ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Chester County

Honorable Brian M. Gibbons, Circuit Court Judge

RECEIVED
AUG 05 2019
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JERRELL TROVASE BROCKMAN,

APPELLANT

APPELLATE CASE NO 2018-002014

INITIAL BRIEF OF APPELLANT

JOANNA K. DELANY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred when it admitted dog tracking evidence where a prerequisite to admissibility is a finding that the trail was not contaminated, and where an unknown man walked through the scene after the robbery but before the dog began to track, since this contaminated the trail?

STATEMENT OF THE CASE

On March 6, 2018, a Chester County Grand Jury indicted appellant for the offenses of armed robbery, first degree assault and battery, and kidnapping. R. p. *. Appellant was tried before the Honorable Brian M. Gibbons and a jury, from November 5 – 8, 2018. Tr. II, 1. William Frick and Kay Boulware represented appellant. Tr. II, 1. Candice Lively and Kaitlyn Easler represented the state. Tr. II, 1.

Appellant was convicted as indicted, and he was sentenced to thirty-five years in prison. Tr. II, 442, ll. 10-20. Appellant was sentenced to concurrent terms of twenty-five years for armed robbery and ten years for assault and battery in the first degree; and to a consecutive term of ten years for kidnapping. Tr. II, 442, ll. 10-20.

This appeal follows.

STANDARD OF REVIEW

"A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion." *State v. White*, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009) (citing *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006)). *Accord State v. Tapp*, 398 S.C. 376, 388, 728 S.E.2d 468, 474-75 (2012); *State v. Rose*, 423 S.C. 382, 392, 814 S.E.2d 529, 534 (Ct. App. 2018).

ARGUMENT

The trial court erred when it admitted dog tracking evidence where a prerequisite to admissibility is a finding that the trail was not contaminated, and where an unknown man walked through the scene after the robbery but before the dog began to track, since this contaminated the trail.

Relevant facts

Katherine Waldrip heard a noise when she left the Bible study; she turned and a man pressed a gun against her head and he demanded her purse. Tr. II, 91, l. 7 – 93, l. 5. Waldrip was eventually able to throw her purse down the road. Tr. II, 94, ll. 18-21. The man let her go, picked up the purse and ran off towards a nearby park. Tr. II, 95, ll. 9-12. Waldrip ran to the choir room and parishioners called 911. Tr. II, 95, ll. 11-18. Officer Nick Harris was parked nearby and arrived within moments. Tr. II, 114, ll. 6-15.

After he spoke with Waldrip, Harris began trying to set up a perimeter, but Harris admitted he had "some issues" with the perimeter, which was "porous." Tr. II, 115, ll. 16-24; Tr. II, 61, ll. 6-15. Harris agreed "at one point" there were "people coming in and out of the scene who shouldn't have been coming in and out of the scene." Tr. II, 61, ll. 18-21. Harris told the court, "There was not enough manpower on the ground at the time to set up a fully fortified position." Tr. II, 61, ll. 9-10. Harris can be heard (on the audio recording from his body worn camera) to express frustration that "there's guys letting people through the perimeter for some reason." Defendant's Exhibit #2. Harris even reprimanded officers for the poor perimeter, telling them, "We're going to have perimeter class tonight." Tr. II, 61, ll. 11-13.

After Harris called for assistance from the dog tracking team, a parishioner approached Harris and said that after the robbery, "some guy [ ] walked through carrying a chain saw." Tr. II,

60, ll. 1-16; Tr. II, 119, ll. 24 – 120, l. 3. The statement from the parishioner that a man had walked through with a chain saw was captured by Harris' body worn camera and was introduced as Defendant's Exhibit #2, which is on file with this Court. Tr. II, 121, l. 14. The parishioner said the man with the chain saw was a black man dressed in dark clothes, and that he went into a nearby tree line. Tr. 127, ll. 3-6.

Despite obtaining the critical knowledge that at least one man unrelated to the crime had walked through the area (the man with a chain saw), Harris did not convey this information to the dog tracking team he had already requested. Tr. II, 229, ll. 4-11. Harris claimed that "from the time I went there nobody came near the scene and where [the suspect] had supposedly ran." Tr. II, 56, ll. 23-25.

The dog, Sadie Mae, eventually led officers to appellant. Tr. II, 38, ll. 12-16; Tr. II, 232, ll. 4-6.

Defense counsel argued pretrial that the dog tracking evidence should be suppressed pursuant to the requirements for admissibility of dog tracking evidence laid out in *State v. White*[1] with regards to: "the dog being placed on a trail where the defendant is known to have been within a reasonable period of time, and . . . the trail not otherwise being contaminated."[2] Tr. II, 33, ll. 18-21.

---

1 In *White*, 382 S.C. 265, 272, 676 S.E.2d 684, 687 (2009), the South Carolina Supreme Court held that "a sufficient foundation for the admission of dog tracking evidence is established if (1) the evidence shows the dog handler satisfies the qualifications of an expert under Rule 702; (2) the evidence shows the dog is of a breed characterized by an acute power of scent; (3) the dog has been trained to follow a trail by scent; (4) the dog has been found to be reliable; **(5) the dog was placed on the trail where the suspect was known to have been within a reasonable time; and (6) the trail was not otherwise contaminated.**" (emphasis added).

2 Counsel mistakenly referred to the factors as "four and five" but the trial court recognized that counsel's argument "center[ed] around prongs five and six." Tr. II, 33, ll. 18-21; Tr. II, 74, ll. 4-5.

The court heard from Sherriff Alex Underwood, who was qualified as an expert in dog tracking. Tr. II, 36, ll. 13-19. Sherriff Underwood previously worked for SLED on the "bloodhound tracking team" and had thirty-two years' experience in the field of dog tracking. Tr. II, 35, ll. 3-14. Sheriff Underwood explained that Sadie Mae was a "Bloodhound/Redbone" dog that he got from SLED, and that her breed was especially suited to tracking human odor in a hot and humid climate. Tr. II, 38, ll. 17-18; Tr. II, 41, ll. 5-6; Tr. II, 38, l. 17 – 39, l. 7. Sadie Mae had "completed a minimum of 60 training hours" and, according to Sherriff Underwood, the dog was very reliable. Tr. II, 40, l. 3 – 41, l. 17.

Sheriff Underwood asked Deputy Matt Faile to bring the dog out to the perimeter of the crime scene. Tr. II, 42, ll. 1-4. The sheriff explained that the "purpose of a perimeter is to keep the area from being contaminated by anybody else." Tr. II, 43, ll. 5-10. To avoid "contamination, we want to set up perimeters so that no other human scent is in that area. Nobody is walking through, nobody is coming out, law enforcement hasn't gone looking and that type of thing. We want the last scent on the scene." Tr. II, 51, ll. 17-21. The dog tracks "the last person that left the scene." Tr. II, 51, ll. 5-6.

Deputy Faile, Sadie Mae's handler, was qualified by the court as an expert in dog handling, and he confirmed that Sadie Mae eventually tracked to appellant. Tr. II, 66, ll. 1-6; Tr. II, 68, l. 25 – 69, l. 7. The dog "lock[ed] in" on a scent and tracked from the church through the park but appeared to lose the scent at a stop sign, whereupon the dog began "circling." Tr. II, 67, l. 11 – 68, l. 5; Tr. II, 223, ll. 19-24. Officers spoke with a woman named Lavetta Turner, who had been out driving in the area, and she said she had picked a man up at that same stop sign and had dropped him off in the Gardendale area. Tr. II, 44, ll. 18-20; Tr. II, 144, l. 6 – 147, l. 23. Lavetta Turner said she was out getting dinner for her kids when she picked up two men,

appellant and a man called DeDe, near the park and dropped them off at places fairly close to each other.[3] Tr. II, 140, ll. 18-21; Tr. II, 144, l. 6 – 147, l. 23. Turner said appellant did not have anything in his hands—including a purse—when she saw him. Tr. II, 149, ll. 7-11.

Officers went to Gardendale where they detained appellant. Tr. II, 68, ll. 13-17. After learning that Lavetta Turner had picked someone up at the stop sign where his dog lost the scent, Faile moved the dog by car to the Gardendale area where Turner said she had dropped the man off. Tr. II, 68, ll. 1-19. Faile said the dog "locked in on the original scent" and tracked to appellant, who was behind some bushes being held by police officers. Tr. II, 68, l. 4 – 69, l. 7; Tr. II, 232, ll. 4-6.

Critically, Sheriff Underwood and Deputy Faile were not told that any potential trail had been contaminated by the unknown man with a chain saw. Tr. II, 229, ll. 4-11. Sheriff Underwood believed the scene was not contaminated because he understood "the perimeter [was] set up very quick." Tr. II, 46, ll. 16-25. Deputy Faile was also unaware that a man had walked through with a chain saw in the intervening moments between the robbery and Officer Harris' arrival. Tr. II, 66, l. 22 – 67, l. 6; Tr. II, 229, ll. 4-11.

At the conclusion of the pretrial hearing, the solicitor argued, "If there is anything that goes to the prongs of possible contamination of that scene or of the perimeter itself, that would go to the credibility and reliability [sic], not necessarily the admissibility of this information." Tr. II, 70, ll. 14-18. Defense counsel responded that, as he had demonstrated via the footage from Defense Exhibit #2 regarding the man with a chain saw, "the scene [was] contaminated and not reliable." Tr. II, 72, l. 12 – 73, l. 2. Counsel argued the scene was contaminated under *State v.*

---

[3] Although Turner said at trial that she picked up two men, Officers McDaniel and Sanders said Turner only mentioned picking up one man, appellant, on the night of the robbery. Tr. II, 162, ll. 13-18; Tr. II, 173, ll. 10-15.

White, supra. Tr. 73, ll. 2-4. The court ruled the dog tracking evidence was admissible and put on the record its reasoning as to the first three factors of *White*. Tr. II, 73, ll. 11-24. Then the court gave its reasoning as to the remaining *White* factors.

> Number four, by experience the dog was found to be reliable. I find that the dog is reliable. I find that based upon the weight of the testimony and evidence given at this stage proffered as the court performs as the gatekeeper function that this evidence is reliable. The dog was—**and so your argument centers around prongs five and six.** The dog was placed on the trail where the suspect was known to have been within a reasonable time. I mean, everything indicates that the dog was there within minutes, I certainly think that's a reasonable time. **And your main argument is the contamination of the scene. I'm satisfied from what I heard that that goes more toward credibility than it does admissibility of the evidence.** I therefore am going to allow this dog tracking evidence into the record for a jury to find.

Tr. II, 73, l. 25 – 74, l. 14. (emphasis added).

Appellant's appearance generally matched Waldrip's physical description of the robber—a "stocky" black male "wearing a thick jacket, possibly a hat and all dark clothes." Tr. II, 57, ll. 18-21; Tr. II, 106, ll. 12-15. However, Officer McDaniel drove Waldrip over to where appellant was being held, but after Waldrip saw appellant she did not identify him as the perpetrator. Tr. II, 57, ll. 18-21; Tr. II, 105, l. 15 – 106, l. 20. Waldrip's purse and a BB gun were found in a shed belonging to appellant's aunt in the Gardendale neighborhood. Tr. I, 23, ll. 15-16; Tr. I, 25, ll. 3-4; Tr. II, 200, l. 7 – 201, l. 7; Tr. II, 102, ll. 7-11; Tr. II, 299, ll. 14-17. Appellant's DNA was on the purse and the BB gun. Tr. II, 319, l. 4 – 322, l. 8. Ms. Waldrip's DNA was not found on the gun, although SLED checked for it because Waldrip reported the robber pressed his gun tightly to her head. Tr. II, 321, l. 24 – 323, l. 25; Tr. II, 92, ll. 1-4.

Appellant testified in his own defense and denied robbing Waldrip. Appellant explained that when he was picked up by Lavetta Turner, she had another man in the car with her. Tr. II,

358, ll. 16-20; Tr. II, ll. 2-16. Turner owed appellant one hundred dollars, and appellant noticed a purse in the car. Tr. II, 358, l. 9 – 359, l. 12; Tr. II, 370, ll. 12-13. Appellant decided to steal the purse because he was owed money by Turner and he thought the purse belonged to Turner, but when he went through the purse in his aunt's shed, he realized that it belonged to someone else. Tr. II, 359, ll. 4-22; Tr. II, 362, ll. 5-20.

Appellant decided to call Turner and return the purse but he was unable to complete the call since he ran when he saw police officers. Tr. II, 362, l. 11 – 363, l. 3. Appellant explained that he ran when he saw the officers because he was carrying a large amount of crack cocaine. Tr. II, 363, l. 4-9; Tr. II, 383, ll. 11-18. Appellant disclosed that his BB gun, which he used to hunt squirrels, had been in the shed for several months. Tr. II, 363, ll. 13-25.

Thus, given appellant's explanation of events, the dog tracking evidence was the only evidence that directly implicated him as the robber.

Discussion

Dog tracking evidence is only reliable (and thus admissible) if all six prongs of *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009), are met. The court erred when it found that contamination of the scene went to weight, not admissibility, since Rule 702, SCRE and *White* require the court to consider whether the scene was contaminated before it may admit the evidence.

Rule 702, SCRE provides, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

In "executing its gatekeeping duties, the trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony." *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury." *Id.* Next, "the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter." *Id.* "Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable." *Id.* "If these preliminary requirements are not met, as a matter of law, the trial court may not permit the jury to consider the evidence." *Id.* at 456, 699 S.E.2d at 180.

In explaining the "reliability foundational requirement" particular to dog tracking evidence, the South Carolina Supreme Court adopted the following evidentiary framework in *State v. White*, 382 S.C. at 270, 676 S.E.2d at 687.

> [A] sufficient foundation for the admission of dog tracking evidence is established if (1) the evidence shows the dog handler satisfies the qualifications of an expert under Rule 702; (2) the evidence shows the dog is of a breed characterized by an acute power of scent; (3) the dog has been trained to follow a trail by scent; (4) the dog has been found to be reliable; (5) the dog was placed on the trail where the suspect was known to have been within a reasonable time; and **(6) the trail was not otherwise contaminated**."

(emphasis added).

Here, the trial court erred when it concluded that evidence regarding "contamination of the scene" "goes more toward credibility than it does admissibility." Tr. II, 73, ll. 10-12. As the Court concluded in *White*, the "familiar evidentiary mantra that a challenge to evidence goes to 'weight, not admissibility' may be invoked only after the trial court has vetted the matters of

qualifications and reliability and admitted the evidence." *Id.* at 274, 676 S.E.2d at 689. "The familiar tenet of evidence law that a continuing challenge to evidence goes to 'weight, not admissibility' has never intended to supplant the gatekeeping role of the trial court in the first instance in assessing the admissibility of expert testimony, including the threshold determination of reliability." *Id.* at 273, 676 S.E.2d at 688.

"[O]nly after the trial court has found the expert testimony . . . is reliable, may the trial court admit the evidence and permit the jury to assign it such weight as it deems appropriate." *Watson v. Ford Motor Co.*, 389 S.C. at 446-47, 699 S.E.2d at 175. Here, the court erred when it ruled that problems with contamination of any scent trail went to credibility rather than admissibility, because the court was required to find that the evidence was reliable before it could be admitted.

Although the court did mention reliability in its ruling, a close reading of the record shows the court was specifically speaking about the fourth *White* prong—the reliability of the dog as a tracking dog, which was not contested. The court did not make any reliability findings about the factors counsel did contest—whether the dog's placement on the trail was timely and whether the trail was contaminated.

In *State v. Tapp*, 398 S.C. 376, 379, 728 S.E.2d 468, 470 (2012), the South Carolina Supreme Court discussed *White*'s application where the "circuit judge stopped short of determining the reliability of Prodan's [the expert's] testimony prior to admitting it into evidence, and therefore the trial court erred." The Court observed that prior to *White*, "reliability questions of such a nonscientific expert went to the weight a jury should accord the testimony, not to its admissibility." *Id.* at 388, 728 S.E.2d at 474. The Court clarified that after *White*, once the court qualified "Prodan as an expert, the circuit judge should have then evaluated the

substance of Prodan's testimony to determine if it was reliable, as required by Rule 702, SCRE." *Id.* at 389, 728 S.E.2d at 475.

The South Carolina Supreme Court explained in *Tapp* that "the circuit judge admitted Prodan's testimony based merely on a finding he was qualified as an expert, and left the reliability determination for the jury. Therefore, the admission of Prodan's testimony was error." *Id.* at 387, 728 S.E.2d at 474. Here, as in *Tapp*, the court erred when it found that evidence about contamination of the scene went to weight, not admissibility, because the court was required to make a reliability finding before admitting the evidence and since the issue of whether the scene was contaminated went directly to reliability.

The record shows the court found the evidence was reliable in terms of the fourth prong of *White*—that the dog was a reliable dog when it came to tracking human scent. However, the court expressed no such finding about the sixth factor—whether contamination of the scene had rendered the dog tracking evidence as a whole to be unreliable. Instead, the court's ruling on the sixth factor mirrors the old standard for dog tracking evidence discussed and rejected by the Supreme Court in *Tapp*—that the reliability of a nonscientific expert's testimony went to the weight a jury should accord the testimony, not to its admissibility. *Tapp*, 398 S.C. at 388, 728 S.E.2d at 474. But, *Tapp* made it clear that after *White*, admitting nonscientific expert testimony before vetting it for its reliability is error. *Id.* at 389, 728 S.E.2d at 475.

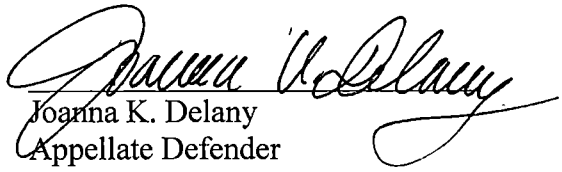
Here, the court erred in its gatekeeping function when it failed to make a reliability finding that took into account the contamination prong of *White*. *State v. White*, 382 S.C. at 273, 676 S.E.2d at 688.

The error was not harmless. Since appellant admitted to having the purse but denied being at the church and robbing Waldrip, the dog track evidence was critical to establish he

committed the crime, particularly where Waldrip was unable to identify appellant as the perpetrator. The improperly admitted evidence went directly to the issue before the jury: whether appellant was the person who robbed Waldrip. *See Tapp*, 398 S.C. at 393, 728 S.E.2d at 477 (Pleicones, J., dissenting) ("Improper 'expert' evidence which goes to the heart of the case is not harmless").

CONCLUSION

Based on the foregoing argument, appellant respectfully requests this Court reverse his convictions and sentences and remand for a new trial.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of August, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Chester County

Honorable Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT

V.

JERRELL TROVASE BROCKMAN,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon William M. Blitch, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Jerrell Trovase Brockman, #312862, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 5th day of August, 2019.

Joanna K. Delany
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 5th day of August, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028