

The Supreme Court of South Carolina

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February 15, 2019

The Honorable Lynn W. Lancaster
P.O. Box 287
Laurens, SC 29360-0287

REMITTITUR

Re: The State v. Daniel Martinez Herrera
Lower Court Case No. 2010-GS-30-01918
Appellate Case No. 2016-002523


Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,



CLERK



cc: Alan McCrory Wilson, Esquire
David Matthew Stumbo, Esquire
LaNelle Cantey DuRant, Esquire
Jonathan Scott Matthews, Esquire

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

The State, Respondent,

v.

Daniel Martinez Herrera, Petitioner.

Appellate Case No. 2016-002523

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Laurens County
Eugene C. Griffith Jr., Circuit Court Judge

Opinion No. 27861
Heard October 17, 2018 – Filed January 30, 2019

REVERSED AND REMANDED

Appellate Defender LaNelle Cantey DuRant, of
Columbia, for Petitioner.

Attorney General Alan M. Wilson and Assistant Attorney
General Jonathan Scott Matthews, both of Columbia; and
Solicitor David M. Stumbo, of Greenwood, all for
Respondent.

JUSTICE KITTREDGE: This is a case about the amount or weight of an illegal
drug. For self-evident reasons, the possession of an illegal drug carries increased

penalties as the amount of the drug in the possession of the offender increases. In this case, Petitioner Daniel Herrera was convicted of "trafficking in"—meaning, possessing—between ten and 100 pounds of marijuana, which carries a substantial term of imprisonment. The penalty for possessing fewer than ten pounds of marijuana is less severe. Moreover, drug trafficking is classified as a violent and serious crime, affecting Herrera's parole eligibility now and in the future.¹

At trial, Herrera contended that he did not knowingly possess any marijuana. Moreover, Herrera disputed the weight of the marijuana—allegedly, ten pounds, 2.78 ounces—by challenging (1) the qualifications of the State's marijuana expert, police officer Jared Hunnicutt, and (2) the accuracy of the purported weight of the marijuana.

Ultimately, Herrera's challenges were unsuccessful, and following his trafficking conviction, the court of appeals affirmed the admission of Hunnicutt's testimony regarding the weight of the marijuana in a summary unpublished opinion. *State v. Herrera*, Op. No. 2016-UP-424 (S.C. Ct. App. filed Oct. 12, 2016). We granted Herrera's petition for a writ of certiorari, and we now reverse, for under the circumstances presented it was an abuse of discretion to permit Hunnicutt to testify to the weight of the marijuana. Accordingly, we reverse the court of appeals and remand to the trial court for a new trial.

I.

Herrera was arrested when he appeared at a post office to claim a package that law enforcement had intercepted. The package contained six bags of suspected marijuana. Herrera was indicted for trafficking in marijuana over ten pounds and less than 100 pounds. At trial, the State attempted to qualify Detective Hunnicutt of the Laurens Police Department as an expert in marijuana analysis. The basis for his alleged expertise came from his experience as a police officer, as well as attending a single course sponsored by the South Carolina Law Enforcement Division. Hunnicutt had never been qualified as a marijuana analyst in General

¹ See S.C. Code Ann. § 16-1-60 (Supp. 2018) (listing drug trafficking under section 44-53-370(e) as a violent crime); *id.* § 24-21-610 (2007) (requiring those convicted of a violent crime to serve one-third of their sentence as opposed to serving one-fourth); *id.* § 17-25-45(B), (C)(2) (2014 & Supp. 2018) (listing drug trafficking under section 44-53-370(e) as a serious offense and requiring the imposition of a sentence of life without parole if that individual has two or more previous convictions for serious offenses).

Sessions court prior to his testimony here.

II.

"The appellate court reviews [the] trial [court's] ruling on admissibility of evidence pursuant to an abuse of discretion standard. . . ." *State v. Torres*, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010). Similarly, "[t]he trial court's decision to admit expert testimony will not be reversed on appeal absent an abuse of discretion." *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Douglas*, 369 S.C. 424, 429–30, 632 S.E.2d 845, 848 (2006).

Rule 702 of the South Carolina Rules of Evidence governs the admissibility of expert testimony and provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Although Hunnicutt's qualifications as an expert present a close question, under our deferential standard of review, we find no abuse of discretion in qualifying him as an expert in marijuana identification. We do, however, find an abuse of discretion in the admission of Hunnicutt's actual testimony, which almost immediately morphed into areas far beyond the mere identification of marijuana, including a purported expertise in marijuana analysis as well as the weight of the drug.

III.

A.

A review of the trial court proceedings leading to Hunnicutt's qualification as an expert is revealing. The trial court diligently vetted Hunnicutt's qualifications as an expert. After allowing the State to proffer the testimony and present its argument, the trial court noted it was "uncomfortable" qualifying Hunnicutt "as an expert for several reasons." The trial court explained its reasoning. This ruling should have ended the matter, but the State would not take "no" for an answer and continued to

push the issue. The State contended Hunnicutt's expert qualification could be limited to:

Identification, I think that would be, identification, that is the sole question. In [his] opinion[,] is this marijuana or a bag of lettuce[?] I think he is qualified to do that, I think he is more qualified certainly than the trier of fact in this case. He can help them to understand that this is not oregano in those bags.

The trial court's lingering doubt as to Hunnicutt's qualifications continued, as it told the State, "I don't think you [get] there I think some of this I have helped you with and I am [un]comfortable helping you with your proving the case. . . . I can't qualify him. . . . He is not qualified. . . . So, my ruling is I can't qualify him as an expert in the field of marijuana analysis and identification."

While the trial court never wavered from its unwillingness to qualify Hunnicutt broadly, it relented on the State's fallback request to limit Hunnicutt's qualification to identification only. The State asked, "Are you going to allow me to attempt to qualify him in identification of marijuana?" The trial court responded, "Yes, I can do that." While a close question is presented, as noted, in granting wide discretion to the trial court, we find no abuse of discretion in the qualification of Hunnicutt as an expert in marijuana identification. After all, it does not appear that Herrera disputes that the bags contained some marijuana.

The State, however, was not content to limit its questioning of Hunnicutt in line with the trial court's narrow grant of "identification" testimony. More to the point, the State asked Hunnicutt about matters that were beyond the proffered expertise of identification. Hunnicutt was asked whether he "tested" the material and where he performed the "analysis." Herrera, through counsel, repeated his objections and specifically reminded the trial court that Hunnicutt "is an expert in identification only. I don't know why he is talking about testing." The trial court correctly sustained the objection.

Yet the State persisted and elicited testimony of Hunnicutt's analysis of the substance, including its weight, which was performed at the Greenwood County Sheriff's Office. Again, Herrera objected, stressing that his "objection [wa]s this witness [wa]s not qualified to testify to anything regarding testing the marijuana or the weight, he was qualified for identification purposes only." The trial court overruled the objection, which was error.

In essence, the State was permitted to introduce testimony from Hunnicutt that ventured well beyond the "identification" limitation. The State ended up with what it wanted all along, which the trial court properly excluded in its initial ruling.

B.

While there may be situations where non-expert testimony may be admissible on the weight of drugs, the circumstances here demonstrate the need for precision in the exact weight of the drug. *See State v. Cain*, 133 A.3d 619, 620 (N.J. 2016) (finding expert testimony is common in drug cases because it "provides necessary insight into matters that are not commonly understood by the average juror, such as the significance of drug packaging and weight").

There are two related concerns with Hunnicutt's testimony concerning weight. First, he admitted he did not know if the scales of the other agency were calibrated, simply remarking, "that wasn't my scale." *See State v. Wallace*, 910 P.2d 695, 719 (Haw. 1996) ("[T]he weight of the [drugs] derived from expert testimony that relied upon scientific measurements obtained from calibrated weighing instruments for its accuracy."). Hunnicutt testified he believed the evidence technician at the Greenwood County Sheriff's Office calibrated the scales, but gave no basis for that belief, such as personal knowledge that the evidence technician regularly or recently calibrated the scales so as to make the scale's representation of the weight an accurate calculation. *See State v. Manewa*, 167 P.3d 336, 346–50 (Haw. 2007) (finding the State laid an inadequate foundation to prove the weight measured was accurate where the expert was not qualified in the calibration of the analytical balance; he did not know how to calibrate the balance; and he had never calibrated the balance); *State v. Richardson*, 830 N.W.2d 183, 189–90 (Neb. 2013) (finding that a more precise foundation regarding the accuracy of the scale was required where the expert did not provide testimony regarding the procedures used to perform a calibration). Similar to these jurisdictions, we find the State laid an inadequate foundation as to the accuracy of the scale, given there was no evidence the scale was properly calibrated. As a result, there was mere speculation in assessing the reliability of the scale, which is patently insufficient under the circumstances presented.

Second, the marijuana was packaged and weighed in six different bags, yet Hunnicutt only weighed one empty bag, and *not even one of the bags actually containing the alleged drug*. Rather, Hunnicutt chose to weigh a bag he found at the Greenwood County Sheriff's Office which appeared to him to be of similar size and assumed the six actual bags were close to the same weight. This relaxed

approach may not be prejudicial in every circumstance, but the prejudice is glaring here. The charge against Herrera was trafficking marijuana ten pounds or more. Even under the State's evidence, the weight of the alleged marijuana was less than three ounces over the ten-pound minimum threshold. *See State v. Diaz*, 365 S.E.2d 7, 9 (N.C. Ct. App. 1988) (explaining the weight element becomes more critical if the State's evidence approaches the minimum weight charged, but that it was a non-issue in the case because the weight exceeded the minimum statutory weight by more than 30,000 pounds (citation omitted)). We believe Hunnicutt's method of weighing a single baggie he viewed as similar to the actual bags containing the marijuana was an unreliable means for weighing the marijuana where, as in this case, the charged weight was barely over the ten-pound minimum threshold.

IV.

We hold the court of appeals erred in affirming the trial court's admission of Hunnicutt's testimony beyond the narrow parameters of identification of marijuana. Herrera's objection to the testimony concerning weight should have been sustained. As a result, we reverse Herrera's conviction and sentence for trafficking in marijuana and remand for a new trial.

REVERSED AND REMANDED.

BEATTY, C.J., HEARN, FEW and JAMES, JJ., concur.

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Daniel Martinez Herrera, Appellant.

Appellate Case No. 2014-001299

Appeal From Laurens County
Eugene C. Griffith, Jr., Circuit Court Judge

Unpublished Opinion No. 2016-UP-424
Submitted September 1, 2016 – Filed October 12, 2016

AFFIRMED

Appellate Defender John Harrison Strom, of Columbia,
for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Megan Harrigan Jameson, both of
Columbia; and Solicitor David Matthew Stumbo, of
Greenwood, for Respondent.

PER CURIAM: Daniel Martinez Herrera appeals his conviction for trafficking marijuana and his sentence of five years' imprisonment with credit for time served. On appeal, Herrera argues the trial court erred by (1) refusing to grant a directed

verdict when the State failed to present any evidence that the weight of the marijuana at issue was ten pounds or more and (2) allowing expert testimony regarding the weight of six vacuum-sealed bags of marijuana when the State failed to establish that the methodology used to weigh the marijuana was scientifically reliable. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

As to Issue 1: *State v. Hewins*, 409 S.C. 93, 102, 760 S.E.2d 814, 819 (2014) ("In criminal cases, the appellate court sits to review errors of law only." (quoting *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001))); *State v. Gracely*, 399 S.C. 363, 371-72, 731 S.E.2d 880, 884 (2012) ("When reviewing the denial of a motion for a directed verdict, [appellate courts] employ[] the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the non-moving party."); *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006) ("A defendant is entitled to a directed verdict when the [S]tate fails to produce evidence of the offense charged."); *id.* at 292-93, 625 S.E.2d at 648 ("If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the [appellate court] must find the case was properly submitted to the jury."); *State v. Bennett*, 415 S.C. 232, 237, 781 S.E.2d 352, 354 (2016) ("Accordingly, in ruling on a directed verdict motion where the State relies on circumstantial evidence, the [trial court] must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt."); S.C. Code Ann. § 44-53-370(e)(1)(a) (Supp. 2015) ("Any person who knowingly sells, manufactures, cultivates, delivers, purchases, or brings into this [s]tate, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, cultivate, deliver, purchase, or bring into this [s]tate, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of . . . ten pounds or more of marijuana is guilty of a felony which is known as 'trafficking in marijuana' and, upon conviction, must be punished as follows if the quantity involved is . . . ten pounds or more, but less than one hundred pounds . . . for a first offense, a term of imprisonment of not less than one year nor more than ten years, no part of which may be suspended nor probation granted, and a fine of ten thousand dollars . . ."); *State v. Mollison*, 319 S.C. 41, 45, 459 S.E.2d 88, 91 (Ct. App. 1995) ("The knowledge element may be proved circumstantially by evidence of acts, declarations, or conduct of the accused from which an inference may be drawn that the accused knew of the existence of the prohibited substance."); S.C. Code Ann. § 44-53-110(27)(a)-(b) (Supp. 2015) (defining "Marijuana" as "all species or variety of the marijuana plant and all parts thereof whether growing or not" and "the seeds

of the marijuana plant," but excluding "the mature stalks of the marijuana plant or fibers produced from these stalks . . . [and] the sterilized seed of the marijuana plant which is incapable of germination"); S.C. Code Ann. § 44-53-392 (2002) ("Notwithstanding any other provision of this article, the weight of any controlled substance referenced in this article is the weight of that substance in pure form or any compound or mixture thereof.").

As to Issue 2: *State v. Cope*, 405 S.C. 317, 334-35, 748 S.E.2d 194, 203 (2013) ("The trial [court] has considerable latitude in ruling on the admissibility of evidence and [its] decision should not be disturbed absent prejudicial abuse of discretion." (quoting *State v. Clasby*, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009))); *State v. White*, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009) ("All expert testimony must satisfy the Rule 702 criteria, and that includes the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration."); Rule 702, SCRE ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."); *State v. Martin*, 391 S.C. 508, 513, 706 S.E.2d 40, 42 (Ct. App. 2011) ("Before a witness is qualified as an expert, the trial court must find (1) the expert's testimony will assist the trier of fact, (2) the expert possesses the requisite knowledge, skill, experience, training, or education, and (3) . . . the expert's testimony is reliable."); *White*, 382 S.C. at 274, 676 S.E.2d at 688 ("The foundational reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach, for the *Council*^[1] factors for scientific evidence serve no useful analytical purpose when evaluating nonscientific expert testimony.").

AFFIRMED.²

WILLIAMS, THOMAS, and GEATHERS, JJ., concur.

¹ *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999).

² We decide this case without oral argument pursuant to Rule 215, SCACR.