

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Benjamin H. Culbertson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTOINE F. CHESTNUT,

APPELLANT

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court reversibly erred by failing to suppress evidence where the State failed to produce testimony from a link in the chain of custody, and where the amount of crack cocaine initially seized and sealed was approximately five grams heavier than the amount in the bag tested and weighed by the State's chemist?

STATEMENT OF THE CASE

Appellant Antoine F. Chestnut was indicted by the Horry County grand jury on June 30, 2011, for trafficking cocaine base in an amount more than ten grams, but less than twenty-eight grams (Trafficking). R. 5, lines 1-5; R.303 (Indictment). His case proceeded to trial in his absence before the Honorable Benjamin H. Culbertson and a jury from October 5 through 7, 2010. Brana J. Williams represented Appellant, while the State was represented by J. Scott Hucks. R. 1.

The jury found Appellant guilty as charged. The trial court sentenced Appellant to twenty-five years imprisonment, and a fine of \$50,000. R. 294, lines 9-16; R. 304, lines 1-16; R.305 (Sentence sheet).

STATEMENT OF THE FACTS

At the behest of Detective David R. Crocker (Crocker), confidential informant James Clifton Wilson (CI) called Timothy “Rat” Alston (Rat) to purchase one ounce of crack cocaine for \$1100 on May 7, 2010. R. 116, line 23—R. 117, line 20; 128, line 9—R. 130, line 1. The CI first met with Crocker and Detective Rebecca Phillips (Phillips) at the judicial center parking lot in Myrtle Beach, was fitted with a video camera, and provided marked purchase money. R. 117, line 20—R. 118, line 6. The CI arrived at Rat’s residence shortly after and eventually walked to the kitchen with Rat. An unnamed individual, whom the CI later identified at trial as “Twizzie,” was also in the kitchen when Rat and the CI entered. R. 118, lines 8-14; R. 130, line 12—R. 131, line 8. According to the CI, Rat told “Twizzie” to “go ahead and serve him.” “Twizzie” then purportedly retrieved crack from a cabinet, weighed it on a scale, put it in a sandwich bag, and handed it to the CI in return for the cash. R. 118, line 16—R. 119, line 6; R. 134, line 13—R. 135, line 6.

The CI then left Rat’s residence, got into his car, and drove away. While driving, he called Crocker, and met the detectives back at the judicial center where they first met that day. R. 119, lines 7-10. At that time, the CI placed the crack into a bag held by Crocker, which Crocker then purportedly sealed. R. 142, lines 2-11; R. 167, lines 1-19.

Crocker field tested and weighed the bag in his office, and the amount of what was alleged to be crack cocaine was approximately 28 grams. R. 94, lines 13-20; R. 174, lines 1-15. He then walked to the evidence locker where he placed the bag. The bag was later taken from the evidence locker, checked into evidence vault, and later transported to the chemist by Sharon Lilly (Lilly), who did not testify because she was on vacation the week that the State called Appellant’s case for trial. R. 207, line 21—R. 208, line 24. Instead,

Lilly's supervisor, Lori Rabon, testified regarding the procedures within Horry County police department evidence section, and identified Lilly as the custodian between Crocker and the chemist. R. 203, line 1—R. 208, line 10.

The final link in the chain of custody of the bag was the State's expert chemist, Lisa Floyd (Floyd). Interestingly, Floyd testified not only that the substance in the bag was cocaine base, but also that the amount was 23.25 grams as of July 12, 2010. R. 212, lines 5-12; R. 215, lines 1-18; R. 215, line 20—R. 218, line 2. Although Floyd indicated on direct examination that it was possible that the weight changed due to losing moisture into the air, she did not testify that this was what likely happened to any degree of scientific certainty. R. 218, lines 3-13; R. 219, line 17—R. 221, line 16. Floyd further indicated that the substance and bag in which it was kept were not in the same condition as when she returned them into evidence after she conducted her tests; specifically, Floyd testified:

Well it was dry, in my notes I made a notation that it was in a broken cookie shape or you think it like a semi circle and it was solid. It is definitely not in that condition anymore. It appears to have escaped the packaging and also a lot of the writing which I put on it to identify it have started to come off and it's definitely wet inside where it was not when I turned it back into evidence.

R. 219, line 17—R. 220, line 4. The trial court admitted the crack into evidence over Counsel's objections based upon the chain of custody. R. 15, line 11—R. 21, line 5; R. 28, line 7—R. 29, line 4; R. 221, line 17—R. 222, line 5.

The jury found Appellant guilty of Trafficking. The trial court imposed a sentence of twenty-five years incarceration, and a \$ 50,000 fine. R. 294, lines 9-16; R. 304, lines 1-16; R.305 (Sentence sheet). This appeal follows.

ARGUMENT

The trial court reversibly erred by failing to suppress evidence where the State failed to produce testimony from a link in the chain of custody, and where the amount of crack cocaine initially seized and sealed was approximately five grams heavier than the amount in the bag tested and weighed by the State's chemist.

Appellant asserts that the trial court erred in admitting the bag of crack cocaine into evidence due to the presence of a break in the chain of custody, coupled with the fact that the amount of the substance collected and weighed by Crocker was significantly different than when it was tested by Floyd. As a result, Appellant requests reversal of his conviction, and a new trial granted.

Although the admission of evidence is within the discretion of the trial judge, his findings will be reversed on appeal if there was an abuse of discretion. State v. Sims, 377 S.C. 598, 604, 661 S.E.2d 122, 125 (2008); State v. Morris, 376 S.C. 189, 205, 656 S.E.2d 359, 368 (2008). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support, or are controlled by an error of law. Sims, 377 S.C. at 604, 661 S.E.2d at 125. Accordingly, in criminal cases, an appellate court reviews errors of law, and is bound by the factual findings of the trial court unless clearly erroneous. State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007).

Because fungible items such as drugs or blood samples are not readily identifiable and may be easily tampered with, the party offering such evidence must establish a chain of custody as far as practicable. State v. Cribb, 310 S.C. 518, 426 S.E.2d 306 (1992). The Supreme Court "has long held that a party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011); see also Benton v. Pellum, 232 S.C. 26, 33, 100 S.E.2d 534, 537 (1957). The party offering evidence must trace

possession of the substance and what was done with it from the time it was taken until final analysis. State v. Cribb, 310 S.C. 518, 522, 426 S.E.2d 306, 309 (1992) (citing Benton, 232 S.C. at 33, 100 S.E.2d at 537). The chain of custody rule is a variation on the principle that real evidence must be authenticated prior to its admission: that the item to be introduced is, in fact, what it purports to be. United States v. Howard-Arias, 679 F.2d 363, 366 (4th Cir. 1982). This threshold authentication requirement is met when the offering party produces evidence or testimony sufficient to convince the court that it is improbable that the proffered item has been altered from its original state. Id. While the proof need not negate all possibility of tampering, it must establish a complete chain of evidence as far as practicable. State v. Williams, 297 S.C. 290, 293, 376 S.E.2d 773, 774 (1989).

Generally, “where all individuals in a chain are, in fact, identified and the manner of handling is reasonably demonstrated, it is not an abuse of discretion for the trial judge to admit the evidence in the absence of proof of tampering, bad faith, or ill-motive.” Hatcher, 392 S.C. at 93, 708 S.E.2d at 754 (emphasis added) (citing State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205-06 (2007)). The trial court’s exercise of its discretion must be reviewed in light of three factors: (1) “the nature of the article;” (2) “the circumstances surrounding the preservation and custody of it;” and (3) “the likelihood of intermeddlers tampering with it.” Hatcher, 392 S.C. at 94-95, 708 S.E.2d at 754-55 (quoting United State v. De Larosa, 450 F.2d 1057, 1068 (3rd Cir. 1971) (internal quotation marks omitted). Thus, the evidence may be admitted after considering these factors if it is reasonably probable that the article has not been changed in important respects. Id. 392 S.C. at 95, 708 S.E.2d at 755 (quoting Gallego v. United States, 276 F.2d 914, 917 (9th Cir. 1960)).

In the present case, the State sought to introduce of crack cocaine, the nature of which is fungible evidence. Id. 392 S.C. at 91, 708 S.E.2d at 753. Thus, the State was required to proved the chain of custody as far as practicable. Although Lilly was identified as a person in the chain by her supervisor, Lilly did not testify. This is especially pertinent where, as here, there is a clear indication that the substance in the bag was changed in important respects between the time it was collected and the time it was tested; namely, the substance collected by Crocker on May 7, 2010 weighed approximately 28 grams, while the substance tested by Floyd weighed 23.25 grams.

Such an alteration raises the specter of evidence tampering. Yet, without completing this critical link in the chain of custody, the State was permitted to enter 23.25 grams of crack into evidence, despite the fact that the substance purported to be crack originally collected by Crocker weighed 28 grams. Therefore, the trial court erred by failing to suppress the evidence.

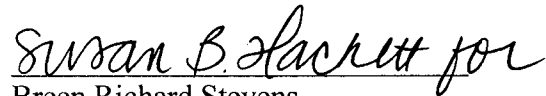
Furthermore, Appellant was prejudiced by the trial court's failure to suppress the evidence. First, as indicated above, it is not clear whether the substance in the bag tested by Floyd was the same collected by Crocker on May 7, 2010. This disquiet regarding the principal evidence against Appellant would have been cured by the State completing the chain of custody, and subjecting Lilly to the crucible of cross-examination to determine what happened to the bag while it was in her care. However, the State was permitted to enter 23.25 grams of crack cocaine into evidence even though it failed to conclusively prove the 23.25 gram substance that tested as crack was indeed the same 28 gram substance collected by Crocker. Had the trial court suppressed the evidence, the State's remaining evidence of trafficking devolved to CI, who himself had multiple prior drug convictions, and

a video which itself did not prove that the substance was crack cocaine. In sum, the State would not have been able to prove Appellant tracked crack cocaine without the 23.25 grams of crack improperly entered into evidence. Accordingly, Appellant was prejudiced by the trial court's error.

CONCLUSION

Accordingly, Appellant Antoine Chestnut respectfully requests reversal of his conviction, and remand for a new trial.

Respectfully submitted,


Susan B. Shackelford
Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of September, 2012.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Benjamin H. Culbertson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTOINE F. CHESTNUT,

APPELLANT

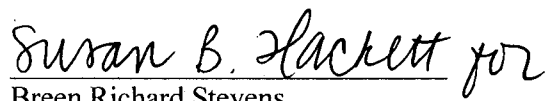
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Antoine F. Chestnut states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Benjamin H. Culbertson, which was held on October 7, 2011, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Antoine F. Chestnut.

Respectfully submitted,


Susan B. Hackett for
Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of September, 2012.

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**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment;
- (2) Trial transcript, pp. 1-302;
- (3) Sentence sheet.

I certify that this designation contains no matter which is irrelevant to this appeal.

September 12th, 2012

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Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

September 12, 2012

Susan B. Zackett for

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