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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Perry H. Gravelly, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TONY TUJUAN SWEET,

APPELLANT

APPELLATE CASE NO. 2024-000286

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the circuit court err denying appellant's motion to vacate his guilty plea for trafficking fentanyl where the plea court lacked subject matter jurisdiction because the offense listed on the indictment was, at the time of appellant's guilty plea, a non-existent criminal offense?

STATEMENT OF THE CASE

On April 6, 2021, a Greenville County grand jury indicted appellant for trafficking fentanyl and trafficking methamphetamine. R*. On May 31, 2022, appellant pled guilty as indicted before the Honorable Edward Miller. May 31, Tr. 1-9. Rachel Kepley represented appellant and assistant solicitor, Grace Moroney, represented the state. May 31, Tr. 1. Appellant's sentencing was deferred pursuant to an agreement with the state. May 31, Tr. 6, l. 25—7, l. 4.

On October 16, 2023, Ms. Kepley filed a motion to vacate appellant's guilty plea to the offense of trafficking fentanyl. Motion. On February 27, 2024, the Honorable Perry H. Gravely sentenced petitioner to concurrent terms of twenty-two years' imprisonment for trafficking in fentanyl and trafficking methamphetamine. Feb. 27, Tr. 1; 31, ll. 8-14. During the sentencing hearing Judge Gravely also denied appellant's motion to vacate his guilty plea for trafficking in fentanyl. Feb. 27, Tr. 18, l. 1—19, l. 13.

This appeal follows.

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 denying appellant's motion to vacate his guilty plea for trafficking fentanyl where the plea court lacked subject matter jurisdiction because the offense listed on the indictment was, at the time of appellant's guilty plea, a non-existent criminal offense.

Introductory facts

At appellant's 2022, guilty plea the solicitor stated that on October 12, 2020, police stopped appellant for a traffic violation in Greenville County. The solicitor alleged appellant "fled" the car and police found him nearby. They further claimed there was drug paraphernalia in "plain view" in appellant's car. Police conducted a search of appellant's car where they discovered 237 grams of methamphetamine and 7.64 grams of fentanyl. May 31, Tr. 6, ll. 14-24.

Relevant facts

In appellant's written motion Ms. Kepley argued his guilty plea to the offense of trafficking in fentanyl should be vacated on two basis. First, Ms. Kepley argued had appellant been aware fentanyl was not a substance that could be lawfully included in any indictment under S.C. Code Ann. §44-53-370(e)(3), he would not have pled guilty.¹ In the alternative, Ms. Kepley argued appellant's guilty plea should be vacated because the circuit court did not have subject matter jurisdiction to accept his guilty plea to a nonexistent criminal offense. Motion.

During appellant's February hearing defense counsel, Rachel Kepley, moved to vacate appellant's earlier guilty plea to the offense of trafficking in fentanyl. Ms. Kepley argued at the time appellant pled guilty, May 2022, there was no statute criminalizing trafficking in fentanyl and therefore the indictment lacked subject matter jurisdiction. Feb. 27, Tr. 18, ll. 1-15.

¹ Attached to appellant's written motion was a November 8, 2022, circuit court order signed by The Honorable Donald Hocker, finding trafficking in fentanyl was not covered under S.C. Code Ann. §44-53-370(e)(3). Order.

The solicitor asserted appellant's guilty plea resulted in a waiver of all defenses to the charged offense. They further contended appellant benefited from the guilty plea where the state could have charged appellant with possession with intent to distribute fentanyl, third offense, which would have increased his maximum sentence exposure. Feb. 27, Tr. 18, l. 18—19, l. 3.

The court denied Ms. Kepley's motion to vacate appellant's guilty plea for trafficking in fentanyl stating, "he did enter a plea" and received a benefit by pleading to trafficking versus possession with intent to distribute. Feb. 27, 19, ll. 7-13.

Discussion

In April 2021, when appellant was indicted and May 2022, when appellant pled guilty, there was no statutory provision in the South Carolina Code of Laws that criminalized trafficking fentanyl. The statute section the state indicted appellant 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 guilty 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. Accordingly, 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 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. Additionally, 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 indictment and guilty 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 guilty 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*.² Opium³ is an opiate⁴ derived from the seeds of the poppy plant and it contains numerous chemical compounds, including morphine. Morphine⁵ is an opiate derived from opium with a distinct molecular structure of C₁₇H₁₉NO₃.⁶ Heroin⁷ is an opiate processed from morphine with a distinct molecular structure of C₂₁H₂₃NO₅.⁸ An isomer⁹ is defined as “one of two or more compounds, radicals, or ions that contain the same

² <https://www.dea.gov/sites/default/files/2020-06/Opium-2020.pdf>

³ National Library of Medicine, PubChem Chemistry databased, “opium” <https://pubchem.ncbi.nlm.nih.gov/compound/Opium>

⁴ 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>

⁵ <https://www.dea.gov/sites/default/files/2020-06/Morphine-2020.pdf>

⁶ National Library of Medicine, PubChem Chemistry databased, “morphine” <https://pubchem.ncbi.nlm.nih.gov/compound/5288826>

⁷ <https://www.dea.gov/sites/default/files/2020-06/Heroin-2020.pdf>

⁸ National Library of Medicine, PubChem Chemistry databased, “heroin” <https://pubchem.ncbi.nlm.nih.gov/compound/5462328>

⁹ <https://www.merriam-webster.com/dictionary/isomer>

number of atoms of the same elements but differ in structural arrangement and properties.” In chemistry a salt¹⁰ is a substance produced by the reaction of an acid with a base.

In contrast, fentanyl¹¹ is a wholly synthetic opioid created in a lab and it does not contain *any* derivative of the poppy plant. Fentanyl has a distinct molecular structure of C₂₂H₂₈N₂O.¹² 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 or the same number of elements as those substances. Fentanyl is not a salt of those drugs where 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.

In Judge Hocker’s order finding fentanyl was not a substance contemplated by 44-53-370(e)(3) the court 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 had advised law enforcement and solicitors it is problematic to charge someone under S.C. Code Ann. § 44-53-370(e)(3) when the drug was a fully synthetic opioid, and 5) that fentanyl is not a morphine, opium, salt, isomer, or salt of an isomer thereof. Order.

Moreover, the language of section 44-53-370(e)(3) is not ambiguous. It is clear from the

¹⁰ <https://www.britannica.com/science/salt-acid-base-reactions>

¹¹ <https://www.cdc.gov/stopoverdose/fentanyl/index.html>

¹² National Library of Medicine, PubChem Chemistry databased, “fentanyl” <https://pubchem.ncbi.nlm.nih.gov/compound/3345>

plain meaning of the words fentanyl is not a substance which can be definitionally included in that statute. However, were there any argument that there is ambiguity within the statute, the rule of lenity requires 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 his 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. Judge Hocker's

order was relied upon by appellant in his motion to vacate his guilty plea. Judge Hocker's order in *State v. Jonathan Conard Dawkins*, which found that fentanyl was not a substance contemplated by the statute, was never appealed by the state. The state has had a full opportunity to litigate this issue in the circuit court and could have raised the issue to this Court for consideration but did not. For the state to argue on appeal that fentanyl 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 guilty plea and therefore the plea court lacked subject matter jurisdiction over the case. The plea court did not have the power to accept appellant's guilty plea to a non-existent criminal offense. *After* appellant's May 2022, guilty plea, in June 2023, our 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). Accordingly, appellant's guilty 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), the circuit court lacked subject matter jurisdiction to hear the plea, and appellant's guilty plea and conviction should be vacated.


Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of September, 2024.