IN THE

Supreme Court of Virginia

RECORD NO. 091265

TYRONE ANTWAN HERNDON,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

REPLY BRIEF OF APPELLANT

S. Jane Chittom, Esq. VSB No. 27464
Appellate Defender
Office of the Appellate Defender
701 East Franklin Street, Suite 1001
Richmond, Virginia 23219
Tel. (804) 225-3598
Fax (804) 225-3673
jchittom@idc.virginia.gov

Counsel for Appellant

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

TABLE OF CONTENTS

Table of Contents 2

Table of Authorities 3

Argument 4

The evidence does not establish that the drug items analyzed are the same items that were recovered from the appellant. 4

A. The substances/items within the package. 5

B. The internal packaging within the bag returned by the laboratory. 6

C. The presumption of regularity. 8

Conclusion 9

Certificate 9

TABLE OF AUTHORITIES

CASES:

Herndon v. Commonwealth, Court of Appeals No. 1343-08-3 (May 26, 2009) (UP) 5

Robinson v. Commonwealth, 212 Va. 136, 183 S.E.2d 179 (1971) 4

Smith v. Commonwealth, 219 Va. 554, 248 S.E.2d 805 (1978) 8

ARGUMENT

The evidence does not establish that the drug items analyzed are the same items that were recovered from the appellant.

In this case, there are apparent discrepancies between what Officer Coleman recovered from appellant Herndon and sent to the laboratory and what the laboratory analyzed and returned. These discrepancies relate both to the items or substances themselves and the internal packaging within the evidence bag that the laboratory returned. The Attorney General argues that these discrepancies are insignificant and fail to rebut the "presumption of regularity" that attaches to public officials, laboratory workers in this case, in the performance of their duties. Brief for the Commonwealth at 9-14. Appellant Herndon submits that the discrepancies are real and significant; they show that the Commonwealth did not meet its burden to establish at trial that the items tested are the same items recovered from Herndon. *Robinson v. Commonwealth*, 212 Va. 136, 138-39, 183 S.E.2d 179, 180 (1971).

A. The substances/items within the package.

Officer Coleman recovered, packaged and sent to the laboratory a "clear plastic baggie" containing "six off-white rocks." Joint Appendix (App.) at 20, 21, 26, 36. The laboratory returned "One (1) small ziplock plastic bag which contained off-white substance and four (4) knotted plastic bag corners each of which contained off-white substance." App. at 34. The Court of Appeals agreed that the items/substances returned by the laboratory did not match Officer Coleman's description. The Court of Appeals said: "...all of the identifying features on the request for laboratory examination and the certificate of analysis, *with the exception of the description*, match." *Herndon v. Commonwealth*, Court of Appeals No. 1343-08-3 (May 26, 2009) (UP) at 5, App. at 46 (emphasis added). However, it is the description which establishes that the items sent and the items returned are the same or not. Identical numbers on the paperwork does not, in and of itself, prove identity of the physical items. The crucial question is not what numbers are on the evidence bag and the certificate of analysis. The crucial question is: what did the laboratory analyze and put into the evidence bag to be returned to Coleman?

B. The internal packaging within the bag returned by the laboratory.

As stated above, the package returned by the laboratory contained one small ziplock bag which contained an off-white substance and four knotted baggie corners each of which contained off-white substance. App. at 35. Coleman said he found with Herndon a "clear plastic baggie which contained several off-white rock-like substances." App. at 35. When he wrote the request for analysis, Coleman described the package recovered as a "baggie with six (6) off-white rocks." App. at 35. Asked by the prosecutor at trial about the apparent discrepancy, Coleman said:

> They were in one baggie, appeared to have plastic wrapped around them and tied. They were not packaged as you see them today. They were in larger forms. There was also the knotted bags that are still available.

App. at 25.

After which the prosecutor asked Coleman:

> So (sic) of the items are in knotted bags and *some of it is loose in the smaller bags that the lab provided*, is that correct?

App. at 25. (emphasis added) Coleman agreed that the prosecutor was correct. App. at 25.

That passage from the trial testimony, although not crystal clear, at least establishes that the some of the drugs sent from the laboratory

were in "smaller bags," plural, that the laboratory, not Coleman, put them in. By this reference to "the smaller bags (plural) that the lab provided," the prosecutor apparently concedes that the laboratory re-packaged at least some of the "rocks" that the laboratory sent back. If that is so, then the Commonwealth failed to establish whether the laboratory analyzed and re-packaged the "rocks" that Coleman sent or whether, alternatively, the laboratory analyzed some sample other than the one recovered from Herndon and mistakenly put it into the Herndon evidence bag.

Pieces of cocaine do not contain unique identifiers. If the packaging does not match, it cannot be said with reasonable certainty that the items contained in the package are the same items that were in the original package. [1]

On cross-examination, Coleman clearly re-iterated that he did not recognize the returned drugs as being the same as the drugs he

---

[1] Although Coleman said in response to the prosecutor's question, "There was also the knotted bags that are still available," App. at 25, appellant does not understand Coleman to be saying that the cocaine he sent was in knotted bags, because he did not mention knotted bags in his testimony about what he recovered from Herndon, App. at 20, or in his written description of the items he was sending to the laboratory. In any event, it is clear that the drugs that came back were in some "smaller bags," that Coleman had not seen before.

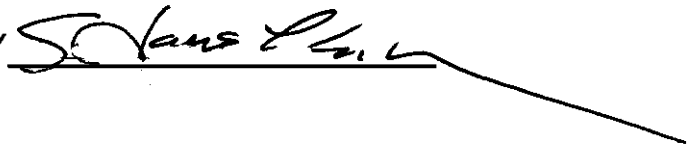
sent. Coleman testified that he did not recognize the drugs at trial the way they were packaged and they were "not what (Coleman) sent." App. at 26.

C. The presumption of regularity.

"In the absence of clear evidence to the contrary, courts may presume that public officers have properly discharged their official duties." *Smith v. Commonwealth*, 219 Va. 554, 559, 248 S.E.2d 805, 808 (1978). *See* Brief for the Commonwealth at 9-10. However, that principle does not mean that the government must prevail in every instance of disputed physical evidence. It only means that the evidence, and its analysis, are not to be excluded upon mere speculation of possible mis-identification or tampering. *See Id.* In this case, however, the presumption ought not stand in the face of Officer Coleman's testimony that he did not recognize the returned items, or their internal packaging, as the same items he sent to the laboratory.

CONCLUSION

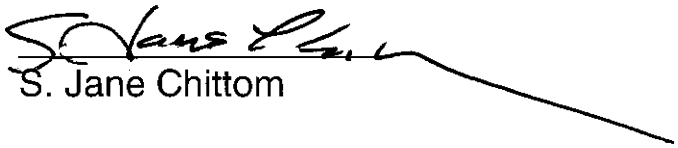
For the foregoing reasons, the appellant, Tyrone Antwan Herndon, asks this Court to reverse his conviction of possessing cocaine and to dismiss the indictment.

BY 

S. Jane Chittom VSB No. 27464
Appellate Defender
Virginia Indigent Commission
701 East Franklin Street
Suite 1001
Richmond, Virginia 23219
Tel (804) 225-3598
Fax (804) 225-3673
jchittom@idc.virginia.gov

CERTIFICATE OF SERVICE

I, S. Jane Chittom, do hereby certify that on February 16, 2010, I filed by hand the required number of copies of this Reply Brief, to include an electronic copy, with the Clerk, Supreme Court of Virginia, and on the same day mailed or delivered three copies of the same to Rosemary V. Bourne, Esq., Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond VA 23219 (804) 786-2071.



S. Jane Chittom