STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Union County

John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RODERICK POPE,

APPELLANT

APPELLATE CASE NO. 2012-207226

FINAL BRIEF OF APPELLANT

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1. Did the trial court err in denying Appellant's motion to suppress the evidence, which consisted of a scale with alleged cocaine residue on it, found during the search of the vehicle in which Appellant was a passenger because there was not sufficient reasonable suspicion to stop the vehicle?
2. 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?
3. Did the trial court err in admitting the scale with residue cocaine found in the vehicle and the drugs found in the police car when no chain of custody existed for the scale, and the chain of custody for the drugs in the police car was insufficient?

STATEMENT OF THE CASE

On August 26, 2010, the Union County Grand Jury indicted Roderick Pope on the charge of trafficking crack cocaine more than ten grams but less than twenty-eight grams. On December 6-8, 2011, Pope proceeded to trial before the Honorable John C. Hayes, III. Pope was tried along with his two co-defendants: Lashad Brewton and Randy Crosby. Pope was represented by Doug Brannon, Brewton was represented by Joe St Pierre, and Crosby was represented by Dan Hall and Mark McKinnon. The state was represented by John Anthony.

The jury returned a verdict of guilty for the three co-defendants on the lesser included charge of possession with intent to distribute crack cocaine (PWID). R. 501, ll. 15-17. Judge Hayes sentenced Pope to fifteen years suspended to the service of seven and one-half years and five years probation. R. 514, ll. 13-18.

Pope's attorney filed notice of appeal. This appeal follows.

STATEMENT OF FACTS

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. Because Harris wanted to get out of jail on bond, he told Officer John Sherfield of the Union County Sheriff's Office that he could help the officers get Harris' supplier and could get the supplier to come to Union County. R. 15, ll. 10-12.

Officer James Johnson made the agreement with Harris that if Harris helped them, Officer Johnson would help Harris obtain a bond. Then, in Officer Johnson's presence, Harris called Pope who allegedly said he had to check and would call him back. Pope called Harris shortly after, and arrangements were made for Harris to purchase $600 worth of crack. Pope would be in a black Ford Expedition, and would meet him at Aunt M's Store on Highway 176. R. 92, ll. 1 – 25; R. 93, ll. 1 – R. 97, ll. 7.

Deputies set up surveillance along Highway 176 at various points. When Pope called and said he was in front of Lighthouse Fish Camp, Sheriff Taylor activated his blue lights and stopped the car. R. 19, ll. 1-19. Officer Sherfield and others approached the car. Officer Sherfield indicated that three men were in the vehicle. Brewton was driving; Pope was in the front passenger seat; and Crosby was in the right rear seat. Officer Sherfield 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. 19, ll. 20 – R. 20, ll.20. 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.

Officer Sherfield testified that one of the other officers got Pope and Crosby from the passengers' seats on the passenger's side. R. 20, ll. 7 – 23. Officer Sherfield then said

he went around and searched the vehicle and "I found a digital scale with white residue on it under the seat where Crosby 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 arrested for the possession of cocaine. R. 21, ll. 14-20. No money was found on Pope, but $280 was found on Brewton and $570 on Crosby. R. 21, ll. 22 – R. 22, ll. 9. When the State asked Officer Sherfield if any drugs were 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 they were under arrest, that all three of them were under arrest." R. 34, ll. 9-14.

On cross-examination, Officer Sherfield admitted that he did not ask for consent to search the vehicle, and did not have consent. He did not obtain a search warrant either. R. 58, ll. 1 – R. 59, ll. 8.

Officer Russell Vinson transported Brewton and Crosby to the detention center in his patrol car. After the two co-defendants were taken into the jail, Officer Vinson discovered crack cocaine under the seat of the back seat of his patrol car. R. 290, ll. 24 - R. 294, ll. 25. He confirmed that Pope was transported in a different car by someone else. R. 306, ll. 6 – 12.

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 there was 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 had seized the evidence from Appellant, Brewton, and Pope. R. 36, l. 5 – 42, l. 3; R. 52, ll. 1-13; 54. 89, ll. 1-8; R. 57, l. 8 – 95, l. 9; R. 75, l. 2 – 77, l. 10.

In a pre-trial motion, Pope's defense counsel moved to suppress the drug evidence seized during the search of the vehicle. R. 10, ll. 4-5. The trial court acknowledged that Co-defendants Crosby and Brewton joined the motion to suppress. R. 10, ll. 13-14.

Pope's counsel argued that his motion to suppress included the traffic stop; the search of the vehicle; the scale that was found in the vehicle and any drug substances they alleged were found on the scale; and the chain of custody for the crack that was seized in the police car. R. 11, ll. 20 – 25.

After the pretrial testimony as seen above, defense counsel argued that the informant Harris lacked credibility and reliability. Counsel argued this was not a traffic stop but an ambush; no citations were issued; and his client said guns were drawn although the officers claimed they did not remember. Counsel argued that reasonable suspicion is a lesser standard than probable cause and allows officer to make a stop when there is some manifestation of criminal activity. Counsel said this was not a high crime area; it occurred at 6:00 PM on June 24 so the hour was not late. The car was travelling legally, and there was no evasive behavior by the defendants. The car stopped at the blue light, and there was no

attempt at flight. Counsel argued this case did not rise to level of reasonable suspicion. R. 126, ll. 9 – R. 134, ll. 1.

Counsel then argued there was not probable cause to search the vehicle after the stop. The police got the men out of the car. The car was then not going anywhere. The police did not get consent to search and did not obtain a search warrant. Because the car was not a risk of flight at that point, a search warrant was needed. None of the men had drugs on them, and the scale had not been found then. Counsel argued that there was just no probable cause to search the vehicle other than the unverified word of Harris whom no one knew anything about. Counsel again argued there was no chain of custody for the scale, and the drug residue was never tested after the field test. He argued for the scale and drug residue to be suppressed. Counsel said the fact that the drugs were found in the patrol car was not sufficient for actual or constructive possession. He argued for those drugs to be suppressed also. R. 130, ll. 7 – R. 134, ll. 1.

Crosby's attorney, who joined in the motion to suppress, 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.

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 thick 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 tipster]." 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 – 9, 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. 205, 23 – 207, l. 6. After the testimony revealed that Captain McNeil did not actually see the Ford Expedition at the Lighthouse, but a mile down the same highway, defense counsel renewed his motion to suppress. R. 311, l. 7 – 312, 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. 312, l. 14 – 313, 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. 318, 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. 319, ll. 15-21.

Pope's counsel objected 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. 344, l. 24 – 345, 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. 346, 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. 503, ll. 1-20.

ARGUMENT

1.

The trial court erred in denying Appellant's motion to suppress the evidence which consisted of a scale with alleged cocaine residue on it found during the search of the vehicle in which Appellant was a passenger because there was not sufficient reasonable suspicion to stop the vehicle.

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").

In *Brendlin v. California*, 551 U.S. 249, 127 S.Ct. 2400 (2007) the United States Supreme Court ruled that passengers of vehicles may challenge the constitutionality of a stop. The court noted that "the stopping of a vehicle and the detention of its occupants constitute a "seizure" within the meaning of the Fourth Amendment." 551 U. S. at 256, 127

S.Ct. at 2406 quoting *Colorado v. Bannister*, 449 U.S. 1, 4, n. 3, 101 S.Ct. 42 (1980) In Brendlin the court ruled that the passenger was seized from the moment the driver's car came to a halt on the side of the road. In our case appellant was seized when their car was detained. "Inarticulate hunches" do not support detentions. *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 99 S.Ct. 1391 (1979); *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968).

"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).

In Pope's 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 because Harris was not known by law enforcement; (2) this was not a high crime area; (3)the car was traveling legally and no citations were issued; (4) there was no evidence of attempted flight; (5) there was no evidence of evasive behavior: (6)the hour was not late as it was 6:00 PM on June 24th; (7)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; (8) law enforcement failed to verify any

information regarding the black Ford Expedition prior to the stop. 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 – 9, l. 1; See *Wong Sun*, 371 U.S. at 484; see also *Nelson*, 336 S.C. 186, 519 S.E.2d 786.

ARGUMENT

2.

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 Pope's 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. The incident does not meet the automobile exception because the car was not mobile once the men were removed. The men did not have drugs nor weapons on them.

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).

ARGUMENT

3

The trial court erred in admitting the scale with residue cocaine found in the vehicle and the drugs found in the police car when no chain of custody existed for the scale, and the chain of custody for the drugs in the police car was insufficient.

"[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." *Hatcher*, 392 S.C. at 95, 708 S.E.2d at 755.

In Pope's 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.

The scales had not been in a secured evidence bag and one of its batteries was missing when it was retrieved—not when it was placed in the drawer. The scales were kept in a drawer with other scales in a vault, and the original bag in which the scales were contained was broken. R. 36, ll. 1 – R. 38, ll. 11.

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. 390, l. 24 – 391, 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.").

State v. Glenn, 328 S.C. 300, 492 S.E.2d 393, 395 (1997), succinctly summarizes the chain-of-custody law:

> Because fungible items such as drugs or blood samples are not readily identifiable and may be easily tampered with, the party offering such items into evidence must establish a chain-of-custody as far as practicable. [Citations omitted.] Where the analyzed substance is passed through several hands, the evidence must not leave it to conjecture as to had it and what was done with it between the taking an analysis. However, the proof of chain-of-custody need not negate all possibility of tampering, but instead must only establish a complete chain of evidence as far as practicable. [Citations omitted.]
>
> While the chain of custody requirement is strict where fungible evidence is involved, where the issue is the admissibility of non-fungible evidence – that is evidence that is unique and identifiable – the establishment of a strict chain of custody is not required ... [i]f the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the item is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit nearly on the basis of testimony that the item is the one in question and is in a substantially unchanged condition. On the other hand, if the offered evidence is of such a nature as not to be readily

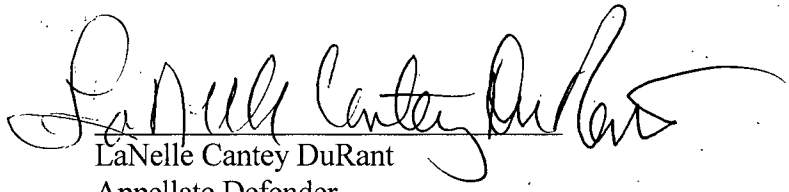
> identifiable, or to be susceptible to alteration by tampering of contamination, the sound exercise of the trial court's discretion may require a substantially more elaborate foundation. A foundation of the latter sort will commonly entail testimony tracing the "chain-of-custody" of the item with sufficient completeness to render it reasonably probable that the original item has neither been exchanged with another nor been contaminated or tampered with. [Citations and quotation marks omitted.]

See, also, *State v. Freiburger*, 366 S.C. 125, 620 S.E.2d 737 (2006).

CONCLUSION

Based on the foregoing reasons, the conviction and sentence should be reversed, and the case remanded for a new trial with the evidence seized by law enforcement to be suppressed.

Respectfully submitted,



LaNelle Cantey DuRant
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

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SC Court of Appeals

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

THE STATE,

RESPONDENT,

V.

RODERICK POPE,

APPELLANT

APPELLATE CASE NO. 2012-207226

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.

LaNelle Cantey DuRant
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.