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Dec 08 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BALLAM JUSTIN ALEXANDER,

APPELLANT

APPELLATE CASE NO. 2023-000275

ANDERS BRIEF OF APPELLANT

WANDA H. CARTER
Deputy Chief Appellate Defender

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The trial judge erred in denying appellant's directed verdict and new trial motions on the offense of trafficking in 1, 4-Butanediol because possession of the same is not illegal without proof of the required accompanying element of intent for use via human consumption.

STATEMENT OF THE CASE

Appellant Ballan Justin Alexander was convicted of trafficking in methamphetamine, possession of a weapon during the commission of a violent crime, trafficking in gamma-hydroxybutyric acid, possession of cocaine with intent to distribute, and possession of heroin with intent to distribute per jury trial held during the February 2023 term of the Greenville County General Sessions Court before Judge Edward W. Miller. Assistant Solicitor Grace Moroney prosecuted the case and W. Christopher Castro appeared as counsel for appellant. Judge Miller sentenced appellant to imprisonment for a period of twenty-five years.

Appellant appealed. This brief follows.

STANDARD OF REVIEW

A case should be submitted to the jury when the evidence is circumstantial if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced. State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011) (quoting State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000)). Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt. *Id.* Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal, this Court must look at the evidence in the light most favorable to the state. State v. Bostick, *supra*. See also State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402 (2013). If the state failed to present any direct evidence or any substantial evidence reasonably tending to prove guilt of the accused, the appellate court must reverse the lower court's denial of the directed verdict motion. Hepburn, *supra*.

ARGUMENT

The trial judge erred in denying appellant's directed verdict and new trial motions on the offense of trafficking in 1, 4-Butanediol because possession of the same is not illegal without proof of the required accompanying element of intent for use via human consumption.

This case emanated from a vehicle traffic stop made by Officer Ledbetter on April 24, 2020, in Greenville County, South Carolina. The driver of the vehicle was William McMurray. Appellant was seated in the passenger seat in the vehicle. Drugs were found during a search of the vehicle conducted thereafter. Driver McMurray testified at trial, but appellant did not testify in his defense.

Officer Ledbetter testified that he stopped the vehicle in question for driving too closely in traffic. Officer Ledbetter stated that he called for backup after learning that the vehicle, which contained three occupants, was a rental car, and that the occupants were riding from Atlanta to Charlotte, and that driver McMurray was flagged as having an active warrant from Georgia for a marijuana offense. When backup police arrived with a dog in tow, a search of the vehicle followed. The search yielded a gray brick item and a black bag located on the passenger floorboard. After drugs were found therein, the occupants of the vehicle were detained as a result. R. 265, l. 16-p. 300, l. 22.

The indictment ending in 6619 addressing the offense of GHB charged against appellant read as follows:

“That [appellant] did in Greenville County, on or about the 24th day in April, 2020, knowingly sell, manufacture, deliver, purchase or bring into the state of South Carolina, or did knowingly provide financial assistance or otherwise aid, abet, attempt or conspire to sell, manufacture, cultivate, deliver, purchase, or bring into the state or was knowingly, in actual or constructive possession of more than 50 milliliters or milligrams or more of gamma

hydroxybutyric (GHB) acid or a controlled substance analogue of gamma hydroxybutyric acid. This is in violation of §44-53-370.”

Defense counsel moved for the dismissal of this indictment as the charge actually addressed the presence of 1,4-Butanediol in the vehicle, rather than GHB, because 1,4-Butanediol did not constitute an illegal substance, but rather an industrial solvent cleaner that is routinely bought and used as a cleansing agent. R. 38, l. 1 – p. 47, l. 13.

At the close of the state’s case and at the close of the trial, defense counsel repeated the identical argument in support of the motions made for a directed verdict and a new trial on this indictment to the extent that 1, 4-Butanediol is not an unlawful substance, and that without proof of the specific element of intent for use via human consumption, which was an **unproved element** in the case, then no crime was committed by appellant under this indictment. R. 645, l. 22 – p. 649, l.4; R. 705, l. 20 – p. 706, l. 19.

Forensic chemist Wendy Cannon Bell testified that 1, 4-Butanediol on its face is an industrial solvent and not a controlled substance, but explained that it is a controlled substance analogue defined ultimately as a pre-drug of GHB because it metabolizes into GHB if it is ingested. Therefore, this solvent, which 1, 4-Butanediol is, can only become a drug per human consumption. Bell stated that consumption of 1, 4-Butanediol makes it a nervous depressant that people use to relax. R. 576, l. 5 – p. 599, l. 5.

The trial judge’s jury charge on this indictment follows:

The defendant is, also, charged with trafficking GHB. The defendant is charged with trafficking in gamma-Hydroxybutyric acid. The state must prove beyond a reasonable doubt that the defendant knowingly sold, manufactured, cultivated, delivered, purchased, brought into this state, provided financial assistance or otherwise aided, abetted or attempted to conspire to sell, manufacture, deliver, cultivate, purchase or bring into this state, was knowingly in actual or constructive possession, knowingly attempted to become in actual or constructive possession of

gamma-Hydroxybutyric acid or a controlled substance analogue of gamma-Hydroxybutyric acid. The state must also prove beyond a reasonable doubt that the amount of the controlled substance analogue of gamma-Hydroxybutyric acid was 50 milliliters or milligrams. And I will tell you that a controlled substance analogue is a substance that is intended for human consumption and either has a chemical structure substantially similar to the gamma-Hydroxybutyric acid or has a stimulant, depressant, analgesic or hallucinogenic effect on the central nervous system that is substantially similar to the gamma-Hydroxybutyric acid. R. 695, l. 16-p. 696, l.15.

Again, at the close of the case for the state and at the close of the case, defense counsel moved for a directed verdict and a new trial, respectively, on this charge on the ground of no proof of intent for human consumption was presented by the state as a required element for a conviction. R. 645, l. 22 – p. 649, l.5; R. 705 l. 20 – p. 709, l.19.

In the case at bar, there was insufficient evidence on the indictment in question with respect to proof of the element of intent (for use via human consumption) in the case. In State v. Taylor, 323 SC 162, 473 S.E.2d 817 (1996), the Court held that the trafficking statute is not silent on the mental state for trafficking as the statute specifically requires that a person must act knowingly regarding trafficking. In State v. Ostrowski 435 S.C. 364, 867 S.E.2d 269 (2021), the Court held that with respect to intent, trafficking doesn't require a defendant to have any intent beyond the knowing possession of the requisite amount of the drug. Similarly, in the drug trafficking case of State v. Miller, 421 SC 154, 805 S.E.2d 204 (2012), the Court held that intent includes conscious wrong doing and that intent may be inferred from the conduct of the parties and other circumstances, but that knowing does not mean intent. Compare Taylor v. State, 312 S.C. 179, 439 S.E.2d 820 (1993), where the defendant, who was charged with possession with intent to distribute, stated that he did not know that drugs were in the truck. In Taylor, supra, the

Court held that intent is defined as the state of a person's mind which directs his actions toward the specific object.

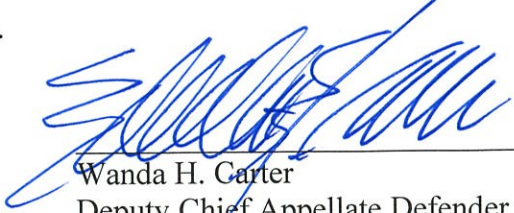
In the case at bar, appellant did not testify at trial; however, driver McMurray testified at trial and admitted that the trip to Atlanta, Georgia was to obtain narcotics.¹ R. 611, 1.17-p. 612, 1.2. McMurray stated that the GHB drug had been put in "bottles." McMurray added that he (McMurray) frequently used GHB, and that the "intent of the use of the GHB" was for "parties" and "personal use." R. 612, 1.5-18. McMurray stated that appellant went with him on the trip to Atlanta, and that appellant packed the back of the vehicle. R. 614, 1.3-11. Undoubtedly, McMurray was in control (actual and/or constructive) over the drugs in the case, but there was no proof that appellant, who allegedly packed the back of the car (rather than the inside passenger seat where the drugs were found), had any knowledge or any usage implying intent with respect to the drug in question. Additionally, McMurray's declaration for his use for personal consumption cannot be ascribed to appellant. Clearly, appellant had no knowledge of the analogue nor any intent for its use.

A defendant is entitled to a directed verdict motion when the state fails to present evidence of all of the elements on the charged offense in a case. State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001). The trial judge erred in denying appellant's directed verdict and new trial motions on the offense of possession of 1,4-Butanediol as an analogue of GHB because possession of the same was not unlawful without the required accompanying proof of the element of intent for use via human consumption, which was not established in the case.

¹ The drugs were cocaine, heroin, methamphetamine, GHB, and marijuana. R. 612, lines 2-4.

CONCLUSION

Based on the foregoing argument, counsel for appellant would request the vacation of appellant's conviction on trafficking in GHB.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of December, 2023.

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CASE NO. 2023-000275

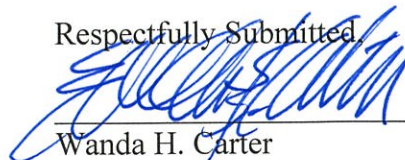
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Ballam Justin Alexander states:

1. She is Deputy Chief Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Edward W. Miller, which was held on February 13 - 17, 2023, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Ballam Justin Alexander.

Respectfully Submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of December, 2023.

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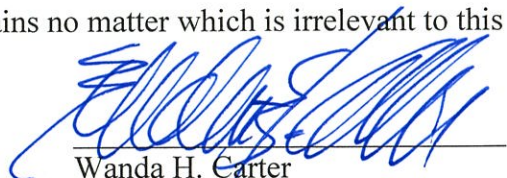
APPELLATE CASE NO. 2023-000275

**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) Entire Trial Transcript dated February 14-17, 2023
- (2) Indictments

I certify that this designation contains no matter which is irrelevant to this appeal.



Wanda H. Carter
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
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ATTORNEY FOR APPELLANT

This 8th day of December, 2023

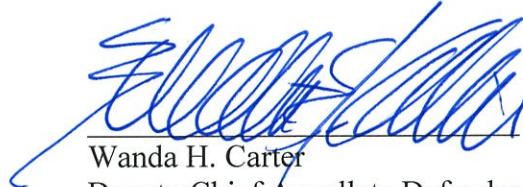
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CERTIFICATE OF COUNSEL

SC Court of Appeals

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."


Wanda H. Carter
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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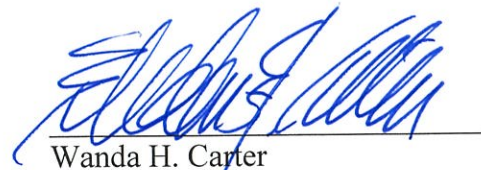
BALLAM JUSTIN ALEXANDER,

APPELLANT

APPELLATE CASE NO. 2023-000275

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Anders Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Mark Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Ballam Justin Alexander, #390308, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 8th day of December, 2023.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

From: [Leverett, Scott](#)
To: [SC - FARTHING MARK](#)
Cc: [Grace Sommer](#); [Carter, Wanda](#)
Subject: Ballam Justin Alexander - Anders Brief of Appellant - Appellate Case No. 2023-000275
Date: Friday, December 8, 2023 2:46:00 PM
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[Ballam Justin Alexander - Record on Appeal - VOL 1 - Appellate Case No. 2023-000275.pdf](#)
[Ballam Justin Alexander - Record on Appeal - VOL 2 - Appellate Case No. 2023-000275.pdf](#)

Dear Mr. Farthing,

Attached please find the Anders Brief of Appellant and accompanying Record on Appeal in the above referenced case that is being filed today, December 8, 2023, with the Court of Appeals.

-Scott Leverett
Admin. Asst. for Wanda Carter
Appellate Defense