THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent

v.

Adam Rowell, Appellant

Appellate Case № 2018-000022

Appeal From Greenwood County
Heard September 22, 2020 - Filed July 7, 2021
Withdrawn, Substituted, and Refiled August 25, 2021

Opinion № 5832

Petition for Rehearing

Pursuant to Rule 221 of the South Carolina Appellate Court Rules, Adam Rowell hereby requests that this Court re-hear this matter. Further, pursuant to Rule 219(b) of the South Carolina Appellate Court Rules, this Court should re-hear this matter *en banc* as the harmless error standard of review in this case is inconsistent with the standard set forth by this Court in *State v. Watts*, 321 S.C. 158, 165, 467 S.E.2d 272, 277 (Ct. App. 1996) and the South Carolina Supreme Court in *State v. Sweet*, 374 S.C. 1, 647 S.E.2d 202 (2007). Further, the error preservation decision is in conflict with the standard of this Court in *State v. Williams*, 417 S.C. 209, 789 S.E.2d 582 (Ct. App. 2016).

In the refiled opinion, this Court addressed the concerns of the State in footnote 1. This

Court did not address in the refiled opinion any of the concerns of the Appellant, including the request for a re-hearing *en banc* to address the perceived conflict with other decisions of the Court of Appeals. As the modified order of this Court fails to address the concerns of Adam Rowell, Mr. Rowell re-submits his Petition for Rehearing based upon the following:

I. The Objection as to Reliability of Sample A was Preserved

This Court erred in concluding "Rowell never raised to the trial court the issue that a blood transfusion caused Sample A's BAC testing results to be unreliable." *State v. Rowell*, Op. № 5832 (S.C. Ct. App filed August 25, 2021 (Shearhouse Adv.Sh. № 29 at 25). This Court erred in two respects as to this issue.

A. First, the issue was raised before the trial judge pre-trial, during the trial, and post-trial. In a pre-trial discussion as to the issues involved in the trial, defense counsel told the court:

> Again, we would challenge the sufficiency of the chain of custody on both draws, as well as the substance and reliability of both draws.
> Rec. on App. at 13, ll 12-14.

In response to this, the assistant solicitor told the Court:

> MR. BLACK: Judge, ultimately the State's opinion is that reliability goes to weight and not admissibility. So, whatever the Defense wants to put up is fine with us, but we obviously feel that your ruling will be dependant on what you hear in trial.
> Rec. on App. at 15, ll 1-5.

The trial judge also acknowledged the issues involved in this case when he stated:

> So it looks like, then, we need to deal with pretrial the issue of alcohol containers found in both vehicles and this reliability of the blood alcohol content analysis with respect to both draws.
> Rec. on App. at 15, ll 16-19

As to Sample A, the EMS person who first treated Mr. Rowell was cross-examined by

defense counsel as to the saline solution and blood products given to Mr. Rowell. Rec. on App. at 522, l 23 to 523, l 1. These are the factors as to reliability.

During the trial, the issue as to the reliability of the hospital test, Sample A, was specifically preserved when the chain of custody issue was argued. As defense counsel stated:

> MR. HENDERSON: And, Judge, we just want to confirm. You're just ruling that you're finding there was a proper chain of custody?
> THE COURT: Yeah. Now, I mean, if there's -- if there's any other issues that we need to address as to the admissibility of the actual results then I will entertain that. I'm just -- even though getting over to Bullcoming I think we kind of deviated just a little bit. But apart from that, I'm finding chain of custody. And if there's any other issues related to the result then I will certainly deal with that at the appropriate time.
> MR. HENDERSON: We have a lot of issues dealing with results.
> Rec. on App. at 640, ll 6-18

The Court then stated:

> And then if the Defense wants to attack it's reliability then you have every right to do that in your case and [sic] chief. But I don't think I have to hear from all sides on reliability before I determine admissibility. So again, assuming that the State's witnesses are going to get into the reliability issue, then -- and if I'm satisfied, I'm going to allow it in assuming everything other thing is met. But I'm not going to allow you all to put up your expert at this stage to attack reliability. Okay?
> Rec. on App. at 644, ll 12-18

After this ruling, defense counsel sought further clarification and had this discourse with the trial court:

> MS. MERRILL: Your Honor, may I clarify one thing? You want us to do the reliability through cross-examine in front of the jury that was not proffered in camera, right? I'm just making sure that –
> THE COURT: Right. Without proffering your expert. That would be done in your case and [sic] chief. But certainly you can cross-examine the State witnesses on reliability.
> Rec. on App. at 645, ll 19-25.

At this point, the trial court told defense counsel he was going to admit Sample A over an objection as to reliability. The trial court improperly concluded that reliability was not a threshold issue for the trial court to determine.[1] "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." *State v. White*, 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009). Moreover, the trial court specifically prohibited defense counsel from introducing in camera evidence as to the reliability of Sample A. The trial court ruled evidence of the reliability of the blood test could only be raised in the defense case in chief and through cross examination. When the trial court denied the defendant the right to offer testimony as to reliability at the hearing, the issue is preserved. At the in camera hearing as to Sample B, the trial court acknowledged he had ruled upon the reliability of Sample A, the hospital draw. The trial court said, "nor did I make a finding that the results from the hospital was reliable." Rec. on App. at 826, ll 13-14. The statement would have been unnecessary if the trial judge did not understand that defense counsel had previously asked him to rule upon the reliability of Sample A. As the trial judge refused to permit defense testimony as to the validity of the Sample A, Defense counsel was relegated to raising the issue of reliability at the directed verdict motion and in a motion for a new trial. Defense counsel raised the issue at the directed verdict motion and in the post-trial motions. At the directed verdict motion, defense counsel stated, "[W]e would like to review [sic] all prior motions." Rec. on App. at 908, ll 11-12. This

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[1] This Court acknowledged the trial court failed to make an independent determination as to the reliability as to Sample B. This Court said, "Specifically, the trial court clarified it did not find the results reliable, only that the methodologies and procedures used in the testing were reliable." *Rowell*, at 20.

would have included the motion as to the reliability of Sample A.

In the modified order, this Court did not address the issue as to the post rial motion which specifically raised the issue. In the post-trial motions, defense counsel again raised the issue of the reliability of Sample A. In specific headings, the issue was referred to as "VI First Blood Draw - Contamination" and "VIII Both Blood Draws - Lack of Scientific Reliability." Rec. on App. at 1358 and 1360. The State received a copy of the post-trial Motion. The State never argued at the post-trial hearing that the issue as to the reliability of Sample A was not argued during the trial and ruled upon by the trial judge. In response to this motion, the trial judge stated:

> I've gone through your motion and your supplemental motion. I've gone back through all my trial notes. I think basically, there may be two new issues: the juror issue and then – and I'm just going to refer to it as the "Greenville Hospital" issue. Everything else is basically what was raised during the course of the trial? Is that correct Mr. Henderson?
> MR. HENDERSON: That is correct, your honor.
> Rec. on App. at 1380, ll 17-25.

In the order denying the motion for a new trial, the trial court included Issues VI and VIII among those "issues that were argued during trial." Rec. on App. at 1423. The Court denied relief as to VI and VIII and said "These arguments are again denied." Rec. on App. at 1423. In denying the motion for a new trial, he again ruled upon the reliability of both blood draws. At the post-trial hearing, neither the trial judge nor the State contended the Issues VI and VIII were not raised during the trial. "It is a fundamental principle that a contemporaneous objection is required at trial to properly preserve an error for appellate review." *State v. Black*, 319 S.C. 515, 521, 462 S.E.2d 311, 315 (Ct. App. 1995). Footnote 1 of the opinion which denied the State

petition for rehearing, is in according with this principle.

The purpose of the preservation of error rule is to ensure that the trial judge had the opportunity to rule on the issue below. The trial judge in this case ruled on the issue below. The trial judge in a written order acknowledged he had ruled upon the issue during the trial. If the trial judge in a written order states he ruled upon a timely objection, this Court should be required to accept that finding at face value and decide this issue on the merits. As this Court has said, "[W]here the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation." *State v. Williams*, 417 S.C. 209, 229, 789 S.E.2d 582, 593 (Ct. App. 2016)(internal citations omitted).

This Court found as to Sample B, when over 150% of a person's blood has been replaced by blood, blood products or saline solution, the result is not admissible. As to Sample A, upon a finding that the issue was preserved, this Court should hold that when approximately 50% of a person's blood has been replaced by blood, blood products, or saline solution, the result is not admissible. If 150% replacement is not admissible, this Court has no basis to determine what level of replacement does not taint the blood being tested. If the blood sample is not 100% the blood of the defendant, the State has not provided to this Court or the Court below any basis in law or science as to where the line should be drawn. The Sample A blood draw should also have been excluded by the trial judge.

B. Second, the State never raised the issue of error preservation in its brief. The Court, therefore, erred in finding the issue was not preserved. No party to this appeal raised the issue of error preservation as to Sample A as to reliability. As former Court of Appeals Chief Justice Alex Sanders said, "More simply put, appellate courts in this state, like well-behaved children,

do not speak unless spoken to and do not answer questions they are not asked." *Langley v. Boyter*, 284 S.C. 162, 181, 325 S.E.2d 550, 561 (Ct. App. 1984), opinion quashed, 286 S.C. 85, 332 S.E.2d 100 (1985). The obvious reason for such a rule is that when neither party briefs an issue, this Court would be well advised not to rule upon the issue without requesting that the issue be briefed. While this Court may affirm a case based upon any reason appearing in the record, this Court should not do so unless the respondent has briefed the issue and the appellant has had the opportunity to respond to the additional sustaining grounds. Such a policy is not only fair, but demanded by due process. "The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." *Kurschner v. City of Camden Plan. Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008)

II. Court Erred in Finding the Chain of Custody was Sufficient

The Court erred in failing to hold the chain of custody as to Sample A was not properly established. The Court, in affirming the lower court, ruled the unexplained discrepancies were due to the time differences between the medical and flight personnel. This Court stated, "The factual circumstances of this case reflect that the exact syncing of times between medical and flight personnel was unlikely." *Rowell* at 24. This finding is not correct. The flight records and the hospital records are in sync. The significant and unexplained time discrepancies are solely within the Greenville Hospital System records. Two charts illustrating the discrepancies are attached as Exhibit A.

The flight records show that Mr. Rowell was handed over to the hospital at 8:59 pm. Rec. on App. at 1461. The Greenville Hospital records confirmed he was received at 9:00 pm. (Rec. on App. at 1452, NURSING PROCEDURE: NURSES NOTES 21:00 Patient arrives;

1451, NURSING ASSESSMENT: Patient arrived at: 21:00); 1455, Accepting Unit 11/15/ 20:59 EST). However, the hospital records are not in sync if one assumes they all apply to Mr. Rowell. To further confuse the issue, the hospital records show the triage time as "Sat Nov 15, 2014 20:49." Rec. on App. at 1450. Again, this hospital record is eleven minutes before other hospital records show Mr. Rowell arrived at the hospital.

The records of Greenville Hospital are hopelessly confusing as to Mr. Rowell. For example, the Greenville Hospital records reflect a blood sample was taken at 8:54 pm. Rec. on App. at 742, ll 19-20; 743, ll 7-10. This was six minutes before the Greenville Hospital records show he arrived at the hospital. This Court did not discuss or consider that fact. In addition, the Greenville Hospital records also show the "first greet" was at 8:44 pm. (Rec. on App. at 1450, TIME OF GREET Nov. 15, 2014 20:44). Again, this was 16 minutes before the same hospital records show Mr. Rowell arrived at the hospital, but consistent with the triage time discussed earlier. The triage time is inconsistent with the hospital records as to the time of Mr. Rowell's arrival. The arrival time of Mr. Rowell at 9:00 pm was also confirmed by his air ambulance. Two independent sources confirmed he arrived at 9:00 pm. These discrepancies within the records of Greenville Hospital were not discussed by this court nor explained by the state at trial.

The time differences in the hospital records are inconsistent only if one assumes the times all refer to Mr. Rowell. The inconsistent times range from six to 16 minutes. These time differences cannot be explained as "clock slop." Those time difference show something is wrong with the records. The other inconsistencies mentioned here do not relate to times. They simply cannot be explained if they all refer to Mr. Rowell.

This Court further failed to discuss other unexplained discrepancies within the

records of the Greenville Hospital System. In the initial report of the hospital, Mr. Rowell is listed as being admitted from Greenville County. (Rec. on App. at 1450, ADMISSION SOURCE). Mr. Rowell was admitted from Greenwood County. Further, the same document, under "TRANSPORT," listed him as being brought to the hospital by LifeNet, a different air ambulance from Life Flight. A few pages over in the same hospital records, under "NURSING PROCEDURE: NURSE NOTES," he is listed as delivered by "Life Flight," which is correct. Rec. on App. at 1452. The NURSING ASSESSMENT also reflects "Life Flight." Rec. on App. at 1451.

The initial report, under "BEDBOARD ENTRY," states the patient had no equipment or tubes. Rec. on App. at 1450. The same hospital record on the next page under "NURSING ASSESSMENT" states Mr. Rowell had a "C-collar, Intubation." Rec. on App. at 1451. The two comments are factually inconsistent.

This Court found that Sample A was drawn by Dr. Snow. This Court failed, however, to explain that Sample A, drawn at 8:54pm, could not have been drawn by Dr. Snow through a "Central line" from Mr. Rowell, as the hospital records show the central line was not put in Mr. Rowell until 9:08 pm. (Rec. on App. at 1451, PROCEDURES).

This Court in its order also failed to discuss the complete absence of testimony as to the location of the blood for approximately 30 minutes. The often used phrase is a chain of custody must be established "as far as practicable". Here the state neither had the person who might have had possession of the blood for the unexplained 30 minutes testify nor did they produce any electronic system to show where it was. This Court failed to consider the missing witness. As Dr. John Reddic testified at the trial:

A. Specimens can be hand-delivered or transported through a pneumatic tube system.
Q And in this particular case were you -- from the audit trail were you able to identify if it was hand-delivered or tubed?
21 A I'm not able to identify that from the audit trail.
Rec. on App. at 551, ll 16-21.

Robert Smith, the laboratory technician who tested the blood, did not know from whom he received the blood. He testified:

Q. Who gave you the three tubes?
A. I don't know who gave me those tubes.
Rec. on App. at 606, ll 22-23.

As the state could not establish the means of delivery nor even the person who delivered the blood to the lab, the State has not established the chain "as far as practicable." *State v. Sweet*, 374 S.C. 1, 647 S.E.2d 202 (2007). Establishing either through direct testimony or through electronic records who was responsible for the blood for the 30 minutes is essential to establish a complete chain. The record does establish that a tech named Bill Evans might have had possession of the blood. No records or testimony, however, actually establish that fact. Mr. Smith said:

Q. So there might have been a person named Bill Evans who had possession of this blood?
A. Uh-huh.
Rec. on App. at 672, ll 3-5.

Thus, this Court erred in concluding in its order, "(3) Bill Evans was on duty and walked Sample A to the lab." *Rowell.* at 23. This Court failed to correct this factual error.

This is not a case where a package is sealed and arrives at its destination in the same sealed condition. Under those circumstances, every person who handled the package on its cross-country trip need not be identified, nor would each person need to testify. The unique

sealing would be sufficient. "The lab technician and the officers all testified that no tampering had occurred to the sealed and uniquely-marked tamper-proof package received and tested by the technician." *Barr v. State*, 302 Ga. App. 60, 65, 690 S.E.2d 643, 647 (2010), overruled on other grounds by *Scott v. State*, 295 Ga. 39, 757 S.E.2d 106 (2014). The sealed package would have the name, date, and time on it and could then be introduced as proof it was in the same condition as when originally mailed. The packaging was not kept in this case, therefore, who handled the blood and what they did with it becomes much more important.

This case actually should also be controlled by *State v. Sweet*, 374 S.C. 1, 8, 647 S.E.2d 202, 207 (2007). In that case an informant who briefly handled the drugs did not testify. The Court held the failure to call the informant or produce an affidavit from the informant was fatal to establishing a proper chain of custody. As the Court said, "In other words, the State simply did not present proof of the chain of custody as far as practicable." The inability, or unwillingness, of the state to produce either Mr. Evans or some other electronic record as to who had the blood, should not be a basis to admit the blood in this case. They have not established the chain as "far as practicable."

Judge Hocker said at the trial:

> I can certainly envision that it is controlled chaos and their one goal and one goal only is to try to save a human life, which I appreciate very much. However, I cannot use that as a reason or an excuse to make any sort of legal rulings.
> Rec. on App. at 686, ll 4-8.

Efforts to save someone's life are often in conflict with due process. And when that life has been saved and the state seeks to put that person in prison, due process must control. Controlled chaos is not the standard for admissibility of evidence. Controlled chaos cannot trump

due process, even if the goal is to save a life.

III. Court Improperly Applied the Harmless Error Standard

A. This Court failed to properly apply the harmless error standard. The South Carolina Supreme Court has said, "Engaging in this harmless error analysis, we note that our jurisprudence requires us not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict." *State v. Tapp*, 398 S.C. 376, 389–90, 728 S.E.2d 468, 475 (2012). The facts of this case establish that the error was not harmless.

First, this Court failed to acknowledge that the SLED blood draw, Sample B, was the only blood draw the State used to obtain a jury charge of an inference of intoxication at a level of .08. Without the second blood draw, the Court could not have charged the inference. This Court failed to recognize the prejudice inherent in the inference charge as to the Sample B which the court excluded.. This Court failed to address the inference charge and the prejudice that arose from it in the modified opinion.

Second, this Court did not analyze the facts of this case based upon the jury rejecting the hospital blood draw, Sample A, and convicting Mr. Rowell solely on the basis of the second blood draw. The jury, under the facts, could have rejected the first blood draw based upon the lack of a chain of custody. The jury heard the confusing times and could easily have discredited the first blood draw because it was taken before Mr. Rowell arrived at the hospital.

Third, the jury could have had a reasonable doubt as to both blood draws but concluded one confirmed the other. While neither alone would have convicted Mr. Rowell, both together did convince the jury.

Under the appropriate standard of review, this Court must conclude that the error was not harmless beyond a reasonable doubt. Under any of the three scenarios, this Court could not conclude, as a matter of law, that the second blood draw did not contribute to the verdict. The standard for finding harmless error is very high. As this Court has said, "In applying the harmless error rule, the court must be able to declare the error had little, if any, likelihood of having changed the result of the trial and the court must be able to declare such belief beyond a reasonable doubt." *State v. Watts*, 321 S.C. 158, 165, 467 S.E.2d 272, 277 (Ct. App. 1996). No court could so conclude under the facts of this case.

IV. Defense Counsel and the State Requested a Hearing as to Juror 164

This Court erred in holding that the issue as to Juror 164 required a hearing before a judge could rule upon the issue. This Court, in its opinion, failed to consider that the record, even without any testimony from Juror 164, establishes that the Juror was asked about pending criminal charges. The Juror did not respond, which simply told the court and the lawyers he had no pending criminal charges. As this Court has said, "It is the duty of every potential juror to make true and full disclosures during voir dire because counsel is entitled to rely on the answers in determining whether to exercise a peremptory strike." *Long v. Norris & Associates, LTD,* 342 S.C. 561, 573, 538 S.E.2d 5, 11 (Ct. App. 2000). The record in this case establishes the response by Juror 164 was not truthful. Once the record establishes the juror's answer was not truthful, the obligation of the moving party is over. The record at that point is sufficient to grant the moving party a new trial.

In ruling on this issue, this Court said, "Without Juror 164's testimony or some other supporting evidence, the record is insufficient to overturn the trial court's order." *Rowell.* at 27.

The Court failed to consider the record in this case. As stated above, the record established the fact the Juror was not honest in his response. This Court failed to consider the factual finding by the trial judge that the Juror did not understand the question is not supported by any evidence in the record. Before a trial court could make this factual determination, the trial court would be required to place the Juror under oath and hear his testimony. Thus, the finding of the trial court that the Juror's concealment was unintentional is without any evidence in the record and is, therefore, an error as a matter of law. As the South Carolina Supreme Court has said, "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005). With no factual basis to conclude, "[T]he Juror 164's concealment was unintentional," (Rec. on App. at 1426) the trial court erred as a matter of law in making such a conclusion.

This Court further erred in ruling on the juror issue by failing to consider that defense counsel specifically requested a hearing in which the juror could testify. As defense counsel stated in the email exchange dated December 12, 2017, "The defense believes that a hearing should be conducted so that the juror can be questioned under oath." Rec. on App. at 1442. This email was in response to an email from the assistant solicitor dated December 11, 2017 in which the assistant solicitor stated, "At this point, we think it is appropriate for the Court [to] inquire upon Juror #164 this week to determine whether or not the concealment was intentional. He is represented by Janna Nelson, and I imagine at the Courts [sic] request, he could be available this week to answer any questions you might have." Rec. on App. at 1438. Both parties requested a hearing as to the Juror. The trial court refused to conduct a hearing. As both sides requested a

hearing, this Court improperly concluded that the issue is not preserved because defense counsel did not subpoena the Juror to the November 27, 2017 hearing.

Subpoenaing the Juror to the November 27 hearing would not have been productive. Prior to that hearing, defense counsel had asked the court reporter what were the questions that related to the Juror issue. The Defense represented to the court what the court reporter had told them. Rec. on App. at 1408, ll 112-17. Without the actual transcript of the exact question, any testimony from the Juror would not have been productive. Only after the transcript was produced could direct and cross examination of the Juror been effective. On December 7, 2017, defense counsel advised the court the transcript had been ordered. Rec. on App. at 1433. Thus, this Court should not have concluded that defense counsel did not seek to subpoena the Juror to a hearing.

Conclusion

For the forgoing reasons, this Court should rehear this matter either by the original panel or *en banc*, correct the order as to the factual and legal errors set forth in this Petition, and issue an order reversing the conviction of Adam Rowell in which both blood draws are excluded from evidence. Furthermore, this Court reverse the conviction because rule Juror 164 was not truthful in his responses to the voir dire.

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