STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from York County

Roger L. Couch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICHEZ MARKIVIOUS BOWSER,

APPELLANT

RECEIVED

SEP 04 2019

SC Court of Appeals

APPELLATE CASE NO. 2018-002164

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in permitting the state to introduce evidence of a cell phone extraction report and photographs obtained from the examination of a cell phone where the state failed to establish the phone examined was the phone located in Appellant's home and the one for which a search warrant had been issued?

STATEMENT OF THE CASE

On May 11, 2017, a York County grand jury indicted Appellant for possession of a firearm by a person convicted of a violent offense on February 7, 2017, (2017-GS-46-1809). R. 613. On September 14, 2017, a York County grand jury indicted Appellant for possession of a firearm by a person convicted of a violent offense on February 21, 2017 (2017-GS-46-3902) and safecracking (2017-GS-46-3903). R. 607. On April 19, 2018, a York County grand jury indicted Appellant for receiving stolen goods (2018-GS-46-2407). R. 616. On September 6, 2018, a York County grand jury indicted Appellant for possession of a handgun by a person convicted of a crime of violence on February 21, 2017, (2018-GS-46-4821). R. 621. Additionally, a York County grand jury indicted Appellant for burglary in the first degree (2018-GS-46-1446), and possession of a weapon during the commission of a violent crime (2018-GS-46-1446A). R. 177, l. 17 – R. 178, l. 24.

On September 11, 2018, the Honorable William McKinnon presided over a hearing regarding pre-trial motions. R. 1. Chris Epting and Ryan Newkirk represented the state at the hearing, and William Nowicki represented Appellant. R. 1. On November 27, 2018, the state, represented by Epting and Newkirk, called the case to trial before the Honorable Roger L. Couch and a jury. R. 123. Nowicki continued to represent Appellant.

Ultimately, the jury acquitted Appellant of burglary and possession of a weapon during the commission of a violent crime. R. 584, ll. 19-24. However, the jury found Appellant guilty of receiving of stolen goods, safecracking, possession of a handgun by a person convicted of a crime of violence, and two counts of possession of a firearm by a person convicted of a violent crime. R. 585, ll. 1-14. Judge Couch sentenced Appellant to ten years imprisonment for receiving stolen goods, twenty-five years imprisonment for safecracking, five years for

possession of a handgun, and five years imprisonment on each count of possession of a firearm. R. 599, ll. 5-17; R. 609, R. 612, R. 615, R. 618, R. 621.

On December 7, 2018, Appellant served his notice of appeal. This brief follows.

STANDARD OF REVIEW

"'The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.'" State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007)). "'In criminal cases, the appellate court sits to review errors of law only.'" State v. Pulley, 423 S.C. 371, 815 S.E.2d 461 (2018) (quoting State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006)). The appellate court "is bound by the trial court's factual findings unless they are clearly erroneous." Id. (quoting Baccus, 367 S.C. at 48, 625 S.E.2d at 220)).

STATEMENT OF FACTS

On February 7, 2017, Victor Minutole returned home around 5:30 p.m. to find his back door open. R. 244, ll. 8-23. Minutole called the police and reported numerous items were stolen. R. 245, l. 6 – R. 247, l. 22. The stolen items included a large gun safe filled with guns, a small gun vault with a Glock in it, a couple of laptops, a watch, jewelry, cameras, a video camera, a cigar humidor, and paperwork, including his last will and testament. R. 246, l. 4 – R. 247, l. 22; R. 262, ll. 12-17. Minutole estimated approximately $10,000 in items were stolen. R. 247, ll. 19-22. The police found no forensic evidence in Minutole's house, and the case went cold. R. 276, ll. 6-8; R. 431, ll. 5-7.

On February 21, 2017, several police agencies worked together to serve Chester County arrest warrants on Appellant, who resided in Rock Hill. R. 292, l. 20 – R. 293, l. 15. When the police arrived at the residence, Kahdijah Ervin answered at the door. R. 293, ll. 15-19; R. 318, ll. 23-25. Ervin told the police that Appellant was not there. R. 293, ll. 16-19. Ultimately, Ervin allowed the police to search the house for Appellant. R. 293, ll. 19-20. Just as Ervin had told the police, Appellant was not there. R. 293, ll. 21-22. However, the police did find a large gun safe, which had been cut. R. 294, ll. 1-2; R. 319, ll. 1-5. Additionally, the police found a camera, a smaller gun safe, jewelry, a watch, a humidor, two laptops, and documentation. R. 325, ll. 19-23; R. 347, l. 8 – R. 348, l. 6; R. 355, ll. 1-4.

Shortly after the police arrived at the Rock Hill residence, a Chester County police officer saw Appellant ride by in a car. R. 294, ll. 3-8. The Chester County officer stopped Appellant and arrested him. R. 294, ll. 3-14.

ARGUMENT

The trial judge erred in permitting the state to introduce evidence of a cell phone extraction report and photographs obtained from the examination of a cell phone where the state failed to establish the phone examined was the phone located in Appellant's home and the one for which a search warrant had been issued.

Relevant facts

The state presented Paula Neely, a member of the Fort Mill Police Department, as an expert in Digital forensics. R. 398, ll. 1-3; R. 403, ll. 9-16. According to Neely, she was requested to complete a "dump" of a cell phone. R. 400, ll. 20-21; R. 403, ll. 18-23. Neely used Cellebrite to complete this dump. R. 403, l. 24 – R. 404, l. 3. Thereafter, Neely used Physical Analyzer, another program, to generate a report. R. 404, ll. 3-12. When the state moved to admit the digital copy of the report and photographs removed from the phone as part of Neely's "dump," Appellant objected to the state's failure to lay a proper foundation. R. 405, l. 15 – R. 406, l. 3. Although the judge requested the state to lay more foundation, the state still failed to provide a sufficient foundation for the admissibility of the report and photographs. R. 405, l. 23 – R. 407, l. 7. Neely explained that she was asked to examine the phone by Walter Beck, a detective, but she had no idea where the phone was found. R. 406, ll. 8-12. Neely knew simply that Beck told her the phone was related to Appellant as well as to a burglary involving a safe for which she had been asked to conduct testing. R. 406, ll. 16-20. Neely did not have a chain of custody form for the phone, and the state did not produce one during the trial. R. 416, ll. 1-8. Appellant maintained his objection, emphasizing that Neely was unaware of where the phone was found. R. 407, ll. 13-16. Nevertheless, the judge overruled the objection and permitted the introduction of the evidence. R. 407, ll. 17-23; R. 602; State's Exhibit #9A.

Thereafter, Neely informed the jury of numerous photographs found on the phone on February 7, 2017, and February 8, 2017. R. 409, l. 7 – R. 415, l. 4; State's Exhibit #9A. The photographs showed various guns. R. 409, l. 7 – R. 414, l. 4; State's Exhibit #9A.

Later, Walter Beck, an investigator with the York County Sheriff's Office, informed the jury that when he searched Appellant's home, he seized multiple cell phones. R. 429, ll. 11-22; R. 443, ll. 14. He further claimed that he obtained a search warrant to search a phone that was seized from the living room table that Appellant wanted to use in the presence of other police officers. R. 443, ll. 16-24. According to Beck, Appellant provided law enforcement with a passcode for the cellphone to enable officers to look at the phone's contents. R. 443, ll. 21-24. Beck told the jurors that information on the phone tied it to Appellant. R. 444, ll. 7-18. According to Beck, he requested a "forensic analysis" of the phone from Neely. R. 443, l. 25 – R. 444, l. 3. This contradicted Neely, who indicated "[n]o particular analysis" was requested of her. R. 403, ll. 23-24. He also elaborated on Neely's testimony by stating that photos of guns found on the phone were taken on the day of the burglary. R. 444, l. 19 – R. 445, l. 2.

Discussion

The proponent of evidence must satisfy "[t]he requirement of authentication or identification as a condition precedent to admissibility." Rule 901(a), SCRE. This requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Id. While the burden is not high, the proponent must offer a satisfactory foundation to permit the jury to conclude the evidence is authentic. Deep Keel, LLC v. Atlantic Private Equity Group, LLC, 413 S.C. 58, 64-65, 773 S.E.2d 607, 610 (Ct. App. 2015) (citing United States v. Hassan, 742 F.3d 104, 133 (4th Cir. 2014)).

One of the most common ways for the proponent to authenticate evidence is through the

testimony of a witness with knowledge that the "matter is what it is claimed to be." See Rule 901(b)(1), SCRE. Another way to authenticate evidence is by showing the evidence contains "distinctive characteristics and the like." Rule 901(b)(4), SCRE. "Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances" may serve to authenticate evidence. Id.; see also State v. Anderson, 386 S.C. 120, 129, 687 S.E.2d 35, 39-40 (2009)(finding a master fingerprint card authenticated where an expert explained the prints on the master card were taken at a correctional facility on a specific date, and assigned a unique state identifying number).

The South Carolina 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 State v. Pulley, 423 S.C. 371, 377, 815 S.E.2d 461, 464 (2018); State v. Governor, 362 S.C. 609, 612, 608 S.E.2d 474, 475 (Ct. App. 2005).

Although the evidence must be clear as to who handled the evidence and what was done with it between the taking and the analysis, testimony from each custodian is not a prerequisite to establishing a chain of custody sufficient for admissibility. Benton v. Pellum, 232 S.C. 26, 33-34, 100 S.E.2d 534, 537 (1957); Sweet, 374 S.C. at 7, 647 S.E.2d at 206. If other evidence establishes the identity of those who handled the evidence and "reasonably demonstrates the manner of handling of the evidence," courts are willing to fill gaps in the chain of custody due to an absent witness. Sweet, 374 S.C. at 7, 647 S.E.2d at 206. "'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.'" Raino v. Goodyear Tire and Rubber Co., 309 S.C. 255, 422 S.E.2d 98 (1992) (quoting Benton, 232 S.C. at 26, 100 S.E.2d at 537); see also

State v. Joseph, 328 S.C. 352, 364, 491 S.E.2d 275, 281 (Ct. App. 1997). "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).

The South Carolina Supreme Court has 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. "On the other hand, where the identity of the persons handling the specimen is established," the Court has "found evidence regarding its care goes only to the weight of the specimen as credible evidence." Id. Police need not account for every transfer of the fungible evidence, but must demonstrate a reasonable assurance the condition of the item remained the same from the time it was obtained until its introduction at trial. State v. Hatcher, 392 S.C. 86, 94, 708 S.E.2d 750, 754 (2011) (quoting State v. Price, 731 S.W.2d 287, 290 (Mo. Ct. App. 1987).

In State v. Cribb, 310 S.C. 518, 522, 426 S.E.2d 306, 309 (1992), the defendant appealed his conviction for three counts of felony DUI raising, among other issues, the trial court's admission of his blood alcohol test results based upon the state's failure to establish the chain of custody. Two nurses treated Cribb when he arrived at the hospital. Id. One nurse administered an intravenous solution ("IV"). Id. It was the hospital's practice to have the nurse administering the IV conduct the blood draw. Id. However, the nurse who administered the IV did not recall drawing Cribb's blood, but assumed that she had in light of her standard procedure. Id. The lab technician did not know who drew the blood or who transferred the blood to the lab. Id. The medical records did not show who drew the blood or transported it to the lab. Further, the label on the blood sample did not reveal who drew it and transported it to the lab. Id.

The Supreme Court reversed Cribb's conviction, holding that the State failed to establish the chain of custody as far as practicable for the blood sample. Id. "The evidence in the record of this case does not identify those persons who handled the blood from the time it was drawn until the time it was tested." Id. Therefore, admitting the results of the blood alcohol test constituted an abuse of discretion. Id.

This Court found a chain of custody insufficient in State v. Joseph, 328 S.C. 352, 364, 491 S.E.2d 275, 281 (Ct. App. 1997). The state presented the following evidence to support introduction of the drug evidence:

> Officers Ruger and Hardy took Joseph [an inmate at a correctional institution] to the "shakedown room" so that the search could be done in the presence of their supervisor, Sergeant McKinzie. Ruger and Hardy began searching Joseph's hair, and Ruger removed two cellophane packages, one containing separate packets of a green leafy substance, and the other containing separate packets of a beige rock-like substance. Ruger filled out a chain of custody form and turned the packages over to Investigator Davis, Kirkland's contraband officer. Davis immediately field tested the substances in the packages, which tested positive for crack cocaine and marijuana. He found weights of 0.07 grams of crack cocaine and 0.54 grams of marijuana. Davis sealed the evidence in a plastic bag and personally delivered the bag to SLED on August 27, 1993, placing the evidence in the drug box. On April 18, 1994, Davis received the evidence back from SLED. He stored the evidence in a locked file cabinet in his contraband office from that time until January 5, 1995, at which point he delivered the evidence back to SLED for retesting.
>
> On September 1, 1993, Susan Kilmer, a SLED chemist, retrieved the evidence from the drop box. Between September 25 and October 4, 1993, she analyzed the evidence, finding 0.43 grams of marijuana and 0.07 grams of crack cocaine. She then secured the evidence in her locker at SLED until March 24, 1994, when she turned it over to Susan Wilson, an evidence control employee at SLED.
>
> On April 18, 1994, Connie McKay, another SLED employee, retrieved the evidence from the evidence vault and returned it to Officer Davis. On January 5, 1995, Davis resubmitted the evidence to SLED, placing it in a secured drug box. Chemist Kimberly Thigpen reanalyzed the evidence, finding 0.41 grams of marijuana and 0.07 grams of crack cocaine.

Id. at 356, 491 S.E.2d at 277. Prior to trial, the state revealed that Kilmer would not testify because she had moved to Michigan and was beyond the state's subpoena power. Id. This Court

held the state failed to establish an adequate chain of custody because "Kilmer was the critical link in the state's chain of custody – it was Kilmer who retrieved the evidence from the drop box and first analyzed the evidence, and it was Kilmer who retained possession of evidence for six months." Id. at 364-365, 491 S.E.2d at 281. Accordingly, this Court concluded the state's evidence of the chain of custody was "fatally deficient" and the trial judge erred by admitting the drug evidence. Id. at 365, 491 S.E.2d at 281-282.

This Court held the state properly established the chain of custody for drugs found in a police car. State v. Pope, 410 S.C. 214, 228-229, 763 S.E.2d 814, 822 (Ct. App. 2014). Noting that drugs were fungible evidence and that a stricter chain of custody was required, this Court held the chain of custody established where:

> Lieutenant Sherfield testified he took the crack cocaine Corporal Vinson found in the back seat of the patrol car back to his office; secured it in an evidence bag to be sent to SLED for analysis; marked the bag with his name and the date; and secured the evidence in a vault in his office. Lieutenant Sherfield transported the evidence to SLED, along with several other evidence bags, on September 21, 2010. Willie Smith, a senior criminalist-chemist in the drug analysis department of SLED, testified he received the evidence on September 22, 2010. He determined the substance was eleven and a half grams of crack cocaine. He testified to the chain of custody of the drugs; that the evidence bag was still sealed when he received it; he resealed it after he tested it; and it was still in the same condition it was when he resealed it.

Id.

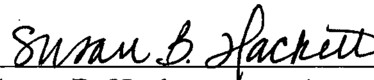
At Appellant's trial, the state simply failed to establish that the phone "dumped" by Neely was the phone seized by Beck from the Rock Hill residence. The state did not present Neely with a phone and ask her to identify it. Likewise, the state did not present Beck with a phone and ask him to identify it. The state failed to present any chain of custody documentation to support its claim that the phone Neely "dumped" was the phone found by Beck at the Rock Hill residence. Although the state presented evidence that Beck gave a phone to Neely, the state failed to present any

evidence that the phone Beck gave to Neely was the phone Beck found at the Rock Hill residence. In fact, Beck and Neely differed in their recollection of what transpired between the two when a phone was transferred – Beck claimed that he requested Neely conduct a forensic analysis of the phone, whereas, Neely indicated no specific analysis was requested of her.

The photographs recovered by Neely from a phone were very damaging to Appellant. In its closing argument, the state used the photographs to assert that Appellant photographed the guns stolen from Minutole in order to sell them. R. 521, ll. 21-23. The state also used the photographs to counter Appellant's statement to police that he received the safe and the stolen guns one week prior to his arrest. R. 522, ll. 1-5. According to the state, the photographs on the phone presented a "[b]ig problem" for Appellant because the photographs of the guns were taken on the day of the burglary. R. 522, ll. 3-18. The state used the photographs and the metadata about the photographs from the phone to argue that Appellant was "not telling the truth." R. 522, ll. 21-24.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and remand for a new trial.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of September, 2019.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Roger L. Couch, Circuit Court Judge

THE STATE,

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RICHEZ MARKIVIOUS BOWSER,

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Richez Markivious Bowser states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent Appellant.

2. She has reviewed the record of Appellant's pre-trial hearing before Judge William McKinnon and the record of Appellant's trial before Judge Roger L. Couch, which was held on November 27-29, 2018, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. Pursuant to Anders v. California, 386 U.S. 738 (1967), she has briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Richez Markivious Bowser.

Respectfully Submitted,

Susan B. Hackett
Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

This 4th day of September, 2019.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
Roger L. Couch, Circuit Court Judge

THE STATE,

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APPELLANT

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

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

(1) Hearing transcript dated September 11, 2018 (Hrg.);
(2) Transcripts dated November 27-29, 2018 (Tr.);
(3) State's exhibit #2 (photos);
(4) State's exhibit #9 (report);
(5) State's exhibit #9A (CD);
(6) Indictments; and
(7) Sentence sheets

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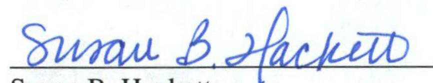
I certify that this designation contains no matter which is irrelevant to this appeal.

September 4, 2019



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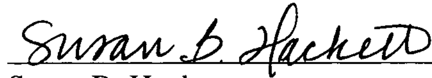
CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

September 4, 2019.



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THE STATE,

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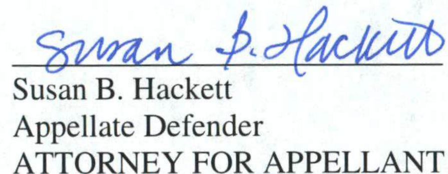
V.

RICHEZ MARKIVIOUS BOWSER,

APPELLANT

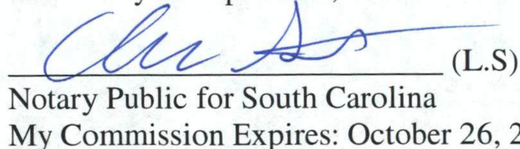
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders 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 Anders Brief of Appellant and Designation of Matter have been served on Richez Markivious Bowser, 293406, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 4th day of September, 2019.



Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me this 4th day of September, 2019.



(L.S)
Notary Public for South Carolina
My Commission Expires: October 26, 2019

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