

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

NORMAN ADGER BRAGG,

APPELLANT

Appellate Case No. 2012-211547

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ANDERS BRIEF OF APPELLANT

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**STATEMENT OF ISSUE ON APPEAL**

Did the trial court err in finding a sufficient chain of custody existed to allow the State's expert witness, a forensic chemist, to testify whether the evidence seized by law enforcement tested positive for methamphetamine at Appellant's trial for trafficking methamphetamine?

## STATEMENT OF THE CASE

On March 25, 2010, the Spartanburg Grand Jury indicted Appellant Norman Bragg for trafficking methamphetamine. R. 262 – 263.

On March 19–20, 2012, Appellant proceeded to trial before the Honorable J. Derham Cole and a jury. R. 1. Ricky Harris represented Appellant, and Assistant Solicitor Eddie Hunter represented the State. The jury found Appellant guilty as charged. R. 257, ll. 14-23. The trial court sentenced Appellant to thirty years imprisonment. R. 260, ll. 3-9; R. 264.

This appeal follows.

## ARGUMENT

The trial court erred in finding a sufficient chain of custody existed to allow the State's expert witness, a forensic chemist, to testify whether the evidence seized by law enforcement tested positive for methamphetamine at Appellant's trial for trafficking methamphetamine.

### **Background**

Based on information provided by an unreliable and anonymous tipster, Officers Matthew Wilde and Gary Watson of the Spartanburg County Sheriff's Office ultimately conducted a "knock and talk" on Appellant's residence. R. 41, l. 5 – 44, l. 25; R. 50, ll. 4-17. Officer Watson subsequently saw Appellant throw a bag of marijuana on the ground after coming out of a hole from under the house. R. 45, l. 2 – 48, l. 25. The officers then placed Appellant under arrest and advised Appellant of his rights. R. 77, l. 13 – 79, l. 6. After Appellant refused to consent to a search of the premises, the officers claimed Appellant voluntarily stated that marijuana was on the premises, but that he would not say where the marijuana was located. R. 79, ll. 7-15. A magistrate judge issued a search warrant based on Appellant's alleged statement and seven officers executed the search warrant. R. 80, l. 1 – 82, l. 12. The officers found marijuana and methamphetamine during a search of the premises.

### **Relevant Facts**

At trial, Officer Watson stated that, as the "return officer," the other six officers conducting the search would notify him upon finding a piece of evidence and that he would personally recover the evidence "[t]o ensure the integrity of the chain of custody[.]" R. 133, ll. 1-8. Officer Watson explained the process he used during the execution of the search warrant (i.e., placing the alleged drug evidence into sealed bags). R. 144, l. 25 – 147, l. 10. Specifically, Officer Watson recalled, "You'll put [the evidence] in an evidence bag. You'll

fill out the correct forms and submit it to be tested by the lab. What the lab does with it after that is part of the chain of custody[.]” R. 145, ll. 9-12.

The State then called Mary Elizabeth Stuart, a forensic chemist for the Spartanburg County Sheriff’s Office, to testify whether the evidence seized by the officers tested positive for marijuana and methamphetamine. R. 154. The forensic chemist described the process for when evidence comes in for testing:

[T]he officer would place [the evidence] into [an evidence bag] and then either *submit it into the drop box or to the evidence officer* [custodian] depending on what time of day it is.” The general routine of the evidence officer, they would pick it up from the drop box or if it was handed directly to them, log it into the system and then place it into the drug room. From there as the chemist I’d go into the drug room, retrieve the evidence and take it back to the lab with me.

R. 157, l. 24 – 158, l. 10 (emphasis added). Notably, the forensic chemist provided no testimony of her retrieving the evidence from Officer Watson or an evidence custodian.

After the State asked the forensic chemist for her expert opinion as to the contents of the evidence bags allegedly containing marijuana, defense counsel objected and argued, “The state has failed to provide . . . an adequate foundation in terms of the chain of custody - - we don’t - - unless the only hands that the items went through were Deputy Watson and this witness. We have no other information, no other foundation.” R. 162, ll. 1-14. A bench conference was held and the trial court stated, “You may continue.” R. 162, ll. 17-19.

The forensic chemist later stated that no one had tampered with the evidence bag allegedly containing methamphetamine and proceeded to reveal her test results. Defense counsel objected, “Your Honor, I have the same objection as [it] relates to this testimony as I did the previous items of evidence, that a proper foundation hasn’t been laid.” R. 164, l. 25 – 165, l. 2. The trial court overruled defense counsel’s objection without providing any

explanation. R. 165, l. 3.

The State subsequently called Jack Westmoreland, an evidence custodian for the Spartanburg County Sheriff's Office, in an attempt to fill in the missing link in the chain-of-custody. R. 182, l. 22 – 189, l. 22.

### **Discussion**

“[Our 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. Sweet*, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007); *see also Benton v. Pellum*, 232 S.C. 26, 33, 100 S.E.2d 534, 537 (1957) (stating “it is generally held that the party offering such specimen is required to establish, at least as far as practicable, a complete chain of evidence”). “Where the substance analyzed has passed through several hands the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis.” *Benton*, 232 S.C. at 33-34, 100 S.E.2d at 537 (citation omitted). “Testimony from each custodian of fungible evidence, however, is not a prerequisite to establishing a chain of custody sufficient for admissibility.” *Sweet*, 374 S.C. at 7, 647 S.E.2d at 206 (citing *State v. Taylor*, 360 S.C. 18, 27, 598 S.E.2d 735, 739 (Ct. App. 2004)).

Furthermore, “[w]here other evidence establishes the identity of those who have handled the evidence and reasonably demonstrates the manner of handling of the evidence, our courts have been willing to fill gaps in the chain of custody due to an absent witness.” *Id.* “Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete.” *State v. Carter*, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001). “In applying this rule, we have found evidence

inadmissible only where there is a missing link in the chain of possession *because the identity of those who handled the [substance] was not established at least as far as practicable.*” *Id.* (emphasis added).

Courts have abandoned inflexible rules regarding the chain of custody and the admissibility of evidence in favor of a rule granting discretion to the trial courts. *See State v. Hatcher*, 392 S.C. 86, 94-95, 708 S.E.2d 750, 754-55 (2011) (citing *United States v. De Larosa*, 450 F.2d 1057, 1068 (3rd Cir. 1971)). “The trial judge's exercise of discretion must be reviewed in the light of the following factors: . . . the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it.” *Id.* (internal quotation marks and citation omitted). “If upon the consideration of such factors the trial judge is satisfied that in reasonable probability the article has not been changed in important respects, he may permit its introduction in evidence.” *Hatcher*, 392 S.C. at 94-95, 708 S.E.2d at 754-55 (quoting *Gallego v. United States*, 276 F.2d 914, 917 (9th Cir. 1960)). Accordingly, our Supreme Court held, “The State need not establish the identity of every person handling fungible items in all circumstances; rather, the standard is whether, in the discretion of the trial judge, the State has established the chain of custody as far as practicable. This determination will necessarily depend on the unique factual circumstances of each case.” *Id.*, 392 S.C. at 95, 708 S.E.2d at 755.


In this case, the trial court erroneously overruled defense counsel’s objection because “the mere fact that evidence is sealed upon presentation for testing does not, in itself, establish a sufficient chain of custody.” *Hatcher*, 392 S.C. at 94-95, 708 S.E.2d at 754-55. At the time of the trial court’s ruling, the State had failed to provide the missing

link in the chain-of-custody. Without the missing link in the chain-of-custody, the State had not satisfied the ultimate goal of having chain-of-custody requirements, which is “to ensure that the evidence is what it is purported to be.” *Id.* Therefore, the trial court erred in finding a sufficient chain of custody existed because, at the time of the trial court’s ruling, the State had failed to establish the chain-of-custody as far as practicable. R. 164, l. 25 – 165, l. 3; *See Id.*, 392 S.C. at 95, 708 S.E.2d at 755.

CONCLUSION

Based on the foregoing reasons, Appellant Norman Bragg respectfully requests that this Court remand this case to the Spartanburg County Court of General Sessions for a new trial.

Respectfully submitted,

  
Dayne C. Phillips  
Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of March, 2013.

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IN THE COURT OF APPEALS

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MAR 15 2013

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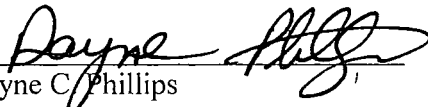
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Norman Adger Bragg 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 J. Derham Cole, which was held on March 20, 2012, 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 Norman Adger Bragg.

Respectfully submitted,

  
Dayne C. Phillips  
Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of March, 2013.

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

Pursuant to the new Anders procedure set forth by the Court, Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictments;
- (2) Sentencing sheet;
- (3) Entire transcript of proceeding.

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

March 15th, 2013

  
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Dayne C Phillips  
Appellate Defender

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Attorney for Appellant

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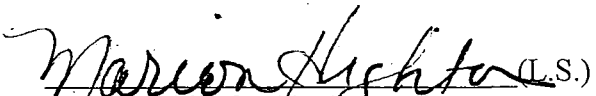
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Columbia, SC 29201; and on Mr. Norman Adger Bragg, #300947 at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 15th day of March, 2013.

  
\_\_\_\_\_  
Dayne C. Phillips  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 15th day of March, 2013.

  
\_\_\_\_\_  
Notary Public for South Carolina

My Commission Expires: October 30, 2022