STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Union County

John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RANDY JARROD CROSBY,

APPELLANT

APPELLANT CASE NO. 2011-205207

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in refusing to suppress the evidence seized during the search of the vehicle in which Appellant was a passenger, when law enforcement did not have reasonable suspicion to justify the traffic stop?

II. Did the trial court err in refusing to suppress the evidence seized during the search of the vehicle in which Appellant was a passenger, when law enforcement did not have probable cause to believe the vehicle contained evidence of criminal activity and no exigent circumstances existed to justify the warrantless search?

III. Did the trial court err in finding a sufficient chain of custody existed to admit the evidence seized during the search of the vehicle and the drug evidence found in the police car?

STATEMENT OF THE CASE

On August 26, 2010, the Union County Grand Jury indicted Appellant Randy Crosby for trafficking more than ten grams but less than twenty-eight grams of crack cocaine. R. 485 (Indictment).

On December 6, 2011, Appellant along with two co-defendants, Lashad Brewton and Roderick Pope, proceeded to trial before the Honorable John C. Hayes, III.[1] R. 1. Dan Hall and Mark McKinnon represented Appellant, while Joe St. Pierre represented Brewton and Doug Brannon represented Pope. Assistant Solicitor John Anthony represented the State. The jury found Appellant and his co-defendant's guilty of the lesser-included offense of possession with intent to distribute crack cocaine. R. 466, ll. 15-17. The trial court sentenced Appellant to fifteen years imprisonment suspended upon the service of ten years followed by five years' probation. R. 474, ll. 23-23.

This appeal follows.

[1] Three transcripts encompass Appellant's record. The December 7, 2011 transcript (Volume II) does not continue with the same pagination from the December 6, 2011 transcript (Volume I). However, the December 8, 2011 transcript (Volume III) does continue with the same pagination as the December 6, 2011 transcript (Volume I).

STATEMENT OF FACTS

Relevant Facts

Pre-trial, counsel for co-defendant Pope moved to suppress the drug evidence seized during the search of the vehicle. R. 10, ll. 4-5. The trial court acknowledged that Appellant and co-defendant Brewton joined the motion to suppress. R. 10, ll. 13-14. John Sherfield of the Union County Sheriff's Office stated that Venson Harris was arrested on June 24, 2010, after Harris sold a confidential informant "a quantity of crack cocaine." R. 14, l. 9 – 15, l. 5. Officer Sherfield maintained that Harris "want[ed] to get out of jail on bond" and "said he could get his supplier down here to Union [County]." R. 15, ll. 10-12. Officer Sherfield further claimed that Harris implicated co-defendant Pope as his supplier and agreed to arrange a drug transaction with co-defendant Pope. R. 15, l. 13 – 16, l. 18.

Officer Sherfield stated, "Sergeant [James] Johnson told me that [co-defendant Pope] would coming down Highway 176 from Spartanburg into Union and that [Pope] would be in a black Ford [Expedition]." R. 17, ll. 4-10. Officer Sherfield also maintained that Sergeant Johnson "told us they had just spoke to Mr. Pope and that Mr. Pope had told Venson Harris that he was coming by the Lighthouse Fish Camp . . . [a]nd just momentarily thereafter Captain [James] McNeil said that he had a visual siting on an [Ford] Expedition that was right at the Lighthouse Fish Camp[.]" R. 18, ll. 9-18.

Officer Sherfield then revealed that "Sheriff [David] Taylor activated the blue-lights" and the [Ford Expedition] pulled off of the interstate. R. 19, ll. 1-6. Officer Sherfield indicated that three men were in the vehicle and stated, "I had Mr. Brewton step out, spoke with him briefly, placed him in hand-cuffs and told him that he was being detained at the time." R. 20, ll. 16-20. Officer Sherfield further testified, "One of the

officers got them out of the passenger's side . . . [I] [w]ent around and searched the vehicle and I found a digital scale with white residue on it under the seat where [Appellant] was seated in the back." R. 20, l. 21 – 21, l. 1.

Officer Sherfield recalled that the white residue tested positive for cocaine when he conducted a field test of the white residue. R. 21, ll. 5-13. Officer Sherfield stated all three men were then under arrest for the possession of cocaine. R. 21, ll. 14-20. The State asked Officer Sherfield, "[W]ere any drugs found on the three men when they were searched on the side of the road?" Officer Sherfield replied, "***No, sir.***" R. 22, ll. 7-9 (emphasis added). Officer Sherfield reiterated on cross-examination, "I put [co-defendant Brewton] in hand-cuffs, told him that he was being detained, then we searched the car, found a scale, told them there were under arrest, that all three of them were under arrest." R. 34, ll. 9-14.

On cross-examination, Officer Sherfield admitted: (1) that he first met Venson Harris, the drug dealer, on the day of his arrest/search of the vehicle based on the information provided by Harris; (2) that law enforcement searched the vehicle without consent; (3) that the seal broke on the original evidence bag containing the weighing scale, so he put the scale in a new evidence bag; (4) that the scale was missing a battery; (5) that no chain of custody written on the form for the scale; (6) that the incident report did not list the scale as an item seized during the search; and (7) that the incident report listed Officer Vinson as recovering the crack cocaine from the patrol car that transported Appellant and co-defendant Brewton, yet Officer Sherfield wrote on the affidavit of the BEST bag that he seized the evidence from Appellant, Brewton, and Pope. R. 36, l. 5 – 42, l. 3; R. 52, ll. 1-13; R. 54, ll. 1-8; R. 57, l. 8 – 60, l. 9; R. 75, l. 2 – 77, l. 10.

Sheriff Taylor became elusive and almost hostile on cross-examination in regards to

the chain of custody of the weighing scale. R. 84, l. 20 – 88, l. 7. Sheriff Taylor admitted that he had no knowledge of whether Captain McNeil attempted to verify the license plate information of the Ford Expedition. R. 90, ll. 4-16.

On cross-examination, Officer Johnson admitted to having ex parte communication with a Magistrate Judge to request a lower bond for Harrison, the drug dealer who had five prior drug convictions, based on Harrison's cooperation with law enforcement. R. 100, ll. 1-21. Officer Johnson also admitted that, although Harrison was arrested prior to the search, Harrison "was not processed" (i.e., booked at the Union County Jail) until 8:14 p.m. that night. R. 105, ll. 5-22.

Defense counsel argued that "no reasonable suspicion existed for the traffic stop," that law enforcement did not have probable cause to search the vehicle, and that "everything after the illegal search of that vehicle is fruit of the poisonous tree[.]" R. 137, ll. 7-25. In support of his argument, defense counsel listed the following factors: (1) the inherent unreliability of Harris, the recently arrested drug-dealer who set up the alleged drug transaction; (2) law enforcement failed to verify the information on the license plate of the Ford Expedition; (3) law enforcement failed to wait until the Ford Expedition arrived at the agreed upon destination for the alleged drug transaction; (4) law enforcement failed to verify whether Harris actually called co-defendant Pope; (5) there was "no discernible criminal activity observed by any of the officers before the stop[;]" (6) the occupants of the vehicle did not consent to the search of the vehicle; and (7) no exigent circumstances were present. R. 134, l. 4 – 137, l. 25; R. 144, l. 12 – 145, l. 8. In sum, defense counsel argued, "[The police] simply pulled three men over, hand-cuffed them, [and then] searched the car with no new facts discovered." R. 137, ll. 7-9. Defense counsel also joined co-defendant Pope's

motion and argument regarding the scale found during the search of the vehicle. R. 137, ll. 21-25.

The trial court ultimately denied the motions to suppress. Specifically, the trial court held, "I'm going to deny the motion to suppress. I think the ice here is thin, but I think it's think enough to support the arrest, the stop first, then the search and then the arrest, and they went in that order." R. 157, ll. 10-14. The trial court found that Harris, the drug dealer, "is somewhere between the confidential informant and [an] anonymous tip[ster]." R. 157, ll. 14-25. The trial court also found that law enforcement had probable cause to stop the vehicle:

> Not a lot of information, that's true, but enough, I think, to establish probable cause to make the stop, and that corroboration is that a black Ford Expedition would be coming from Spartanburg to Union on 176 out of Spartanburg. That alone would not be enough . . . [Harris] gave information that he had been contacted by whoever was on the other end of that phone, whether it was Pope or not, that the car in question was passing the Lighthouse fish camp, and that was confirmed by Mr. McNeil, Officer McNeil. So I think that's enough to create probable cause for the stop.

R. 158, l. 10 – 159, l. 1.

Furthermore, the trial court further held, "As to the search, the three individuals were taken out of the car. They were not arrested. They were detained. They were, in fact, handcuffed." R. 159, ll. 2-4. Interestingly, the trial court ruled that the search was proper because exigent circumstances existed under the automobile exception. Specifically, the trial court stated:

> I've got to determine whether or not under the totality of circumstances there was a legal basis for the search. That would come down to whether or not - - at least in my opinion, whether or not the automobile exception would

apply.

. . .

> I find that the exigency of the circumstances - - that is, that at the time they had probable cause to stop; they detained these individuals and found no contraband or anything that would give rise to a right to reason to arrest them but they had information that was credible only because it had been corroborated that the Ford Expedition would have contraband in it; that that was exigency enough. They couldn't arrest them because they didn't have grounds for it. So they couldn't detain them forever because you can't detain people longer than necessary. And so I believe that created exigent circumstances.

R. 159, l. 7 – 160, l. 3.

The trial court noted, "As to the scales, . . . there's certainly a lot of questions about the way it was handled, but it was not a fungible item. . . . In fact, the battery was missing, but the character of it is not readily changeable, is not fungible; that is, it cannot be mixed with something else and be confused." R. 160, ll. 9-16. The trial court held, "I'm not going to suppress the introduction of the scales." R. 160, ll. 24-25.

At trial, the trial court entered the scales into evidence over defense counsel's objection. R. 187, 23 – 189, l. 6. After the testimony revealed that Captain McNeil did not actually see the Ford Expedition at the Lighthouse, but a mile down the interstate, defense counsel joined co-defendant Pope's renewed motion to suppress. R. 293, l. 7 – 294, l. 2. The trial court admitted:

> I'm very concerned about that because my corroboration was based, for lack of a better way to put it, kind of a three-legged stool . . . they were expecting a black Ford Expedition; that there was more than one person in the car, which was confirmed by Officer Sherfield when he followed the car and saw somebody in the back; and that the car was coordinated to be at the Lighthouse when Mr. Pope said it was by an officer. . . . It's a crucial fact in the decision I reached.

R. 294, l. 14 – 295, l. 5. The trial court stated, "I am going to still not grant the motion to suppress. I am, as you can probably tell, disturbed about the way this has fallen into place." R. 300, ll. 16-18. The trial court subsequently ruled, "I still find it is sufficient . . . nexus in time and place to establish the settlement corroboration or Harris's testimony . . . [the] motions to suppress are again denied on behalf of all three defendants." R. 301, ll. 15-21.

Defense counsel later joined co-defendant Pope's objection to the admissibility of the crack cocaine "based on the testimony of the State's expert witness, that had he known the affidavit, which is beginning of the chain of custody that was submitted to SLED were false, that he would not have tested the material, that he would [have] returned it to the agency and told them that they had a problem with their chain." R. 372, l. 24 – 373, l. 19. The trial court overruled the motion and stated, "the Court has to determine whether or not the chain exists, not whether were [sic] there some flaw in the chain[.]" R. 3, ll. 3-17.

Additionally, after the jury found Appellant guilty of the lesser-included offense of possession with intent to distribute crack cocaine, defense counsel renewed all objections and motions and moved for a new trial. R. 468, ll. 20-21.

ARGUMENT

I. The trial court erred in refusing to suppress the evidence seized during the search of the vehicle in which Appellant was a passenger, when law enforcement did not have reasonable suspicion to justify the traffic stop.

Traffic stops are reviewed under the standard set forth in *Terry v. Ohio*, 392 U.S. 1 (1968), because a traffic stop is more analogous to an investigative detention than a custodial arrest. *See United States v. Rusher,* 966 F.2d 868, 875 (4th Cir. 1992). In *Terry*, the United States Supreme Court outlined a two-prong test for analyzing the constitutionality of a traffic stop: (1) whether the police officer's action was justified at the inception of the traffic stop; and (2) whether the police officer's subsequent actions were reasonably related in scope and duration to the circumstances that justified the stop. *Rusher,* 966 F.2d at 875. Notably, temporary detention of individuals during a traffic stop by police, even if only for a brief period and for a limited purpose, constitutes a seizure of the persons within the meaning of the Fourth Amendment. *See Whren v. United States,* 517 U.S. 806, 809–10 (1996); *see also United States v. Arvizu,* 534 U.S. 266, 273 (2002) (noting the Fourth Amendment's protection against "unreasonable searches and seizures" extends to "brief investigatory stops of persons or vehicles").

"To justify a brief stop [or] detention, the police officer must have a reasonable suspicion that the person has been involved in criminal activity." *State v. Robinson*, 306 S.C. 399, 402, 412 S.E.2d 411, 413 (1991). The term "reasonable suspicion" requires a particularized and objective basis that would lead one to suspect another of criminal activity. *See United States v. Cortez*, 449 U.S. 411 (1981); *see State v. Woodruff*, 344 S.C. 537, 544 S.E.2d 290 (Ct. App. 2001). In determining whether reasonable suspicion exists, the whole picture must be considered. *See United States v. Sokolow*, 490 U.S. 1

(1989). The burden is on the State to articulate facts sufficient to support reasonable suspicion. *See State v. Butler*, 343 S.C. 198, 539 S.E.2d 414 (Ct. App. 2000); *see also State v. Pichardo*, 367 S.C. 84, 104, 623 S.E.2d 840, 851 (Ct. App. 2005).

The United States Supreme Court created the exclusionary rule to safeguard Fourth Amendment rights. *United States v. Calandra*, 414 U.S. 338 (1974). The exclusionary rule prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure under the fruits of the poisonous tree doctrine. *See Wong Sun v. United States*, 371 U.S. 471, 484 (1963); *see also State v. Nelson*, 336 S.C. 186, 519 S.E.2d 786 (1999) (finding evidence is not admissible under the "fruit of the poisonous tree" doctrine when the police exploit an unlawful search to seize evidence that would not have otherwise come to light). The Fourteenth Amendment incorporates the rule of excluding evidence obtained through an illegal search or seizure and makes it applicable to the states. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

"The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" *United States v. Mendenhall*, 446 U.S. 544, 553–54 (1980) (quoting *United States v. Martinez–Fuerte*, 428 U.S. 543, 554 (1976). The United States Supreme Court and the Supreme Court of this State have recognized and applied the principle that police officers are not granted under *Terry*, "a general warrant to rummage and seize at will" and that any evidence seized from an unlawful detention must be excluded as "fruit of the poisonous tree." *State v. Woodruff*, 344 S.C. 537, 549, 544 S.E.2d 290, 296-97, n. 1 (citing *Texas v. Brown*, 460 U.S. 730, 748 (1983) (Stevens, J., concurring) (The United States Supreme

Court "*has been sensitive to the danger . . . that officers will enlarge a specific authorization, furnished by a warrant or an exigency, into the equivalent of a general warrant to rummage and seize at will*") (emphasis added).

"Undoubtedbly, a law enforcement officer may request permission to search at any time. However, when an officer asks for consent to search after an unconstitutional detention, the consent procured is per se invalid unless it is both voluntary and not an exploitation of the unlawful detention." *State v. Tindall*, 388 S.C. 518, 523-24, 698 S.E.2d 203, 206 (2010) (quoting *Adams*, 377 S.C. at 339, 659 S.E.2d at 275) (finding "any time" meaning (1) during a lawful traffic stop, (2) post-traffic stop investigatory detention, or (3) a consensual encounter)); *See Wong Sun,* 371 U.S. 471 ("We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.") (citation and internal quotation marks omitted).

In this case, law enforcement did not have reasonable suspicion to justify the traffic stop because: (1) the information provided by Harris, the drug dealer, is inherently unreliable; (2) the trial court relied on incorrect information that Captain McNeil saw the Ford Expedition at the Lighthouse, when he was actually a mile down the interstate; (3) law enforcement failed to verify any information regarding the black Ford Expedition prior to the stop; and (4) no traffic violation occurred. *See Woodruff*, 344 S.C. 537, 544 S.E.2d 290. Therefore, the trial court erred in refusing to suppress the evidence seized by

law enforcement. R. 157, l. 10 – 159, l. 1; *See Wong Sun*, 371 U.S. at 484; *see also Nelson*, 336 S.C. 186, 519 S.E.2d 786.

II. The trial court erred in refusing to suppress the evidence seized during the search of the vehicle in which Appellant was a passenger, when law enforcement did not have probable cause to believe the vehicle contained evidence of criminal activity and no exigent circumstances existed to justify the warrantless search.

"[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967); *see also State v. Peters*, 271 S.C. 498, 501, 248 S.E.2d 475, 476 (1978). One of these exceptions is the automobile exception, which provides that police officers may conduct a warrantless search of an automobile when the officers have probable cause to believe the automobile contains evidence of criminal activity. *See Carroll v. United States*, 267 U.S. 132, 153 (1925); *see also Maryland v. Dyson*, 527 U.S. 465 (1999). The automobile exception to the search warrant requirement is based on: (1) the ready mobility of automobiles and the potential that evidence may be lost or destroyed before a warrant is obtained and (2) the lessened expectation of privacy in motor vehicles which are subject to government regulation. *State v. Cox*, 290 S.C. 489, 351 S.E.2d 570 (1986). The automobile exception does not contain a separate exigency requirement. *See Dyson*, 527 U.S. 465.

In *United States v. Ross*, 456 U.S. 798, 800 (1982), the Court defined the scope of the search in such situations as permitting officers to search as thorough as a magistrate could authorize in a warrant "'particularly describing the place to be searched.'" The *Ross* Court also explained that the probable cause determination must be made based upon objective facts that could justify the issuance of a search warrant by a magistrate. *Id.* at 808. In other words, the facts must justify the issuance of a warrant, even though a warrant was

not actually obtained. *Id.* at 809. As explained by this Court, the standard for probable cause to conduct a warrantless search is the same as that for a search with a warrant. *Peters*, 271 S.C. at 502, 248 S.E.2d at 477 (1978; *see also State v. Bultron*, 318 S.C. 323, 332, 457 S.E.2d 616, 621 (Ct. App. 1995).

"[U]nder the automobile exception, probable cause *alone* is sufficient to justify a warrantless search." *Cox*, at 492, 351 S.E.2d at 571-72. "The standard for probable cause to conduct a warrantless search is the same as that for a search with a warrant." *Bultron*, 318 S.C. at 332, 457 S.E.2d at 621. This requires, "a justifiable determination, based upon the totality of the circumstances and in view of all the evidence available to law enforcement officials at the time of the search, that there exists a practical, nontechnical probability that a crime is being committed or has been committed and incriminating evidence is involved." *Id.*

When a confidential informant is involved, it is necessary to examine the reliability and credibility of the informant for determining the existence of probable cause. *Illinois v. Gates*, 462 U.S. 213, 230-235 (1983. In determining whether the information relied upon by law enforcement is reliable, no one factor is necessary or sufficient to establish probable cause. Instead, probable cause arises from the totality of the circumstances, and "[a] deficiency in one [factor] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." *Id.* The Court explained:

> If, for example, a particular informant is known for the unusual reliability of his predictions of certain types of criminal activities in a locality, his failure, in a particular case, to thoroughly set forth the basis of his knowledge surely should not serve as an absolute bar to a finding of

> probable cause based on his tip. . . . Likewise, if an unquestionably honest citizen comes forward with a report of criminal activity – which if fabricated would subject him to criminal liability – we have found rigorous scrutiny of the basis of his knowledge unnecessary. . . . Conversely, even if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case.

Id.; *see also State v. Hill*, 245 S.C. 76, 138 S.E.2d 829 (1964).

Similar to this case, our Supreme Court's decision in *State v. Weaver*, 374 S.C. 313, 649 S.E.2d 479 (2007) does not involve a confidential informant and it is instructive on the issue of probable cause supporting a warrantless search of an automobile. In *Weaver*, Officers developed the defendant as a murder suspect at the scene of the crime and learned that the defendant had been driving a green Jeep around the time of the murder. When law enforcement located the Jeep, it smelled of bleach and had a wet interior. Our Supreme Court concluded that to the officers, it seemed apparent there had been an attempt to destroy evidence in the Jeep. Thus, probable cause existed to search the Jeep because the vehicle was connected to the suspect, the investigation revealed evidence would be in the Jeep, and the condition of the Jeep could result in the loss of the evidence. *Id.* at 320, 649 S.E.2d at 482.

In this case, law enforcement did not have probable cause to believe that the vehicle in which Appellant was a passenger contained evidence of criminal activity. *See Carroll*, 267 U.S. at 153. This is because law enforcement failed to conduct an investigation to gain probable cause; instead, the officers handcuffed the occupants and immediately searched the car without consent. Notably, this instant case is distinct from our Supreme Court's decision in *Weaver*, where the murder suspect's Jeep smelled of bleach and had a wet interior after

the murder. *Weaver*, 374 S.C. 313, 649 S.E.2d 479. The officers had only the unreliable information provided by the recently arrested drug dealer who was facing serious jail time. Accordingly, the trial court erred in refusing to suppress the evidence seized by law enforcement. R. 159, l. 2 – 160, l. 3; *See Wong Sun*, 371 U.S. at 484; *see also Woodruff*, 344 S.C. 537, 549, 544 S.E.2d 290, 296-97, n. 1 (citing *Brown*, 460 U.S. 730, 748 (1983 (Stevens, J., concurring) (The United States Supreme Court "*has been sensitive to the danger . . . that officers will enlarge a specific authorization, furnished by a warrant or an exigency, into the equivalent of a general warrant to rummage and seize at will,*") (emphasis added).

III. The trial court erred in finding a sufficient chain of custody existed to admit the evidence seized during the search of the vehicle and the drug evidence found in the police car.

"[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.

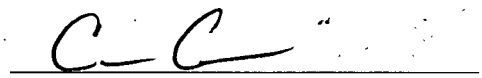
In this case, the "unique factual circumstances" of this case establish that a sufficient chain of custody did not exist. Our Supreme Court has noted, "[T]he mere fact that evidence is sealed upon presentation for testing does not, in itself, establish a sufficient chain of custody." *Hatcher*, 392 S.C. at 94-95, 708 S.E.2d at 754-55. As to the scales, the trial court found that the scale had not been in a secured evidence bag and that one of its batteries was missing. As to the crack cocaine, the officers provided false information on the accompanying affidavit of the evidence bag. Therefore, the trial court erred in

finding a sufficient chain of custody existed. R. 160, ll. 9-25; R. 372, l. 24 – 373, l. 19; *See Carter*, 344 S.C. at 424, 544 S.E.2d at 837 ("Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete.").

CONCLUSION

Based on the foregoing reasons, Appellant Randy Crosby respectfully requests that this Court reverse his conviction and remand this case to the Union County Court of General Sessions for a new trial with instructions to suppress the evidence seized by law enforcement.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of December, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final 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."

December 9th, 2013

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Union County
John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RANDY JARROD CROSBY,

APPELLANT

APPELLANT CASE NO. 2011-205207

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 9th day of December, 2013.

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 9th day of December, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023 .