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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

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

Appellant, as plainly stated in the issue statement of the Brief of Appellant, is appealing the denial of her motion to vacate her guilty plea because the circuit court lacked subject matter jurisdiction to take a plea to a nonexistent criminal offense. Respondent frames the matter as a challenge to the sufficiency of the indictment or a factual challenge. However, both of these characterizations miss the mark.

In State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005), our Supreme Court held that the concepts of subject matter jurisdiction and sufficiency of an indictment are distinct. Gentry at 101, 610 S.E.2d at 499. Our Supreme Court made clear that the circuit court has subjection matter jurisdiction to hear a case even if the indictment failed to allege **all the elements** of the offense. Id. (emphasis added). However, the State must still allege a statutorily valid criminal offense in order to vest the circuit court with subject matter jurisdiction. See State v. Crocker, 366 S.C. 394, 402, 621 S.E.2d 890, 894 (Ct. App. 2005) ("Generally, the requirements of subject matter jurisdiction are satisfied when appropriate charges are filed in a competent court.").[1]

In the matter *sub judice* the State never charged Appellant with a criminal act that was proscribed by South Carolina law. "Trafficking in Illegal Drugs" prohibits the trafficking of morphine, opium, salt, isomer, or salt of an isomer thereof, including heroin. The only substances that can be charged and prosecuted under S.C. Code Ann. § 44-53-370(e)(3) are those contained in the statute. Importantly, when the State brought the charge against Appellant, it changed the language of the statute to include a narcotic that was not contemplated by S.C. Code Ann. § 44-53-370(e)(3). The State charged that Appellant did "knowingly sell, manufacture, cultivate, deliver, purchase, or bring into the State of South Carolina, or did knowingly provide

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1 Notably, Crocker was decided in October 2005, approximately seven months *after* our Supreme Court's decision in Gentry.

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. 21-22. Fentanyl is, quite simply, not a morphine, opium, salt, isomer, or salt of an isomer thereof, including heroin. It is a chemically distinct, wholly synthetic opioid that until June of 2023 was not proscribed by the trafficking laws of this State.

Respondent relies on extraterritorial case law to bolster its argument that a defendant can be sentenced to a nonexistent criminal offense when the conviction is the result of the plea-bargaining process. What Respondent overlooked was that in those cases the respective courts upheld the guilty pleas because the defendants were originally brought into court on valid criminal charges and then, through plea negotiations, pled to nonexistent offenses. In McPherson v. State, the defendant was originally charged with attempted first-degree murder, a valid crime under Kansas law. McPherson, 38 Kan. App. 2d 276, 277, 163 P.3d 1257 (2007). Through negotiations he agreed to enter a no-contest plea to attempted second-degree unintentional murder. Id. at 278, 163 P.3d at 1260. Years later McPherson challenged his plea and conviction arguing he pled to a nonexistent offense because the Kansas Supreme Court had held that unintentional second-degree murder was not a recognized crime in the state. Id. at 278-279, 163 P.3d at 1260. The Kansas Court of Appeals, relying on Spencer v. State, 24 Kan. App. 2d. 125, 942 P.2d 646 (1997), *aff'd on other grounds* 264 Kan. 4, 954 P.2d 1088 (1998), held that a defendant is permitted to plead to a nonexistent offense as part of a plea agreement so long

as the defendant 1) **was initially brought into court on a valid pleading**; 2) received a beneficial plea agreement; and 3) voluntarily and knowingly entered into the plea agreement. Id. at 281, 284, 163 P.3d at 1261, 1263 (emphasis added).

Similarly, in Downer v. State, Downer was charged with third degree burglary, misdemeanor theft, and second-degree conspiracy, all valid criminal offenses in Delaware. Downer 543 A.2d 309, 309-310 (Del. 1988). Downer was also facing a sexual assault of a minor charge in the family court system which meant the decision to prosecute the case in family court or the criminal court was reviewed by the Office of the Attorney General. The State indicated it was going to dismiss the family court case in favor of indicting the defendant on a charge of first-degree rape, a valid criminal offense in Delaware. To resolve the case and avoid the potential of a life sentence, Downer pled guilty to sexual misconduct and the other charges were dismissed. Id. Some fifteen months later Downer challenged whether the court had jurisdiction to take his plea to sexual misconduct based on a then recently decided Delaware Supreme Court Case which held that the statute establishing the crime of sexual misconduct was impliedly repealed by a 1977 amendment to the Delaware Criminal Code. Id. at 310.

In analyzing the case the Delaware Supreme Court noted that at the time of his plea bargain, Downer was facing rape, burglary, theft, and conspiracy charges "over which the Superior Court clearly had jurisdiction[,] and which were unquestionably viable under the Delaware Criminal Code..." Id. at 312. Further the Court noted that the conduct to which Downer pled guilty included all of the elements of rape first degree. The Court ultimately held that "because the State was not legally precluded from obtaining a valid conviction based on one of the other charged offenses, the lower court had jurisdiction over all charges pending against

Downer. Accordingly, the court's error in accepting the guilty plea to a sexual misconduct charge **was curable** and not subject to collateral attack." Id. (emphasis added).

Both McPherson and Downer, *supra*, are inapposite to Appellant's case. Appellant was never brought into court on a valid criminal offense. She was charged and prosecuted with trafficking fentanyl – a nonexistent criminal offense in this State until June 2023. The power to define crimes and set punishments rest exclusively with the general assembly and cannot be appropriated by the courts or the prosecution. Attempting to pigeonhole fentanyl into the general class of trafficking crimes under the title "trafficking in illegal drugs" is akin to putting lipstick on a pig. As this Court wrote in State v. Sims,

> While a valid guilty plea waives "nonjurisdictional" defects and defenses, **it is unclear what amounts to a jurisdictional defect to a criminal prosecution**. Sims does not contest personal jurisdiction. Nor does he argue the court lacked subject matter jurisdiction over his ABHAN prosecution in the sense State v. Gentry, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005), defines it: the very power of the court to hear and determine the class of cases of which he was convicted.
>
> **Just because a court has subject matter jurisdiction over the class of cases a defendant is convicted of does not end our inquiry into whether a jurisdictional defect sufficient to survive a guilty plea exists.** The jurisdictional power of the court of general sessions to adjudicate criminal cases is not unlimited. **It does not include, for instance, the power to convict someone** of a statute no longer in effect, In re Terrence M., 317 S.C. 212, 214, 452 S.E.2d 626, 627 (Ct. App. 1994), **or of a nonexistent offense**. Whitner v. State, 328 S.C. 1, 5, 492 S.E.2d 777, 779 (1997).

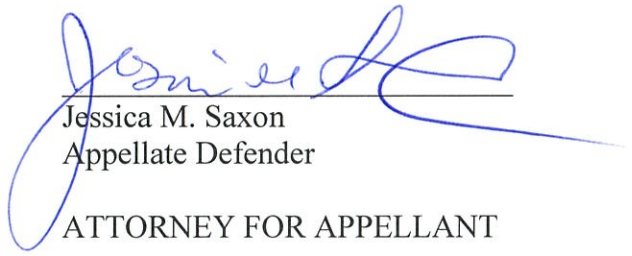
Sims, 423 S.C. 397, 400, 814 S.E.2d 632, 633 (Ct. App. 2018) (emphasis added). In deciding the case this Court applied the formulation from United States v. Curcio, 712 F.2d 1532, 1539 (2d Cir. 1983), which stated "a [ ] criminal defendant who unconditionally pleads guilty may still challenge his conviction on any ground that, if asserted before trial, would forever preclude the state from obtaining a valid conviction against him, regardless of how much the state might endeavor to correct the defect." Sims at 402, 814 S.E.2d at 634. "In other words, a plea of guilty

may operate as a forfeiture of all defenses **except those that, once raised, cannot be 'cured.'"** Id. (Emphasis added).

At trial, the State would be required to prove that fentanyl was a proscribed substance under S.C. Code Ann. § 44-53-370(e)(3) which is a legal, scientific, and factual impossibility. If the issue before this Court was merely a factual defect, it would be curable through an amended indictment. Yet, there is no way that the State could amend the indictment to conform with the statutory law because there is no factual, scientific, or legal support for the argument that fentanyl is morphine, opium, salt, isomer, or salt of an isomer thereof, including heroin, or vice versa, as proscribed by section 44-53-370(e)(3). The statute is unequivocal in what in prohibits. Even the Director of Forensic Services for SLED, Dr. Wendy Bell, testified at a 2022 hearing in another case that SLED had been advising law enforcement agencies and solicitors **for several years** that it was problematic to charge someone under S.C. Code Ann. § 44-53-375(e)(3) when the drug was a fully synthetic opioid such as fentanyl. R. 25-26, 31-39. There is no way to "cure" the impropriety of Appellant's plea to, conviction of, and sentence for a nonexistent criminal offense absent vacating her plea and conviction. This Court should overturn the circuit court's denial of Appellant's motion to vacate guilty plea.

CONCLUSION

Based on the foregoing arguments, along with those arguments set forth in Appellant's Final Brief, Appellant respectfully request 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 7th day of August, 2024.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Reply 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."

August 7, 2024.

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CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Reply Brief of Appellant in the above-referenced case have been served upon Joshua A. Edwards, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 7th day of August 2024.

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