IN THE

Supreme Court of Virginia

RECORD NO. 091265

TYRONE ANTWAN HERNDON,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING 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

Statement of the Case 4

Assignment of Error 5

Question Presented 5

Statement of Facts 5

Argument 9

It was error to admit into evidence the certificate of analysis contained in Commonwealth's Exhibit 1, because the item described in the certificate of analysis was not shown to be the same item the officer submitted to the laboratory.

Conclusion 15

Certificate 16

TABLE OF AUTHORITIES

CASES:

Bloom v. Commonwealth, 262 Va. 814,
554 S.E.2d 84 (2001) 10

Coe v. Commonwealth, 231 Va. 83,
340 S.E.2d 820 (1986) 9

Crews v. Commonwealth, 18 Va. App. 115,
442 S.E.2d 407 (1994) 12

Herndon v. Commonwealth, Court of Appeals No.
1343-08-3, May 26, 2009 (UP).....9, 14

Johnson v. Commonwealth, 12 Va. App. 391,
404 S.E.2d 384 (1991)..... ...10

Koon v. United States, 518 U.S. 81 (1996)..... 9-10

Porter v. Commonwealth, 276 Va. 203,
661 S.E.2d 415 (2008) 9

Robinson v. Commonwealth, 212 Va. 136,
183 S.E.2d 179 (1971) 10

Washington v. Commonwealth, 228 Va. 535,
323 S.E.2d 577 (1984) 10, 11

OTHER AUTHORITY:

Charles Friend: The Law of Evidence in Virginia
(6th ed. 2003)..... 11

STATEMENT OF THE CASE

This case originated in the Circuit Court of the City of Martinsville. The Hon. Joseph W. Milam presided at trial and sentencing.

The appellant, Tyrone Antwan Herndon, was charged with possession of cocaine. He elected to be tried by the court and was convicted of the charge. Judge Milam sentenced Herndon to three years in prison but suspended two years and nine months of that term, on condition of supervised probation for one year and six months and good behavior for two years following release from confinement.

The final order in the case was entered on May 27, 2008. Notice of Appeal was timely filed. The record of the case was received at the Court of Appeals on August 8, 2008. A petition for appeal was timely filed. The Court of Appeals granted review on December 2, 2008 but affirmed the trial court in an unpublished opinion May 26, 2009. This Court granted review of the single assignment of error on November 30, 2009.

ASSIGNMENT OF ERROR

The Court of Appeals erred in affirming the trial court's admission of the certificate of analysis contained in Commonwealth's Exhibit 1 into evidence, because the item described in the certificate of analysis was not shown to be the same item the officer submitted to the laboratory.

QUESTION PRESENTED

Whether the trial court erred in admitting the certificate of analysis contained in Commonwealth's Exhibit 1, where the item described in the certificate of analysis was not shown to be the same item the officer submitted to the laboratory.

Preserved, Joint Appendix (App.) at 17, 27-28 (objection to evidence), 29-32 (final argument by the parties on guilt/innocence).

STATEMENT OF FACTS

On August 12, 2006, police received a call about someone tampering with a motor vehicle. App. at 5. Officers Robert Jones and Rob Coleman went to the area. App. at 5, 14. They saw a man run from a car that matched the car description they had. They chased the man and Officer Coleman caught him. App. at 6, 14-15. The man had run to a wooded area. App. at 6, 15. The man, appellant

Tyrone Herndon, App. at 6, was arrested for tampering with a motor vehicle, App. at 6. These events took place around 1:30 a.m. App. at 15.

When Officer Coleman caught up with him, Herndon was lying face down in the wooded area, with "balled up" money and a cell phone in his hand. App. at 15. Coleman put handcuffs on Herndon and rolled him over. As he did so, Coleman saw a plastic bag containing several off-white rock-like objects.[1] It was raining but the bag was dry. App. at 7, 15-16. The bag was later sent to the laboratory by certified mail. App. at 16.

At trial, Officer Coleman testified that he collected the bag, sealed it, placed it into "evidence" at the station and later sent it to the laboratory for analysis. App. at 16. When the certificate of analysis from the laboratory was offered into evidence, defense counsel objected and cross-examined Officer Coleman. App. at 16-17.

On cross examination, Coleman testified that when he sent the bag to the laboratory, his description of it was of "six off-white rocks."

---

[1] Officer Coleman appeared to be uncertain whether the bag was beneath Herndon or beside Herndon when found. App. at 19-20, but it is the contents of the bag, not the placement of the bag which is at issue in this case.

App. at 20; *see also* App. at 35, Commonwealth's Exhibit 1, page labeled "Request for Laboratory Examination, signed "R.S. Coleman". Coleman's "Request for Laboratory Examination" described the object being sent to the laboratory as "Evidence Bag containing baggie with six (6) off-white rocks." App. at 35. The certificate of analysis returned by the forensic laboratory describes the item analyzed as "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 item analyzed by the laboratory weighed 1.4 grams and contained cocaine. *Id.*

At trial, Officer Coleman testified that he sent six rocks to the laboratory for analysis. App. at 21, 26. He did not know who received the bag when it was returned from the laboratory to the Martinsville Police Department. App. at 26. Officer Coleman was asked by the defense attorney:

> Q. But you don't recognize that group the way it was packaged back today?"
> A. That's correct.
> Q. It's not what you sent?
> A. That's correct.

App. at 26.

The reference above was to the packaging of the items sent from the laboratory. App. at 27.

The Commonwealth offered the certificate of analysis into evidence. Defense counsel objected, because the item analyzed was not in the same condition or substantially the same condition as the item sent to the laboratory. The item described in the certificate of analysis varies from what Officer Coleman said he recovered at the scene. App. at 27.

The trial court admitted the certificate of analysis over defense objection. App. at 28. The Commonwealth rested. The defense did not put on evidence. Defense counsel argued to the court that the "presumption of regularity" had been rebutted as to the certificate of analysis, App. at 29-30, because of the variance between the descriptions of the item by Officer Coleman and on the certificate of analysis. For that reason, defense counsel argued, the court could not find that the item recovered was the same item described in the certificate of analysis. Therefore the evidence does not prove beyond a reasonable doubt that Herndon is guilty of possessing cocaine. App. at 30-31.

The Court of Appeals opined that a trial court may consider several factors in assessing the authenticity of a certificate, namely the date of the offense, the identity of the suspect, the identity of the investigating officer, the case numbers assigned and certified mail numbers. The Court of Appeals found that all the identifying features on the request for analysis and on the certificate of analysis matched "with the exception of the description" of the materials in the package. *Herndon v. Commonwealth*, Court of Appeals Record No. 1343-08-3, May 26, 2009 (UP) at 5.

ARGUMENT

It was error to admit into evidence the certificate of analysis contained in Commonwealth's Exhibit 1, because the item described in the certificate of analysis was not shown to be the same item that the officer submitted to the laboratory.

Standard of Review

The admissibility of evidence is within the discretion of the trial court and a ruling will not be disturbed on appeal absent an abuse of discretion. *Coe v. Commonwealth*, 231 Va. 83, 87, 340 S.E.2d 820, 823 (1986). However, by definition, a trial court abuses its discretion when it makes an error of law. *Porter v. Commonwealth*, 276 Va. 203, 260, 661 S.E.2d 415, 445 (2008), citing *Koon v. United States*,

518 U.S. 81, 100 (1996). The proponent of the evidence bears the burden of establishing the facts necessary to support its admissibility. *Bloom v. Commonwealth, 262* Va. 814, 821, 554 S.E.2d 84, 87 (2001). On appeal, the appellant has the burden to show that admission of the evidence was reversible error. *Johnson v. Commonwealth*, 12 Va. App. 391, 396, 404 S.E.2d 384, 387 (1991).

Discussion

Whenever the Commonwealth seeks to admit a scientific opinion derived from tests on an object, the Commonwealth must establish that the items tested are the same items that were recovered. *Robinson v. Commonwealth*, 212 Va. 136, 138-39, 183 S.E.2d 179, 180 (1971). The Commonwealth must prove "the chain of possession necessary to validate...the analysis of the item." *Id.* A proper foundation for the admission of scientific analysis "includes proof of the chain of custody and a showing with reasonable certainty that the item has not been altered, substituted, or contaminated prior to analysis, in any way that could affect the results of the analysis." *Washington v. Commonwealth*, 228 Va. 535, 550, 323 S.E.2d 577, 587 (1984) (citing *Robinson*). The requirement is stricter when the

item has been subjected to scientific tests than for an item of real evidence. As Professor Friend observed:

> Where...the evidence involves chemical analysis, as with e.g. blood or narcotics, a stricter rule must be imposed. Because of the danger of adulteration or confusion of samples, the party offering such evidence must establish the whereabouts and handling of the evidence from the moment it is obtained to the moment of trial.

Friend: The Law of Evidence in Virginia (6th ed. 2003) at 528.

The scientific analysis being offered in this case is of cocaine rocks, something that is "indistinguishable from others of its kind, *see Washington*, 228 Va. at 550, 323 S.E.2d at 587. Therefore, it is crucial that the Commonwealth establish that the sample analyzed was the same material that was recovered from Mr. Herndon.

In this case, the material analyzed was some off-white pieces of rocklike substance, pieces of crack cocaine. They are fungible with other pieces of crack cocaine of similar size. One way that some pieces of crack cocaine can be distinguished from other pieces is by the number of the pieces and how the pieces are packaged when recovered by police. By those criteria, the item analyzed in this case was not the same item sent to the laboratory for analysis or was not the item analyzed and reported in the certificate.

Officer Coleman testified that he sent six "rocks" to the laboratory. He said nothing about their being in "baggie corners" when found. That is not what came back. Asked if he recognized the group of rocks in "knotted baggie corners" that was returned with the certificate of analysis, he said that he did not. App. at 26. Asked if it was what he sent to the laboratory, he said that it was not. App. at 26.

A certificate of analysis is admissible in evidence only where the integrity of the chain of custody has been satisfied. *Crews v. Commonwealth*, 18 Va. App. 115, 119, 442 S.E.2d 407, 409 (1994). One of the links in that chain is a comparison of the request form which accompanied the drugs to the laboratory with the item described on the certificate of analysis. *Crews*, 18 Va. App. at 120, 442 S.E.2d at 409. In *Crews*, the request form "fully and correctly identified the instant offense and related evidence." *Id.* By contrast, in this case, neither the request form nor the Commonwealth's witness at trial identified the material referred to in the certificate of analysis as the same material Officer Coleman packaged for transmittal to the laboratory.

In this case, the difference between the two descriptions, on the request form and the certificate of analysis, is striking, and these

differences were not reconciled or satisfactorily explained by the Commonwealth at trial. The request form contained in Commonwealth's Exhibit 1 refers to a "baggie containing six (6) off-white rocks." App. at 35. The certificate of analysis in Commonwealth's Exhibit 1, App. at 34, refers to "One (1) small ziplock bag which contained off-white substance and four (4) knotted plastic bag corners each of which contained off-white substance." Those two descriptions simply, plainly, do not match.

Since pieces of cocaine do not contain unique identifiers, the only way their identity can be established with reasonable certainty is by number of pieces and their packaging at the time they are recovered. Neither characteristic matches in this case. Officer Coleman's request form makes no reference to four knotted baggie corners, nor does his testimony at trial, [2] but that is how the analyzed

---

[2] Officer Coleman did say, "There was also the knotted bags that are still available." App. at 25. Appellant does not understand Officer Coleman to be saying that he sent the suspect cocaine to the laboratory in knotted baggie corners. There was no mention of knotted baggie corners on Coleman's request form. *See* Commonwealth's Exhibit 1, page labeled "Request for Laboratory Examination," App. at 35 There was no mention of knotted baggie corners in Coleman's testimony about what he seized from Herndon, "a clear plastic which contained several off-white rocklike substances."

material was described by the laboratory analyst. Given the discrepancy in the two descriptions, the Commonwealth did not meet its burden to establish with reasonable certainty that the substance analyzed was the same substance recovered from appellant Herndon.

The Court of Appeals said that the names, dates and numbers on the packaging matched but agreed that the description of the item submitted and the item analyzed did not match. *See Herndon*, *Id.* at 5 ("...all of the identifying features on the request for laboratory examination and the certificate of analysis, *with the exception of the description*, match") (emphasis supplied). That is to say that all the information that identifies the packaging matches - - the offense date, suspect name, investigating officer's name, case numbers assigned and certified mail numbers - - match. *Id.* All of these features serve to identify the package—not what was in the package. However, it is the item in the package, not the packaging, that establishes the identity of the item analyzed.

It is elementary that to analyze a suspect substance, a laboratory worker must remove the item from its package, perform tests on it or some part of it, then put it back in the package. There is

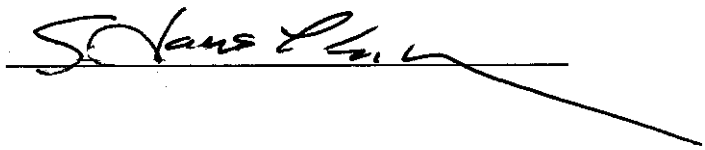
only one way to be sure that the substance tested and put into Officer Coleman's package was the same substance removed from Officer Coleman's package—by matching the description of the item sent with the description of the item analyzed. Here, those descriptions do not match. All of the other "matches" merely prove that Coleman's packaging was returned, not that the items in it are the same ones that he sent.

It was reversible error to admit the certificate of analysis in this case, for the reasons stated above. There is no other evidence to prove that the substance recovered from Herndon was cocaine. For that reason, his conviction of possessing cocaine must be reversed and the indictment dismissed.

CONCLUSION

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

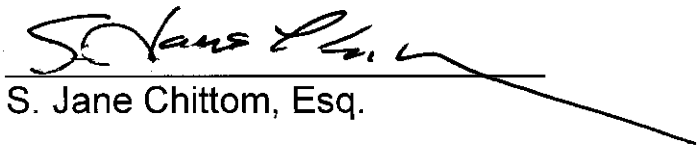
RESPECTFULLY SUBMITTED



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

CERTIFICATE

I, S. Jane Chittom, Esquire, Counsel for Appellant, do hereby certify that on January 8, 2010, I filed by hand the required number of copies of this Appellant's Opening Brief, to include an electronic copy, with the Clerk, Supreme Court of Virginia, and on the same day mailed or delivered three copies of this Brief to Rosemary V. Bourne, Assistant Attorney General, 900 East Main Street, Richmond, Virginia 23219.



S. Jane Chittom, Esq.