

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable William A. McKinnon, Presiding

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FEB 23 2021

SC Court of Appeals

State of South Carolina -- Respondent,

-vs-

Quincy Lakeith Hemphill -- Appellant,

APPELLATE CASE NO. 2019-00-1807

APPELLANT'S PRO-SE ANDERS BRIEF

Quincy L. Hemphill
SCDC# 301409
Perry Corr. Inst.
430 Oaklawn Rd.
Pelzer, SC. 29669

Appellant, pro-se

STATEMENT OF ISSUES ON APPEAL

ISSUE (I)

THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE SEARCH WARRANT WHERE THE INFORMATION CONTAINED IN THE AFFIDAVIT IS NOT VERIFIED BY THE AFFIANT AND IS DEVOID OF ANY INFORMATION AS REQUIRED BY THE STATUTE.

ISSUE (II)

THE TRIAL COURT ERRED FAILING TO PROHIBIT THE DNA TESTIMONY SINCE THE STATE CAN'T ESTABLISH A CHAIN OF CUSTODY AS TO WHOSE DNA IT IS.

ISSUE (III)

THE TRIAL COURT ERRED IN OVERULING TRIAL COUNSEL'S OBJECTION TO THE PROSECUTION'S IMPROPER STATEMENTS DURING CLOSING SUMMATION REGARDING REASONABLE DOUBT THAT SO INFECTED THE TRIAL WITH UNFAIRNESS AS TO MAKE THE RESULTING CONVICTION A DENIAL OF DUE PROCESS.

STATEMENT OF THE CASE

For the sake of brevity and to save the Court's time, Appellant adopts Appellate Counsel's statement of the case, Anders Brief at page 2.

STANDARD OF REVIEW

In the instant matter Appellate Counsel submitted an ANDERS Brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967) while simultaneously Petitioning To Be Relieved as Counsel. Thus, pursuant to Anders an Anders review triggers to the Court the responsibility to review the entire record for error.

In criminal cases. the Appellate Court sits to review errors of law only, and is bound by the trial court's factual findings unless those findings are clearly erroneous. State v. Edwards, 384 S.C. 504, 682 S.E.2d 820 (2009).

ISSUE (I)

THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE SEARCH WARRANT WHERE THE INFORMATION CONTAINED IN THE AFFIDAVIT IS NOT VERIFIED BY THE AFFIANT AND IS DEVOID OF ANY INFORMATION AS REQUIRED BY THE STATUTE.

FACTS

Prior to trial, trial counsel motion to suppress the search warrant. Tr.p.31. Counsel advised the court that the crux of the case was that on February 24, 2016 various officers and agencies of York County executed a search warrant on the residence where Appellant resided, Tr.p.30, 1.24-p.31, 1.2.

Prior to that the officers sought a search warrant on February 19, 2016 and had it signed the same day, Tr.p.31, 1.14-16. Counsel argued that the crux of the affidavit states that the affiant was whom he believed was as Officer Vaughn. The affiant received information from a confidential informant that a black male named "Q" was selling cocaine from his residence in York County. The affiant states that the confidential informant conducted a control purchase within the last 72 hours at "Q's" residence. The affiant also states that the confidential informant was monitored with the transaction with the specific confidential informant, but this specific confidential informant had been seen on previous occasions entering and exiting that location. Tr.p.31, 1.16-p.32, 1.4.

Counsel provided the Court with a copy of the search warrant and the attached affidavit, Tr.p.32, 1.9-11. Counsel reminded the Court that this is a retrial from a hung jury and the testimony

that came out at that trial that suggested: "That a confidential informant provided information that they thought drugs were being sold out of this residence, and based upon that information the York town authorities, drug enforcement unit sheriff's department, set up surveillance for a couple of weeks. They see the confidential informant go in and out of the residence and this is prior to the controlled purchase. At sometime thereafter they sent a control purchase. He comes out with a substance of which at the time of the search warrant, was never Id or tested. It was just a substance that they took from him and based upon that they provided that affidavit. Tr.p.32, 1.12-p.33, 1.1. Counsel argued that "what is glaring is that the affidavit in and of itself is devoid of any information as required by the statute and there is nothing there that shows the credibility and reliability of the confidential informant." Counsel pointed out to the Court that not only is that information devoid, but it in fact does not even make mention that the confidential informant had previously been at that location prior to the controlled purchase which in and of itself raises credibility issues on whether or not knowing he had pending charges if he placed or set the items there that he later retrieved at a later date knowing he was coming back, Tr.p.33, 1.5-13.

Counsel positioned that we are at a point that we have an affidavit that was submitted to the Magistrate that was void of any information regarding credibility and then the information that should have been in that could have raised a question as to his credibility that Magistrate could have looked at, was void of that as well. Tr.p.33, 1.13-19.

After brief discussion and colloquy between counsel, the State and the Court, Tr.p.33.22-p.43, 1.8, the Court in ruling on the issue stated "My instruction as a circuit court judge from Our Supreme Court is to give great deference in the Magistrate's determination. I just -- barring case law to the contrary, I don't think that's enough for me to not find probable cause. It seems to me that, yes, they apparently left out in the typed affidavit the word purported cocaine or believed to be cocaine, but I don't think that's enough to overturn the warrant. Tr.p.43, 1.9-16. The Court further found that the Dupree decision takes care of all the issues counsel raised, "except, for the fact that the officers called it cocaine when they didn't really have proof it was cocaine. I don't think that's enough to overturn. Tr.p.43, 1.23-p.44, 1.2.

DISCUSSION

Search warrants are prescribed by statute. A search warrant may be issued on an affiant reciting the facts on information and belief. See I. S.C.Jur. Affidavits §29 Search warrants. A probable cause affidavit in support of a search warrant must state facts so closely related to the time of the issuance of the warrant, as to justify a finding of probable cause at the time. State v. Corns, 310 S.C. 546, 426 S.E.2d 324 (Ct.App.1992).

In State v. Philpot, 317 S.C. 458, 454 S.E.2d 905 (1995), Philpot asserted the court erred in failing to suppress the evidence seized during the search of his home because the search warrant was not supported by probable cause. Specifically Philpot attacked the failure of the officers to address the veracity of the confidential informant. The S.C. Court of Appeals found the

evidence seized during the search should have been excluded. Id. Mere conclusory statement which give the Magistrate no basis regarding probable cause are insufficient. State v. Smith, 301 S.C. 371, 392 S.E.2d 182 (1990).

The task of the Magistrate when determining whether to issue a warrant is to make a practical, common sense decision as to whether under the totality of the circumstances set forth in the affidavit, there is a fair probability that the evidence of a crime will be found in a particular place. State v. Adolphe, 314 S.C. 89, 441 S.E.2d 832 (Ct.App.1994). This decision includes consideration of the veracity of the person supplying the information upon which the magistrate may make a determination of probable cause. State v. Smith, supra.

The Magistrate in the instant matter did not have sufficient information about the informant's veracity to determine whether there was probable cause to issue the search warrant based on the affidavit in support of the warrant.

Accordingly the evidence obtained as a result of the search warrant was inadmissible. The Court erred in failing suppress the search warrant.

ISSUE (II)

THE TRIAL COURT ERRED FAILING TO PROHIBIT THE DNA TESTIMONY SINCE THE STATE CAN'T ESTABLISH A CHAIN OF CUSTODY AS TO WHOSE DNA IT IS.

FACTS

During trial the State called deputy Stephen Moore of the York County Sheriff's Department, Tr.p.178-182. Moore testified he was currently assigned to the forensic services unit as a crime scene investigator. Id. Moore testified that he occasionally retrieves saliva samples (bucal swabs) from individuals and that on August 8, 2017 he retrieves one sample from Appellant just outside one of the courtrooms. Tr.p.179, 1.1-10. Moore testified that once he collected the sample he went to his office and prepared his evidence envelope and then it was turned into the York County Evidence Control, Tr.p.180, 1.19-22. Moore testified that he delivered the sample to evidence tech Barbie Traylor, Tr.p.181, 1.4-10.

During cross Trial Counsel asked Moore "if Appellant was the person he collected the swab from? Moore answered: "As far as I can recall, yes, sir. Tr.p.181, 1.17-19. The State asked deputy Moore if there was anyone present when Moore collected the swab and Moore stated "there was an attorney present in the room when he took the swab, but the attorney was not Trial Counsel, Tr.p.182, 1.4-16.

The State then called Jimmy Stiles to the stand at which time trial counsel advised the Court he had an objection that needed to be taken up., Tr.p.183, 1.7-13. Outside the presence of the jury trial counsel stated that at this point and time he would object to any further evidence or testimony regarding DNA,

directly from the person who is alleged or who said he was the collector. They can't identify -- he couldn't identify whether he collected it from Appellant or not. His testimony was matter of fact truthful. He thinks it's Appellant because he was sitting there. He testified that he sees a lot of people and he has no way to identify whether he took it from Appellant or not. Alls he said was an attorney and when you collect the DNA there needs to be a chain of custody to be established so there wad no testimony as to whether he got an ID from the person he took the swab from. So we don't know what swab or whose DNA they are getting ready to testify to. Tr.p.183, 1.12-p.184, 1.9.

At that time the State requested to hear the transcript played back. Tr.p.184, 1.13-p.185, 1.6. At that time the State told the Court he knew there was other people in the room when he took the swab including Mike Ligon who can also confirm that he observed Steven Moore take the swab from Appellant and placed it in that bag on the day in question and turn it into evidence. There were no other swabs turned in. Tr.p.185, 1.8-17.

Counsel took the position that in order to establish proper protocol with regard to the chain of custody the collector has to be able to absolutely identify the person from whose sample he took. Tr.p.185, 1.21-24. Trial counsel contended that "whether the lieutenant can come in and say he took it or not unless he has a video, audio showing specific date and time and that's the only time that it has been taken it just raises to many other collateral issues without them being able to specifically identify whose swab they have. Tr.p.185, 1.21-p.186, 1.7. At which time the following colloquy was recorded:

The Court: Okay, so your asking to prohibit the DNA testimony based on that?

Mr. Haley: Correct.

The Court: What's the basis for that? I mean understand you have a line of attack for closing but --

Mr. Haley: Your Honor, they can't establish the chain of custody to say whose DNA it is.

Tr.p.186, 1.8-15.

Counsel further argued that at this point we're having to assume whether or not on specific scientific evidence. Tr.p.188, 1.5-7. Counsel went on to suggest that when the defense objects to it it's not the defense's burden to show that he did follow protocol and when the State wishes to introduce this evidence it's their burden to show that it was collected properly, Tr.p.188, 1.19-23.

Counsel maintained that "it is a specific legal issue on whether or not chain of custody is there to specifically say that we can protect the integrity of the test, Tr.p.189, 1.1-5.

The Court was sceptical as to whether to exclude the evidence, Tr.p.189, 1.8-9. After brief colloguy that Court found that given the State was still putting on their case the Court reserved ruling on the issue. Tr.p.195, 1.1-3. After brief colloguy the Court overruled the objection, Tr.p.193-p.209, 1.17.

The chain of custody revealed to be a much bigger gap than anticipated. Expert Analyst Cynthia Mitchum testified under oath that she did not know whose signature that was, Tr.p.343, 1.17-18. Mitchum testified that the DNA packet that was supposedly to have been sealed appeared to be opened and/or compromised.

There was nearly eleven (11) different individuals who handled the DNA evidence. 1. Crystal Kissel, 2. Cynthia Mitchum, 3. Barbie Traylor, 4. Emily Campbell Smith, 5. Craig Ramsey, 6. David Vaughn, 7. Patrick Patterson, 8. Bren Jocelyn, 9. Stephen Moore, 10. Jimmy Stiles, and 11. Mike McGarity. After considering all of these individuals handling the DNA and the State's DNA expert Mitchum testifying she did not know whose signature of one of the actors and candidly admitting the DNA was stained and tampered, leads to the inference that there is an inadequate chain of custody and the DNA should have been suppressed.

DISCUSSION

A complete chain of evidence, tracing possession from the time the blood sample was taken from the human body to the final custodian by whom it was analyzed, the evidence must not leave it to conjecture as to who had the blood sample and what was done with it in between taking and analysis. In *State v. Hatcher*, 392 S.C. 86, 708 S.E.2d 750 (2011). citing *Benton v. Pellum*, 100 S.E.2d 534 (1957), the Court held that "while proof need not negate all possibility of tampering, it is generally held that the party offering such specimen (DNA) is required to establish, at least as far as practical, a complete chain of evidence tracing possession from the time of the DNA if taken from the human body to the final custodian by whom it is analyzed."

In *Rogers v. Commonwealth*, 197 Va. 527, 90 S.E.2d 257, 260, the Court stated: "Where the DNA analyzed has passed through several hands the evidence must not leave it to guessing or conjecture as to who had it, signed for it, and what was done with it between the taking and the analysis. *Id* at 537. See also South Carolina Rule 16, SCRCrimP-Chemical Analysis and Chain of

custody.

The DNA evidence and testimony should have been suppressed and Appellant should be granted a new trial.

ISSUE (III)

THE TRIAL COURT ERRED IN OVERRULING TRIAL COUNSEL'S OBJECTION TO THE PROSECUTIONS'S IMPROPER STATEMENTS DURING CLOSING SUMMATION REGARDING REASONABLE DOUBT THAT SO INFECTED THE TRIAL WITH UNFAIRNESS AS TO MAKE THE RESULTING CONVICTION A DENIAL OF DUE PROCESS.

FACTS

After the State and Trial Counsel rested, the Trial Court instructed the jury on the law. Tr.p.440, 1.24-p.458, 1.22.

Specifically the Court instructed the jury on reasonable doubt, Tr.p.444, 1.5-p.445, 1.1.

During closing summation to the jury the Prosecution made the following statement to the jury, as recorded:

In order for you to have reasonable doubt, a doubt must be reasonable. Some possible doubt is not enough. I mean, like I said, there's very few things we know with a hundred percent certainty. So if you have a reasonable doubt you must be able to assign a reason to it. Tr.p.462, 1.22-p.463, 1.2.

Immediately thereafter Trial Counsel objected and the Trial Court recharged the jury on reasonable doubt as a curative instruction, Tr.p.463, 1.3-p-464, 1.3.

Thereafter the Prosecution again argued a contrary statement to what the Court gave what reasonable doubt is, Tr.p.464, 1.4-p.465, 1.6 and Counsel again objected, and the Trial Court overruled the objection. Tr.p.465, 1.7-11, and the Prosecution resumed summation. The Court did not give a second curative instruction.

DISCUSSION

The United States Supreme Court has recognized that the prosecution [must prove each and every element] of the crime charged beyond a reasonable doubt. In *re Winship*, 397 U.S. 158 (1970). The burden of proof on any element cannot be shifted to the defense because doing so decreases the State's burden of proving the crime beyond a reasonable doubt.

The solicitor's statements regarding reasonable doubt injected an arbitrary factor into the jurors deliberations. The solicitor's comments that "if the jury had a doubt they must be able to assign a reason to it that acted to impermissibly shift the burden of proof and substantially lessen the State's burden of proof. The State bears the burden at all times and this argument cannot be construed in any way other than shifting the burden of proof. The Solicitor's improper comments during closing "so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). This determination requires the Court to look to "the nature of the comments, the nature and quantum of evidence before the jury, the arguments of opposing counsel, the judge's charge, and whether the errors were isolated or repeated. *Bennett v. Angelone*, 92 F.3d 1336, 1345-46 (4th Cir.1996)(internal quotation marks omitted).

Here the solicitor did not just make an isolated remark, but deliberately violated established rules regarding closing arguments. Appellant was denied his right to a fair trial.

CONCLUSION

Based on the foregoing, Appellant respectfully prays the Court will remand with instructions to conduct a new trial.

Respectfully Submitted,

/s/ _____

Quincy L. Hemphill

Appellant,

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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FEB 23 2021

SC Court of Appeals

Appeal from York County

Honorable William A. McKinnon, Presiding

State of South Carolina -- Respondent,

- vs -

Quincy L. Hemphill -- Appellant,

CERTIFICATE OF SERVICE

The undersigned hereby certifies he has served a true and correct copy of the enclosed pro-se Anders Brief on William M. Blich, Attorney General's Office, P.O. Box 11549, Columbia, SC. 29211, by placing the aforesaid in properly addressed, first-class postage affixed and placed in the U.S Mail this _____ day of February, 2021.

The original was mailed to the S.C. Court of Appeals Clerk, P.O. Box 11629, Columbia, SC. 29211 the same day stated herein.

SWORN TO AND SUBSCRIBED BEFORE ME

Respectfully Submitted,

THIS 18 DAY OF FEBRUARY, 2021

/s/ Quincy Hemphill

Jamarcus Conwell
NOTARY PUBLIC

Quincy L. Hemphill
Appellant, pro-se

MY COMM. EXPIRES My Commission Expires
September 25, 2023

Quincy L. Hemphill
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FEB 28 2021

SC Court of Appeals

Hon. Jenny Abbott Kitchings
S.C. Court of Appeals, Clerk
P.O. Box 11629
Columbia, SC. 29211

February 18, 2021

RE: Appellate Case No. 2019-001807

Dear Ms. Kitchings,

Enclosed for filing please find my por-se Anders Brief.

Due to covid restrictions Appellant was unable to obtain legal copies of his brief to properly serve a copy on the Respondent.

Therefore, I have enclosed a self addressed, first-class postage affixed envelope and I kindly ask you to please forward me a clock stamped copy of my brief so that I am able to serve Respondents.

I thank you very much for your time and consideration in this matter.

Respectfully Submitted,

/s/ _____
Quincy L. Hemphill

Appellant,

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Perry Correctional Institution
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