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STATEMENT OF ISSUES ON APPEAL

Whether the trial judge erred in admitting the drug evidence obtained from the informant because the chain of custody was defective?

STATEMENT OF THE CASE

Appellant Garry L. Valentine was indicted by the Horry County grand jury in 2004 for trafficking cocaine in an amount more than ten grams and less than twenty-eight grams. The Honorable Steven H. John presided over his trial in absence on September 11-12, 2006. The jury found appellant guilty and Judge John sealed his sentence. ROA p. 101, lines 1-7. The following day, appellant was brought in for the unsealing of his sentence. Judge John sentenced him to three years in prison. ROA p. 106.

This appeal follows.

ARGUMENT

The trial judge erred in admitting the drug evidence obtained from the informant because the chain of custody was defective.

Valentine was accused of selling cocaine to a confidential informant who had been sent into a hotel room to buy drugs with police money. At trial, Officer Kent M. Donald with the Horry County Police Department testified that he met the CI on March 17, 2004. The CI told him he could purchase illegal drugs from Valentine. ROA p. 14, lines 5-12. The CI wanted to "get some assistance" on the three charges of trafficking in cocaine that the police had again him. ROA p. 15, lines 11-15.

That same day, the police searched him and put an electronic recording device on him. ROA p. 15, lines 20-25. The police gave him $1000 in marked money. ROA p. 16, lines 8-10. The CI telephoned a person, who was allegedly Valentine, and arranged a purchase of twenty-eight grams of cocaine. ROA p. 15, lines 15-21. The police took the CI to an apartment in Myrtle Beach. Officer Donald saw them "make small talk" for about five minutes outside and then go in the apartment building. ROA p. 17, lines 16-20. Once they were inside, he could no longer observe them but listened in real time to the taped conversation. ROA p. 18, lines 12-16.

Ten minutes later, the CI came back out and he met with the police. ROA p. 20, lines 1-15. The police took cocaine from him. Donald testified he did not see anyone exit or enter the apartment besides the CI and Valentine. ROA p. 19, lines 13-19. He admitted that there was a back door that no officers observed. ROA p. 34, line 15 – p. 35, line 7.

Donald told his officers to arrest Valentine in the apartment. ROA p. 21, lines 19-24. Officer Robert Lee Sutter testified that Valentine refused consent to search so they got a search warrant. ROA p. 59, lines 8-12. They searched the apartment and found some of the police money, a pepper grinder with a white powder substance like baking soda "normally used for cutting" cocaine, a scale, cigarette papers, "a small bag of marijuana, a sheet with numbers and weights on it, and prices." ROA p. 22, lines 18-25; p. 61, lines 12-24; p. 88, lines 7-13. The evidence was introduced at trial, except the sheet, which was not listed on the return. ROA pp. 68-69. No cocaine was found in the house or on Valentine. ROA p. 44, lines 3-8; p. 76, lines 11-12.

Donald testified that he sealed up the cocaine received from the CI and placed in the evidence locker on March 19, 2006. ROA pp. 24-25. The cocaine had a field weight of twenty-three grams. ROA p. 41.

Horry County Police administrative assistant Rose Headly testified she took the evidence from the locker, packaged it, logged it, and took it to the evidence room. ROA pp. 79-81. The evidence supervisor, Lori Rabon, testified she picked up the package from the drug vault and gave it to Lisa Floyd, the chemist. ROA pp. 82-83. Floyd testified that the cocaine, which was packaged in six separate bags, weighed a total of 19.65 grams. ROA p. 87, lines 7-9. The state moved to introduce the cocaine into evidence and defense counsel objected because the chain had not been proven. ROA p. 87, lines 10-20. The judge instructed the solicitor to ask Floyd what she did with the drugs after testing. The solicitor did so and Floyd testified that she resealed them and transferred them back to evidence. The solicitor sought to introduce them again.

Defense counsel objected on the grounds that the chain had not been proven from the "very start." ROA p. 88, lines 10-12.

The judge heard arguments outside the presence of the jury.[1] Counsel argued that the CI's absence was a fatal missing link in the chain. He also noted that he had testified at the prior mistrial, apparently not favorably for the state, and was available to appear. ROA pp. 91-92.

The solicitor argued that the CI's absence merely went to the weight of the evidence and not to the admissibility of the drugs themselves. He argued the state had "established the chain as far as practical and it's reasonable." ROA p. 92, lines 12-14.

The judge stated he believed the chain had been established from the time the police gained control of the drugs and denied the motion. ROA p. 92-93. The state was allowed to introduce the drugs over defense objection. ROA p. 93, lines 20-24. See also ROA p. 98-99 (objection renewed at close of case.) This was error.

Appellant's case is indistinguishable from the recent South Carolina Supreme Court case of State v. Sweet, 374 S.C. 1, 647 S.E.2d 202 (2007). In Sweet, the state sought to introduce crack cocaine received from a non-testifying confidential informant. The trial judge allowed it, overruling Sweet's objection to the chain of custody. Id. at 4, 647 S.E.2d at 204. The Supreme Court held that the trial judge erred in admitting the drug evidence obtained from the informant because the chain of custody was defective. Id. at 7, 647 S.E.2d at 206.

[1] Prior to trial, defense counsel argued that since the confidential informant was not at trial, "a vital link in the chain of custody for the narcotics" was missing. ROA p. 11, lines 1-6. The trial court took his motion under advisement pending a review of the evidence sought to be introduced at trial. ROA pp. 12-13.

As the Court explained, our courts have long held that "a party offering into evidence fungible items such as drugs or blood sample must establish a complete chain of custody as far as practicable." Id. at 7, 647 S.E.2d at 205. If a chain witness is absent, the state is required to produce evidence of the identity of the person who handled the evidence and the manner in which it was handled. Id. (citing State v. Williams, 297 S.C. 290, 376 S.E.2d 773 (1989)).

The Court noted that none of the chain witnesses in Sweet's case testified to seeing into the room where the transaction allegedly took place. No one could testify that appellant's voice was on the tape. The officer's testimony about observing no other individuals enter or exit the room "did not fill the gap in the chain of custody left by the unavailable informant." Id. The chain was incomplete as in Valentine's case.

The Court noted that the CI was not available for trial but further held that it would not have been impracticable for the state to introduce a sworn statement from the CI under Rule 6(b), SCRCrimP. In other words, the Court held, "the State simply did not present proof of the chain of custody as far as practicable." Id. at 8. 647 S.E.2d at 206-207 (citing State v. Chisolm, 355 S.C. 175, 584 S.E.2d 401 (Ct. App. 2003)).

In appellant's case, the CI was available so the state had even less justification for an incomplete chain. The state made no attempt to subpoena the CI, who was possibly in prison under the state's control. See ROA pp. 7-11. The police also took a statement from the CI, which the state did not seek to introduce. ROA p. 21, lines 11-12.

Therefore, the chain of custody was defective and the judge erred in admitting the drug evidence obtained from the CI.

CONCLUSION

Based on the foregoing, appellant is entitled to a new trial.

Respectfully submitted,

_____
Eleanor Duffy Cleary
Appellate Defender

ATTORNEY FOR APPELLANT.

This 28th day of May, 2008.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

May 28, 2008

_____

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GARRY L. VALENTINE,

APPELLANT

FINAL BRIEF OF APPELLANT

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GARRY L. VALENTINE,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Deborah R. J. Shupe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 28th day of May, 2008.

_____

Eleanor Duffy Cleary
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 28th day of May, 2008.

_____(L.S.)
Notary Public for South Carolina

My Commission Expires: August 15, 2010 .

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December 9, 2009

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Re: The State v. Garry L. Valentine

Dear Deborah:

Enclosed are two copies of the Final Brief of Appellant in the above-entitled case, which I have filed today with the South Carolina Court of Appeals.

Please call me if you have any questions.

Sincerely,

Eleanor Duffy Cleary
Appellate Defender

EDC/fkb

Enclosure