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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.

LILLIAN MAE BATES,

APPELLANT.

APPELLATE CASE NO. 2023-000483

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the circuit court erred in denying Appellant's motion to vacate her guilty plea where the plea court lacked subject matter jurisdiction to hear the case because the State did not allege a valid criminal offense?

STATEMENT OF THE CASE

On November 13, 2020, Appellant was arrested for delivering 995 grams of narcotics to an undercover officer with the Greenville County Sheriff's Office. The narcotics field tested positive as heroin. Subsequent chemical testing revealed the narcotics to be fentanyl, not heroin. R. ___ (State's Response); Plea Tr. 8, l. 22-Plea Tr. 9., l. 6. The Greenville County grand jury returned an indictment for trafficking in illegal drugs during its May 2021 term. In the body of the indictment it charged that Appellant "did...knowingly sell, manufacture, cultivate, 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 or attempted to be become in actual or constructive possession of **more than 28 grams or more of Fentanyl; a morphine, opium, salt, isomer, or salt of an isomer thereof, including heroin, as described in §44-53-0190 or §44-53-210 of South Carolina Code of Laws. This is in violation of §44-53-0370 of the South Carolina Code of Laws (1976) as amended.** R. __ (Indictment) (emphasis added).

On November 9, 2022, Appellant appeared before the Honorable Letitia H. Verdin to enter a guilty plea. The State was represented by Clark Grounsell. Appellant was represented by Rachel Kepley. Plea Tr. 1. Judge Verdin sentenced Appellant to ten years incarceration with credit for 691 days on GPS home detention. Plea Tr. 18, l. 18-Plea Tr. 19, l. 9. On November 17, 2022, Appellant, through Counsel Kepley, filed a motion to vacate the guilty plea arguing that the plea was not knowingly and voluntarily entered or, in the alternative, that the circuit court lacked jurisdiction to accept the plea because fentanyl was not a substance that could be legally included in an indictment under S.C. Code Ann. § 44-53-370(e)(3). R.-

____(Motion to Vacate). A hearing on the motion to vacate was held on March 17, 2023, before the Honorable Edward W. Miller.¹ Ryan Holloway represented the State and Appellant was represented by Counsel Kepley. Motion Tr. 1. After hearing argument from the parties Judge Miller denied the motion to vacate. Motion Tr. 12, ll. 14-19. This brief follows.

¹ Judge Verdin ascended to the Court of Appeals in early 2023 and was therefore unable to hear the motion to vacate guilty plea.

STANDARD OF REVIEW

Questions involving subject matter jurisdiction and statutory interpretation are questions of law which this court reviews de novo without deference to the courts below. Seels v. Smalls, 437 S.C. 167, 172, 877 S.E.1d 351, 353 (2022). See also, State v. Alexander, 424 S.C. 270, 274-75, 818 S.E.2d 455, 457 (2018) (A question of statutory interpretation is a question of law, which is subject to de novo review); Byrd v McDonald, 417 S.C. 474, 478, 790 S.E.2d 200, 202 (Ct. App. 2016) (The question of subject matter jurisdiction is a question of law).

ARGUMENT

The circuit court erred in denying Appellant's motion to vacate her guilty plea where the plea court lacked subject matter jurisdiction to hear the case because the State alleged that Appellant violated a non-existent criminal offense.

Relevant Facts

On November 13, 2020, Appellant met an undercover officer with the Greenville County Sheriff's Office to deliver five kilograms of a powdered substance. The substance was delivered in five "bricks." Subsequent testing of the substances revealed that four of the bricks contained 3,969 grams of tramadol. The fifth brick was comprised of 995 grams of fentanyl. Plea Tr. 8, l. 22- Plea Tr. 9, l. 3. At the plea hearing the State alleged that text messages² between Appellant and the supplier made it clear that Appellant had "done this before." Plea Tr. 9, ll. 7-17. The State admitted that Appellant told law enforcement that she was raped by the supplier and was forced to go through with the deal, but they did not investigate the matter since they felt it appeared from the text messages that Appellant was a willing participant. Plea Tr. 9, ll. 18-21. Appellant, upon her arrest, requested a rape kit but was denied the ability to obtain one by law enforcement. Her allegation of being sexually assaulted by the supplier was never taken seriously and was not investigated. Plea Tr. 14, ll. 14-21.

Despite her allegations of assault being ignored, Appellant fully cooperated with police after her arrest. The day of her arrest she provided police with the name and number of the actual trafficker, Marquis Little. According to Counsel Kepley, she had been informed that law enforcement was not interested in investigating Little. Appellant consented to a search of her phone which Counsel Kepley asserted showed she did not have a close relationship with Little,

² These text messages were not entered into evidence at the plea.

that she was in desperate need of money, that he had approached her offering her \$200 to drive a car to Greenville, and that she did not know what was in the car. Plea Tr. 12, ll. 5-25. Defense counsel stated Appellant was the definition of someone who was a drug mule and that she did not know the risks she was taking when she accepted the offer to drive the car. Plea Tr. 13, ll. 1-3.

In handing down the sentence, Judge Verdin noted that Appellant had no prior criminal record³ and stated that she believed Appellant was, for lack of a better word, a mule in the scenario. Judge Verdin recognized that, at least from a financial standpoint, Appellant was not a willing participant in the incident as Appellant was a single mother in need of money. She also took into consideration that Appellant had no infractions while on GPS monitored bond for almost two years but that the narcotic involved in the case was extremely dangerous. She ultimately sentenced Appellant to ten years imprisonment with credit for time served. Plea Tr. 17, l. 15-Plea Tr. 19, l. 9.

Counsel Kepley timely filed a motion to vacate guilty plea on November 17, 2022, eight days after the plea had been entered. R.____ (Motion to Vacate). In the motion Counsel Kepley stated that the day prior to Appellant's plea, November 8, 2022, an order had been signed by the Honorable Donald Hocker which found that fentanyl was not a substance that could be lawfully included in any indictment under S.C. Code Ann. § 44-53-370(e)(3). That order, along with another circuit court order from the Honorable William A. McKinnon finding hydrocodone was not included under S.C. Code Ann. § 44-53-370(e)(3) were submitted as exhibits with the motion. R.____ (Motion to Vacate exhibits). Counsel Kepley argued in the written motion that Appellant's plea should be vacated because had she been aware of Judge Hocker's order she

³ Appellant was thirty-three years old at the time of her plea.

would have advised Appellant not to plead guilty. Therefore, Appellant's plea was not made knowingly and intelligently. She also argued that the plea should be vacated as the circuit court lacked subject matter jurisdiction to accept the plea because the indictment did not state a valid criminal offense. R. ___ (Motion to Vacate).

The State filed a response to Appellant's motion to vacate her guilty plea on March 9, 2023, essentially arguing that Appellant was bringing a non-jurisdictional defect claim which was waived when she entered her plea. The State additionally argued that fentanyl was within the purview of the S.C. Code Ann. § 44-53-370(e)(3). R. ___ (State's Response).

A hearing was held on the motion to vacate on March 17, 2023, before Judge Miller. Motion Tr. 1. At the hearing Counsel Kepley explained that the issue in Appellant's case had always been whether fentanyl was a substance covered by the trafficking illegal drugs statute (S.C. Code Ann. § 44-53-370(e)(3)). She confirmed that she had discussed the matter with the original solicitor on the case and that while she did not believe fentanyl was within the purview of the statute, the solicitor did. She told the court that if she had known about the Judge Hocker order prior to the plea that Appellant would likely not have entered a guilty plea. She stated her failure to inform Appellant about the order rendered her plea not knowing or intelligent, and asked that the court to allow Appellant to withdraw her plea. Motion Tr. 3, l. 19-Motion Tr. 5, 2.

Alternatively, Counsel Kepley argued that Appellant was challenging the subject matter jurisdiction of the court to accept Appellant's plea. She clarified that Appellant was not challenging the sufficiency of the evidence to prove the indictment but was disputing that the indictment alleged an action that was a crime in this state. In support of that argument, she informed the court that the legislature was currently in the process of passing legislation to specifically criminalize trafficking fentanyl. Counsel Kepley reiterated that the indictment that

Appellant pled to did not allege a crime under South Carolina law, therefore the plea court lacked jurisdiction to hear the matter and Appellant's plea should be vacated. Motion Tr. 5, l. 3- Motion Tr. 6, l. 22. Counsel Kepley also argued that there were some estoppel issues with the State attempting to say that fentanyl was included in the statute for the purposes of Appellant's case when the State had failed to appeal the Judge Hocker and Judge McKinnon orders. Motion Tr. 7, ll. 2-6.

The State argued that pursuant to Rule 268, SCACR⁴, that Appellant could not rely on unpublished orders from other circuits in support of her argument. Motion Tr. 8, l. 24-Motion Tr. 9, l. 2. The State also argued that the issue of whether fentanyl was included in the statute was not a chemistry issue and that the language of the 44-53-370(e)(3) cross referenced the statutes describing Schedule I and Schedule II drugs which "roped in" other drugs, such as fentanyl into the trafficking statute. Motion Tr. 11, ll. 6-20.

During the hearing Judge Miller questioned whether he had jurisdiction to hear the motion because it was not filed during the term of court in which the plea was entered. The State informed the court it believed the motion was timely⁵ because it was made within ten days of the plea and that it could be heard by Judge Miller. Judge Miller stated he believed the motion had to be made during the term of court in which the plea was entered and that he did not think there was an additional ten-day period that applied. App. 7, l. 15-App. 8, l. 7. Judge Miller stated that he was "just not sure, technically" that he had jurisdiction and that he believed the motion was

⁴ Rule 268, SCACR, has no applicability in a circuit court matter as it is an Appellate Court rule. Additionally, the section that State seemed to rely on, Rule 268(d), SCACR, is specifically addressed to decisions and order of the appellate courts, not to decisions and orders of the circuit courts.

⁵ The State also conceded in its written reply that the motion to vacate was timely. R. ____ (State's Response).

filed out of time. Motion Tr. 10, ll. 3-6. Ultimately Judge Miller denied Appellant's motion to vacate the plea stating "I am convinced this is an issue that should be decided at the appellate level. And it's unfortunate that the two orders you cited were not appealed so that could be tested. And so[,] I'm going to deny your motion. And let you appeal it." Motion Tr. 12, ll. 14-19.

Discussion

At the time of Appellant's arrest and guilty plea, there was no statutory provision in the South Carolina Code of Laws that criminalized trafficking fentanyl. The statute section that Appellant was indicted under, S.C. Code Ann. § 44-53-370(e)(3), only applied to quantities of "morphine, opium, salt, isomer, or salt of an isomer therefore, including heroin." For the plea court to have had subject matter jurisdiction to accept Appellant's plea, trafficking in illegal drugs under S.C. Code Ann. §44-53-370(e)(3) would have to include fentanyl as a proscribed substance. Fentanyl, being a wholly synthetic opioid, cannot be classified as "morphine, opium, salt, isomer, or salt of an isomer therefore, including heroin", and is therefore not covered by the plain language of the statute. As the offense of trafficking in illegal drugs does not include the drug fentanyl, the indictment did not allege a valid criminal offense. Therefore, the plea court lacked subject matter jurisdiction to hear and accept Appellant's guilty plea.

"Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong." State v. Crocker, 366 S.C. 394, 401–02, 621 S.E.2d 890, 894 (Ct. App. 2005) *quoting* Pierce v. State, 338 S.C. 139, 150, 526 S.E.2d 222, 227 (2000). "The circuit court has original jurisdiction in all criminal matters except those where an inferior court is given exclusive jurisdiction." Id. *quoting* State v. Dudley, 364 S.C. 578, 582, 614 S.E.2d 623, 625 (2005); S.C. Const. art. V, § 11 (Supp. 2004). "Circuit courts

obviously have subject matter jurisdiction to try criminal matters.” Id. quoting State v. Gentry, 363 S.C. 93, 101, 610 S.E.2d 494, 499 (2005). Circuit courts have subject matter jurisdiction over drug trafficking charges. Id. citing Dudley, 364 S.C. at 582, 614 S.E.2d at 625. Generally, the requirements of subject matter jurisdiction are satisfied when appropriate charges are filed in a competent court. Id. citing State v. Dudley, 354 S.C. 514, 523, 581 S.E.2d 171, 176 (Ct.App.2003), aff’d as modified, 364 S.C. 578, 614 S.E.2d 623.

“Jurisdiction of the offense charged and of the person of the accused is indispensable to a valid conviction.” Id. quoting Dudley, 354 S.C. at 522, 581 S.E.2d at 175 (quoting State v. Langford, 223 S.C. 20, 26, 73 S.E.2d 854, 857 (1953)). “Under South Carolina law, a circuit court lacks subject matter jurisdiction to accept a guilty plea to a nonexistent offense. Whitner v. State, 328 S.C. 1, 492 S.E.2d 777(1997) citing Williams v. State, 306 S.C. 89, 410 S.E.2d 563 (1991). “A judgment by a court without jurisdiction of both the parties and the subject matter is a nullity and must be so treated by the courts whenever and for whatever purpose it is presented and relied on.” Blanton v Stathos, 351 S.C. 534, 542, 570 S.E.2d. 565, 569 (Ct. App. 2002).

[I]ssues related to subject matter jurisdiction may be raised at any time. State v. Gentry, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005) (internal citations omitted). Notably, lack of subject matter jurisdiction cannot be waived as “[t]he jurisdiction of a court or of a particular judge over the subject matter of a proceeding depends upon the authority granted by the Constitution and laws of the state and is fundamental.” Harden v. S.C. State Highway Dep’t, 266 S.C. 119, 124, 221 S.E.2d 851, 853 (1976) (citations omitted). The issue of subject matter jurisdiction in this case turns on whether fentanyl is a substance proscribed by S.C. Code Ann. § 44-53-370(e)(3) which is ultimately a question of statutory interpretation.

The basic principles of statutory construction as applied to criminal statutes have been clearly and repeatedly set forth by this Court. It is well established that in interpreting a statute, the court's primary function is to ascertain the intention of the legislature. When the terms of the statute are clear and unambiguous, the court must apply them according to their literal meaning. Furthermore, in construing a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Finally, when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant. State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) (citations omitted); *see also* Kerr v. State, 345 S.C. 183, 188, 547 S.E.2d 494, 496–97 (2001); State v. Johnson, 347 S.C. 67, 70, 552 S.E.2d 339, 340 (Ct.App.2001); *accord* Kennedy v. S.C. Ret. Sys., 345 S.C. 339, 346, 549 S.E.2d 243, 246 (2001); Paschal v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995).

S.C. Code Ann. § 44-53-370(e) contains the law prohibiting the trafficking of drugs. At the time of Appellant's arrest and plea the statutory section listed the offenses, and penalty ranges, for trafficking in marijuana (44-53-370(e)(1)), trafficking in cocaine (44-53-370(e)(2)), trafficking in illegal drugs (44-53-370(e)(3)), trafficking in methaqualone (44-53-370(e)(4)), trafficking in LSD (44-53-370(e)(5)), trafficking in flunitrazepam (44-53-370(e)(6)), trafficking in gamma hydroxybutyric acid (44-53-370(e)(7), and trafficking in MDMA or ecstasy (44-53-370(e)(8)). Appellant pled to trafficking in illegal drugs, fentanyl, under S.C. Code Ann. 44-53-370(e)(3). That code section states in part,

“Four grams or more of any morphine, opium, salt, isomer, or salt of an isomer thereof, including heroin, as described in section 44-53-3190 or 44-53-210, or four grams or more of any mixture containing any of these substances, is guilty of a felony which is known as “trafficking in illegal drugs...”

S.C. Code Ann. § 44-53-370(e)(3). To determine whether fentanyl was covered by that statutory provision it is necessary to define the terms used in the statute.

Each drug listed in the plain language of the section 44-53-370(e)(3) is derived in whole or part from the poppy plant, *Papaver somniferum*.⁶ Opium⁷ is an opiate⁸ derived from the seeds of the poppy plant and it contains numerous chemical compounds, including morphine. Morphine⁹ is an opiate derived from opium with a distinct molecular structure of C₁₇H₁₉NO₃.¹⁰ Heroin¹¹ is an opiate processed from morphine with a distinct molecular structure of C₂₁H₂₃NO₅.¹² An isomer¹³ is defined as “one of two or more compounds, radicals, or ions that

⁶ <https://www.dea.gov/sites/default/files/2020-06/Opium-2020.pdf>

⁷ National Library of Medicine, PubChem Chemistry databased, “opium”
<https://pubchem.ncbi.nlm.nih.gov/compound/Opium>

⁸ Opioids are natural, semi-synthetic, or synthetic chemicals that interact with opioid receptors in the body and brain and reduce perception of pain. While the terms opioids and opiates are sometimes used interchangeably, opiate refers specifically to natural compounds derived from the poppy plant, such as heroin or morphine, while opioids may be natural or derived in a lab.
<https://www.psychiatry.org/patients-families/opioid-use-disorder>

⁹ <https://www.dea.gov/sites/default/files/2020-06/Morphine-2020.pdf>

¹⁰ National Library of Medicine, PubChem Chemistry databased, “morphine”
<https://pubchem.ncbi.nlm.nih.gov/compound/5288826>

¹¹ <https://www.dea.gov/sites/default/files/2020-06/Heroin-2020.pdf>

¹² National Library of Medicine, PubChem Chemistry databased, “heroin”
<https://pubchem.ncbi.nlm.nih.gov/compound/5462328>

¹³ <https://www.merriam-webster.com/dictionary/isomer>

contain the same number of atoms of the same elements but differ in structural arrangement and properties.” In chemistry a salt¹⁴ is a substance produced by the reaction of an acid with a base.

In contrast, fentanyl¹⁵ is a wholly synthetic opioid created in a lab and it does not contain any derivative of the poppy plant. It has a distinct molecular structure of $C_{22}H_{28}N_2O$.¹⁶ Fentanyl is not heroin, morphine, or opium, or a derivate of any of those drugs. It is not an isomer of those drugs as it does not contain the same number of atoms of the same number of elements as those substances. It is also not a salt of those drugs as there is no acid added to heroin, morphine, or opium as a base that would create fentanyl. Fentanyl is not expressly or implicitly covered by S.C. Code Ann. § 44-53-370(e)(3) and therefore a charge alleging trafficking in illegal drugs, fentanyl, is not covered by the plain meaning of the statute.

Notably, in Judge Hocker’s order finding fentanyl is not a substance contemplated by 44-53-370(e)(3) he recounted the testimony of SLED Captain and director of forensic services, Dr. Wendy Bell. Dr. Bell testified that 1) fentanyl was a fully synthetic opioid, 2) that morphine and heroin were natural opiates produced from the opium poppy, 3) that fully synthetic opioids cannot be produced by synthesizing the opium poppy, 4) that SLED has advised law enforcement and Solicitors that it is problematic to charge someone under S.C. Code Ann. § 44-53-370(e)(3) when the drug at issue was a fully synthetic opioid, and 5) that fentanyl is not a morphine, opium, salt, isomer, or salt of an isomer thereof. R.____(Motion to Vacate Guilty Plea, Exhibit 2) Further evidence that fentanyl was not a drug proscribed by the illegal drugs

¹⁴ <https://www.britannica.com/science/salt-acid-base-reactions>

¹⁵ <https://www.cdc.gov/stopoverdose/fentanyl/index.html>

¹⁶National Library of Medicine, PubChem Chemistry databased, “fentanyl” <https://pubchem.ncbi.nlm.nih.gov/compound/3345>

trafficking statute at the time of Appellant's plea is the fact that in June of 2023 the Legislature passed Act 72 (H.3503) which amended section 44-53-370 to specifically add an offense and penalties for trafficking in fentanyl. See S.C. Code Ann. § 44-53-370(e)(9).

The language of section 44-53-370(e)(3) is not ambiguous. It is clear from the plain meaning of the words that fentanyl is not a substance that can be definitionally included in that statute. However, were there any argument that there is ambiguity within the statute, the rule of lenity requires that any doubt about the statute's scope be resolved in favor of Appellant, not the State. See Berry v. State, 381 S.C. 630, 633, 675 S.E.2d. 425, 426 (2009) (“[I]n construing a criminal statute, we are guided by the rule of lenity – the principle that any ambiguity must be resolved in favor of the accused”).

Finally, the State should be collaterally estopped from arguing in Appellant's case that fentanyl or synthetic opioids were contemplated by S.C. Code Ann. § 44-53-370(e)(3) at the time of her plea. “Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same.” State v. Hewins, 409 S.C. 93, 106, 760 S.E.2d 814, 821 (2014) (internal citations omitted). “The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment.” Id. “While the traditional use of collateral estoppel required mutuality of parties to bar relitigation, modern courts recognize the mutuality requirement is not necessary for the application of collateral estoppel where the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issue.” Id. “The doctrine of collateral estoppel should not be rigidly or mechanically applied.” Id. “Thus, even if all the elements for collateral estoppel

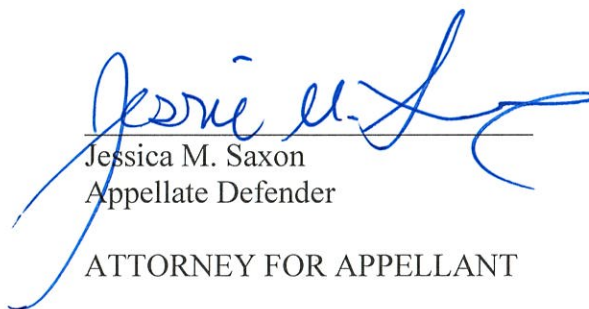
are met, when unfairness or injustice results or public policy requires it, courts may refuse to apply it.” Id.

The State has fully litigated the issue of whether S.C. Code Ann. § 44-53-370(e)(3) prohibits the trafficking of synthetic opioids such as fentanyl and hydrocodone. Two separate circuit court judges found that the statutory section could not be construed to cover those drugs. Those orders were relied upon by Appellant in her motion to vacate guilty plea. The order by Judge William McKinnon in State v. Harold Gene White, III, finding hydrocodone was not within the purview of section 44-53-370(e)(3) was initially appealed by the State but then dismissed by agreement of the parties. The other order by Judge Donald Hocker in State v. Jonathan Conard Dawkins, which found that fentanyl was not a substance contemplated by the statute, was never appealed by the State. Both orders were dispositive of serious criminal charges. The State has had a fully opportunity to litigate the issue in the lower court and could have raised the issue to this court for considering but declined to do so. For the State to now argue on appeal that fentanyl or any synthetic opioid is within the purview of S.C. Code Ann. 44-53-370(e)(3), purely to uphold an invalid plea and illegal sentence, would be repugnant to the concepts of due process, fair play, and substantial justice.

The crime of trafficking illegal drugs, fentanyl, was a non-existent offense at the time of Appellant’s plea and therefore the circuit court lacked subject matter jurisdiction over the case. The circuit court did not have the power to accept Appellant’s guilty plea to a non-existent criminal offense. As such Appellant’s plea, conviction, and sentence are a nullity at law and should be reversed.

CONCLUSION

Based on the forgoing arguments, Appellant respectfully requests that this Court find fentanyl is not a proscribed substance under S.C. Code Ann. § 44-53-370(e)(3), that the circuit court lacked subject matter jurisdiction to hear the plea, and that Appellant's guilty plea and conviction should be vacated.



Jessica M. Saxon
Appellate Defender
ATTORNEY FOR APPELLANT

This 11th day of December, 2023.