**IN THE**

**SUPREME COURT OF VIRGINIA**

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**RECORD NO. 091265**

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**TYRONE ANTWAN HERNDON,**

***Appellant,***

**v.**

**COMMONWEALTH OF VIRGINIA,**

***Appellee.***

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# BRIEF FOR THE COMMONWEALTH

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**BRIEF FOR THE COMMONWEALTH**

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## STATEMENT OF THE CASE

In his appeal from his conviction for possession of cocaine from the Circuit Court of the City of Martinsville, Tyrone Antwan Herndon argues that the trial court erred in admitting a certificate of analysis against him because the Commonwealth failed to adequately prove the chain of custody. On May 27, 2008, following a bench trial, the

Circuit Court convicted Herndon of possession of cocaine and sentenced him to three years in prison, with two years and nine months suspended. (App. 37).

In an unpublished decision on May 26, 2009, the Court of Appeals of Virginia affirmed the conviction. Herndon v. Commonwealth, 09 Vap UNP 1393083 (2009) (App. 42-48). Herndon now appeals that decision.

## 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.**

## QUESTIONS PRESENTED

This Court granted Herndon an appeal on the following question:[1]

> **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**

[1] The Commonwealth has not altered the question presented.

**OFFICER SUBMITTED TO THE LABORATORY.**

## STATEMENT OF FACTS

After responding to a call reporting motor vehicle tampering in the rainy, early morning hours of August 12, 2006, Officers Robert Jones and Rob Coleman of the Martinsville Police Department saw the defendant standing near a vehicle. (App. 5-7). As they got closer to the defendant, he ran from the vehicle toward a wooded area. (App. 5-7, 15). The police chased Herndon and found him lying in the woods with balled up money and a cell phone in his hand. (App. 15). After placing Herndon under arrest, the police recovered a dry clear plastic baggie underneath him that contained "several off-white rock like substances." (App. 6, 15-16).

Officer Coleman secured the suspected drugs and kept them in his possession until he arrived at the police station. (App. 16). There, he sealed the suspected narcotics, placed his initials on the evidence tape, and mailed the package to the state laboratory by certified mail. (App. 16). Officer Coleman received a certificate of analysis back from the Division of Forensic Science showing that the item submitted contained cocaine. (App. 16-17, 34).

Officer Coleman explained at trial that he knew the evidence bag he received from the lab was the same bag he had submitted because it had his signature on the back, the same date and time he recovered it and the same case number. (App. 24). In addition, the case number and the certified mail number listed on the Request for Laboratory Examination form matched those numbers on the Department of Forensic Science Certificate of Analysis form. (App. 34, 35).

When Officer Coleman received the contraband back from the Division of Forensic Science, it had the "yellow tape that the lab puts on there." (App. 23). The drugs were still in a manila envelope that had Officer Coleman's initials written on it. (App. 22).

During cross-examination, Officer Coleman acknowledged that he stated in his report that he sent "six off-white rocks" to the laboratory. (App. 20). When defense counsel suggested that a discrepancy existed between that description and the "off-white substance in four plastic bag corners" mentioned in the certificate of analysis, Officer Coleman explained, "It does not say how many off white rocks are in each bag." (App. 20).

Officer Coleman testified that when he sent the drugs to the lab "they were in one baggie, appeared to have plastic wrapped around them and tied. They were not packaged as you see them today. (App. 25). They were in larger forms." (App. 25). But, he explained, "There was (sic) also the knotted bags that are still available." (App. 25). Officer Coleman agreed that when the drugs came back from the laboratory, "they were in knotted plastic bags and some of it is loose in the smaller bags that the lab provided." (App. 25).

The following exchange took place between Officer Coleman and defense counsel:

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. 26-27).

Afterwards the Court clarified, "I think counsel was referring to the packaging, correct counselor?" Defense counsel responded, "That's correct Judge." (App. 27).

The trial court stated,

> It is argued that there is a variance between what the officer described as being seized and what is now returned from the lab. However, it's the court's view that the certificate of analysis may not have been as descriptive in terms of numbering or providing a gross number of the rocks involved as Officer Coleman's testimony, but it's not at variance because the officer never said that it was one rock per baggie corner.

(App. 32).[2]

## ARGUMENT

**THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE CERTIFICATE OF ANALYSIS BECAUSE THE COMMONWEALTH ADEQUATELY PROVED THE CHAIN OF CUSTODY.**

### A. Standard of Review

Whether the foundation is sufficient to establish the chain of custody is a question within the sound discretion of the trial court. Anderson v. Commonwealth, 274 Va. 469, 479, 650 S.E.2d 702, 708 (2007). In reviewing the admissibility of evidence, the Court applies an abuse of discretion standard of review. Ortiz v. Commonwealth, 276 Va. 705, 712, 667 S.E.2d 751, 756 (2008).

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[2]The Court of Appeals' opinion incorrectly stated that the trial court made this statement in its ruling that the certificate was admissible. (App. 46). The trial court made this factual finding in its ruling on Herndon's motion to strike. (App. 32).

The Court examines the evidence "in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deducible therefrom." Crews v. Commonwealth, 18 Va. App. 115, 117, 442 S.E.2d 407, 408 (1994). "The trial court's factual findings in making its admissibility determinations are to be given the same weight as is accorded a finding of fact by the jury." Rabeiro v. Commonwealth, 10 Va. App. 61, 64, 389 S.E.2d 731 (1990) (citing Campbell v. Commonwealth, 194 Va. 825, 830, 75 S.E.2d 468, 471 (1953). Also, on appeal the party objecting to the admission of the evidence has the burden of proving that the trial court erred. Jeter v. Commonwealth, 44 Va. App. 733, 737, 607 S.E.2d 734, 735-36 (2005).

**B. The Chain of Custody was Proven**

The defendant argues that the court erred by admitting the certificate of analysis showing the items tested were cocaine because the Commonwealth failed to establish a proper chain of custody. (Def. Brf. at 11-12). Specifically, Herndon contends that "discrepancies" between the officer's description of the drugs recovered and the description of the drugs returned from the Division of Forensic Science prove that those items were not the same. (App.

13). Because the record adequately established the chain of custody from the time of the discovery of the cocaine until its presentation in court, the defendant's argument has no merit.

"The purpose of the chain of custody rule is to establish that the evidence obtained by the police was the same evidence tested." Robertson v. Commonwealth, 12 Va. App. 854, 857, 406 S.E.2d 417, 419 (1991). To prove the chain of custody, the Commonwealth must "show with reasonable certainty there has been no alteration or substitution" of the evidence the police recovered from the scene and sent to the state forensic laboratory for examination. Robinson v. Commonwealth, 212 Va. 136, 138, 183 S.E.2d 179, 180 (1971); Reedy v. Commonwealth, 9 Va. App. 386, 387, 388 S.E.2d 650, 650-651 (1990).

While the Commonwealth is required to "account for every vital link in the chain of possession," the Commonwealth is not required to show that "all possibility of tampering" has been eliminated. Robinson, 212 Va. at 138, 183 S.E.2d at180. (holding that where nurse who collected biological evidence from victim did not testify, vital link in the chain of custody was missing); see also Pope v. Commonwealth, 234 Va. 114, 129, 360 S.E.2d 352, 357 (1987).

"Where there is mere speculation that contamination or tampering could have occurred, it is not an abuse of discretion to admit the evidence and let what doubt there may be go to the weight to be given the evidence." Reedy v. Commonwealth, 9 Va. App. 386, 391, 388 S.E.2d 650, 652 (1990).

Furthermore, "a presumption of regularity" applies to the "handling of [evidence] by public officials." Smith v. Commonwealth, 219 Va. 554, 559, 248 S.E.2d 805, 808 (1978).

In Anderson v. Commonwealth, 274 Va. 469, 479, 650 S.E.2d 702 (2007) this Court stated:

> "[A] chain of custody is properly established when the Commonwealth's evidence affords reasonable assurance that the exhibits at trial are the same and in the same condition as they were when first obtained." Vinson v. Commonwealth, 258 Va. 459, 469, 522 S.E.2d 170, 177 (1999). Whether the foundation is sufficient to properly establish the chain of custody is a question within the sound discretion of the trial court. Essex v. Commonwealth, 228 Va. 273, 285, 322 S.E.2d 216, 223 (1984).

274 Va. at 479, 650 S.E.2d at 708.

In Dunn v. Commonwealth, 20 Va. App. 217, 221-22, 456 S.E.2d 135, 136 (1995), the Court of Appeals applied "a common-sense analysis" in holding that "the underlying rationale of Code § 19.2-187.01, . . . was meant to relieve the Commonwealth of having

to call into court every employee who handled a tested material to prove its chain of custody." In cases where authorized personnel handled a tested material, "a 'presumption of regularity' attaches at the moment the material is received by an authorized agent . . . until it is released after analysis." Id.

In the instant case, the evidence proved that the evidence Officer Coleman collected was the same evidence that the lab analyzed. Officer Coleman packaged the drugs in a sealed evidence bag and marked them for identification with his initials and the date and time he recovered them. (App. 16). He mailed the drugs to the Department of Forensic Science by certified mail and received a certificate of analysis back from the laboratory showing that the item he submitted contained cocaine. (App. 34).

Officer Coleman testified that he recognized the evidence bag he received back from the lab as the same bag he submitted because it bore his signature on the back, and had the same date, time and case number. (App. 24). In addition, numbers on the Request for Laboratory Examination form and Department of Forensic Science Certificate of Analysis form matched. (App. 34).

Herndon, however, argues that the difference between the descriptions on the request form and the certificate of analysis show that the Commonwealth did not establish with reasonable certainty that the substance analyzed was the substance recovered from Herndon. (Def. Brf. at 12-14). Herndon has failed to rebut the presumption of regularity that attaches to the performance of public officials in the performance of their duties. See Dunn, 20 Va. App. at 221-22, 456 S.E.2d at 136.

The Court of Appeals correctly held that any "discrepancy between the number of pieces submitted for testing and the number of pieces tested was [a factual matter] disposed of by the trial court, which the Court of Appeals would not review unless "plainly wrong." (App. 32, 46, 47). In ruling the certificate of analysis was admissible the trial court found:

> It is argued that there is a variance between what the officer described as having been seized and what is now returned from the lab. However, it is the Court's view that the certificate of analysis here may not be as descriptive in terms of numbering and providing a gross number of rocks involved as Officer Coleman's testimony, but it's not a variance because the officer never said that it was one rock per baggy corner.

As Officer Coleman testified, “It says four plastic baggie corners. It does not say how many off-white rocks are in each bag.” (App. 20).

While the defendant points to Officer Coleman’s testimony that what he sent to the laboratory was not what was returned, the trial court clarified that that response referred only to the manner of packaging. (App. 25). “The Court of Appeals correctly held that when Officer Coleman’s statement was “taken in the proper context, it is clear that Officer Coleman was not saying that the evidence was different; rather he was saying that the packaging was different from the packaging he used to send the evidence to the laboratory.” (App. 47). Officer Coleman explained that the laboratory placed the yellow tape on the package to reseal the evidence after testing. (App. 23, 25, 47). The Court of Appeals correctly emphasized that “such changes in packaging are to be expected, as it is axiomatic that the laboratory will have to open the sealed evidence bag and then re-seal it in the course of conducting the requested tests.” (App. 47).

The difference in the descriptions was not significant enough to demonstrate that the substance analyzed was different from the one submitted. See, e.g., United States v. Dent, 149 F.3d 180, 188-89 (3d Cir. 1998) (upholding conviction for cocaine trafficking where one

witness described evidence as an "off-white chunky substance wrapped in foil," and another witness described it as a "white chunky residue," because the witnesses evinced "minor discrepancies that can be attributed to the inevitable differences in human perception"); Clark v. Commonwealth, 00 Vap UNP 2312981 (2000) (affirming conviction for possession of cocaine where officer testified that he recovered two syringes and three to five bags of a solid white substance" and another officer testified that he recovered one syringe and a bag containing white powdery substance); Waller v. Commonwealth, 97 Vap. UNP 1873952 (1997) (ruling that presumption was not rebutted where investigator described substance as two off-white rock-like substances but forensic scientist described it as white solid material).

Finally, the Court of Appeals correctly rejected Herndon's argument that Officer Coleman must have been referring to the knotted plastic baggie corners when he testified that the packaging was different. Although Officer Coleman did not mention "baggy corners" in his "Request for Laboratory Examination," in response to the Commonwealth's Attorney's question as to how the evidence was

packaged, he replied “there was also the knotted bags that are still available.” (App. 25).

Thus, both the trial court and the Court of Appeals correctly determined that the evidence proved with “reasonable assurance” that the evidence collected by the police was the same evidence tested by the laboratory.

## CONCLUSION

The trial court did not err in admitting the certificate of analysis against Herndon. Accordingly, the judgment of the Court of Appeals of Virginia affirming the judgment of the Circuit Court for the City of Martinsville should be affirmed.

Respectfully submitted,

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COMMONWEALTH OF VIRGINIA
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## CERTIFICATE OF TRANSMISSION AND SERVICE

On February 2, 2010 the required copies of this Brief were hand-filed with this Court, and three copies were mailed to S. Jane Chittom, Appellate Defender, 701 East Franklin Street, Suite 1001 Richmond, Virginia 23219.

The Commonwealth desires to present oral argument in this case.

_____
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