

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL TO SPARTANBURG COUNTY
COURT OF GENERAL SESSIONS

SC Court of Appeals

APPEAL No. 2021-00-939

State of South Carolina,
Respondent,

v.

Brandal Smith,
Petitioner.

BRIEF OF APPEAL

Hereby mover the above named Petitioner, Brandal Smith, to be heard on his Brief of Appeal, pursuant to the South Carolina Court of Appeals Rules of Procedure. Petitioner contends that this Brief is made in a timely manner and made in good faith, not in waste of precious judicial resources.

ISSUES ON APPEAL:

1. Did the trial judge err in denying Smith's motion for directed verdict on the charges of trafficking in fentanyl (4 grams or more, but less than 14 grams) and distribution of fentanyl within a half-mile of a school or park?

FACTS

Petitioner was tried in the Spartanburg County Court of General Sessions on August 23-25, 2021, for the offenses of trafficking in 4 grams or more, but less than 14 grams of fentanyl and the distribution of fentanyl within a half-mile of a school or park. The incident took place on or about February 20th, 2018, as a controlled buy with an informant named Germaine Smith for the Spartanburg County Sheriff's Office. The jury found the Petitioner guilty as charged, after the trial court sentenced Petitioner to twenty-five years on the charge of trafficking of 4 or more grams, but less than 14 grams of fentanyl, plus ten years on the charge of distribution of fentanyl within a half-mile of a school or park. Petitioner filed a timely appeal.

ARGUMENT

Petitioner argues that the trial court erred when denying Petitioner's motion for a directed verdict, because as of February 20, 2018 and August 23-25, 2021, there wasn't a prohibited act prescribing any punishment nor penalty for the offense "trafficking of 4 grams or more, but less than 14 grams of fentanyl." South Carolina Code of laws 44-53-370(e)(3)(a) states:

"44-53-370(e)(3) : Any person who knowingly sells, manufactures, cultivates, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, cultivate, deliver,

purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of... heroin... is guilty of a felony which is known as "trafficking in illegal drugs..."

S.C. Code Ann. § 44-53-370 (e)(3) (2018). State v. Sanchez, 435 S.C. 468, 867 S.E.2d 595 (S.C. App. 2021).

Petitioner argues that the trial court erred when it substituted the word "heroin" for "fentanyl" when stating the charges petitioner faced and was ultimately convicted. However, all of it is in vain because there was not a prohibited act of "trafficking in 4 grams or more, but less than 14 grams of fentanyl." Instead, there exists a bill pending at the South Carolina Legislature providing:

"A BILL"

"To amend sections 44-53-190 and 44-53-370, Code of Laws of South Carolina, 1976, relating in part to the trafficking offenses for certain controlled substances, so as to add a definition for 'fentanyl-related substances' and to add an offense for 'trafficking in fentanyl'."

"Be it enacted by the General Assembly of the State of South Carolina: Section 1. Section 44-53-190 (B) of the 1976 Code is amended by adding an appropriately numbered item at the end to read:

'- Fentanyl-related substances, unless specifically excepted, listed in another schedule or contained within a pharmaceutical product approved

by the United States Food And Drug Administration, any material compound, mixture, or preparation, including its salts, isomers, esters, or ethers, and salts of isomers, esters, or ethers that is structurally related to fentanyl by one or more of the following modifications...
four grams or more of any fentanyl or fentanyl-related substance, as described in Section 44-53-190 or 44-53-210, or 4 grams or more of any mixture containing fentanyl or fentanyl-related substance, is guilty of a felony which is known as 'trafficking in fentanyl' and upon conviction, must be sentenced to

Petitioner argues that the law at the time of the incident and trial, just as today, did not provide the above stated prohibited acts nor prescribed punishments that the trial court based its denial of the directed verdict on. Simply put, the trial court's substitution of the word "heroin" for "fentanyl," does not make "4 grams or more" a crime of trafficking in fentanyl. There is not a crime for "trafficking in 4 grams or more of fentanyl."

The trial court has allowed the State to create law by applying pieces of several statutes for criminalization of "4 grams or more of fentanyl." However, although clever, all laws are created exclusively by the South Carolina legislature. South Carolina Constitution, 18 Formalities of Act provides:

"No Bill or Joint Resolution shall have the force of law until it shall have been read three times and on three several days in each

house, has had the Great Seal of the State affixed to it, and has been signed by the President of the Senate and the Speaker of the House of Representatives: Provided, That either branch of the General Assembly may provide by rule for a first and third reading of any Bill or Joint Resolution by its title only."

(2022 Edition) of S.C. Constitution)

21 Bill or joint resolution must be signed or vetoed by Governor

"Every bill or joint resolution which shall have passed the General Assembly, except on a question of adjournment, shall, before it becomes a law, be presented to the Governor, and if he approves he shall sign it..."

(South Carolina Constitution (2022 Edition))

Petitioner argues that the legislative intent of 44-53-370 did not include "trafficking of 4 grams or more... fentanyl" in 2018-2021. There did not exist, any statute prohibiting such or prescribing "4 grams or more of fentanyl is trafficking." "The general rule of statutory construction is that a specific statute prevails over a more general one." *State v. Taub*, 336 S.C. 310, 317, 519 S.E.2d 797, 801 (H. App. 1999). Also see, *Miller v. Doe*, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994) ("If a statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning.") *Hodges v. Rahey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). (Same)

The trial court looked to another meaning of 44-53-370 in this

case by substituting the drug "fentanyl" in place of "heroin". The legislative intent can not be ignored in this case. There clearly isn't any intent, because the intent is in the pending bill now, which proves there was not one prior to the proposal of the bill.

Petitioner argues that the trial court's error cannot be considered harmless because our supreme court has held "Our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict." State v. Middleton, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014); State v. Stewart, 858 S.E.2d 808 (S.C. 2021).

Petitioner argues that the State did not request a lesser included offense of distribution of fentanyl. As a result, the trial court could not rely on such now. Petitioner invoked his right to a jury trial to the indicted offense. However, the indicted charge was not a prohibited act under 44-53-370 which provides the punishment for certain offenses. Under the S.C. Constitution, the Governor has not passed or enacted a law of "trafficking of 4 grams or more of fentanyl." Therefore, the conviction for such must be vacated.

Penal statutes are to be strictly construed. This rule of lenity applies when a criminal statute is ambiguous, and requires any doubt about a statute's scope be resolved in the Petitioner's favor. State v. Miles, 421 S.C. 154, 164, 805 S.E.2d 204, 210 (S.E. App. 2017). "One of the foundations of the rule of lenity is the concept of fair notice—the idea that those trying to walk the straight and narrow are entitled to know where the line is drawn between innocent conduct and illegality." *Id.* Criminal ordinances are, of course, to be strictly construed and a defendant has a

right to know just where in he is charged with the commission of a crime...

Town of Conway v. Lee, 209 S.C. 11, 18, 38 S.E.2d 914, 917 (1946).

There is not a law or code that defines trafficking in fentanyl under 44-53-370. Since it is a criminal statute, the court must construe the statute 44-53-370(e)(2) strictly against the State in favor of the Petitioner because the statute fails to mention fentanyl. See Stardorcer Casino, Inc. v. Stewart, 347 S.C. 377, 556 S.E.2d 357 (2001).

Finally, Appellant argues that the conviction and sentence for trafficking in fentanyl must be vacated. In typical trials, the trial court would give a jury instruction on a lesser included offense, but it didn't. Therefore, the fact that Petitioner invoked his right to trial by jury, bars any retrial on the same set of facts under double jeopardy. The trial court abused his discretion in the case at bar by instructing the jury on a error of law. See State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012).

CONCLUSION

Petitioner asserts that the trial court committed reversal error by denying his motion for a directed verdict, constituting the vacation of the charge of trafficking of 4 grams or more, but less than 14 grams of fentanyl.

Respectfully submitted,

Brandal Smith

Brandal Smith

July 1st, 2022

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Certificate of Service

I, Brandal Smith, hereby certify that I have this day served my Pro Se Brief of APPEAL upon the following by placing such within the legal mail system at Kirkland Corr. Inst. The following have been served via U.S. Postal Service.

1. S.C. Court of Appeals
1220 Senate St.
Columbia, SC 29201

2. Attorney General of South Carolina
P.O. Box 11549
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