.

The State in its brief also ignores that more than 150% of the blood volume of Mr. Rowell had been replaced. The State offered no expert testimony that a blood test conducted under such circumstances is in fact reliable. The State cites no authority that a blood test conducted after such a massive transfusion is reliable, especially when their test result shows a benadryl level of 4.9. As noted in the opening brief, even the expert for the State would not attest to the reliability of a test after such massive transfusions. She simply stated "[M]y results are filed for what I received." Br. of App. at 22.

Question IV

Did the trial court err in failing to conduct an evidentiary hearing as to a juror who failed to disclose that he had been arrested and had a pending criminal charge being prosecuted by the office of the solicitor for the 8th judicial circuit when such a question was

asked during jury voir dire?

Under the facts of this case, the Defendant was not required to subpoena Juror 164 to the post trial hearing. All Mr. Rowell was required to do at that hearing was establish that Juror 164 was dishonest in his response to the question asked at the trial. Such a showing establishes a prima facie case of juror misconduct. Based upon this showing, the trial judge was required to conduct a hearing. During the email exchanges after the hearing, counsel for Mr. Rowell specifically requested that a hearing be conducted for the juror to testify. The trial judge declined to conduct such a hearing.

In the prior cases in South Carolina, a hearing was held once it was determined that a juror may not have answered a question truthfully. *See, State v. Woods,* 338 S.C. 561, 527 S.E.2d 128 (Ct. App. 2000), aff'd, 345 S.C. 583, 550 S.E.2d 282 (2001) and *Long v. Norris & Associates, LTD*, 342 S.C. 561, 538 S.E.2d 5 (Ct. App. 2000). Here, the trial judge, notwithstanding the request of trial counsel, refused to conduct such a hearing.

Mr. Rowell has been clear in his brief that a new trial should be ordered because of this error. As noted in the opening brief, this Court could order a hearing with juror 164, but such a hearing would be useless with the time that has passed since the trial. Contrary to the position of the State, the record in this case establishes that the juror did not give a proper response to a question asked by the Court. This is all the showing that is needed for a new trial. If the State wanted to establish that the answer was given in good faith or the juror misunderstood the question, the State had the burden of explaining the false answer given by the juror. The record alone is sufficient to grant a new trial based upon a juror giving a false answer to a question asked by the trial Court. Some 12 other jurors had no problem understanding the question and

giving a correct and truthful answer.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the opening brief, this conviction and sentence of Adam Martyn Rowell should be reversed and this matter remand for a new trial with instructions that the blood alcohol test result be excluded.

Dec 7th, 2018

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

December 7th, 2018

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