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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable Daniel D. Hall, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

OCTAVIUS TREMAIN CURRENCE,

APPELLANT

APPELLATE CASE NO. 2024-000106

ANDERS BRIEF OF APPELLANT

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The trial judge erred in sentencing appellant to imprisonment for a period of seven years under S.C. Code Ann. §44-53-370(2)(b)(1), which addresses narcotic offenses and carries a prison sentence of not more than fifteen years (first offense), because the charge in the instant case was for a non-narcotic drug offense under S.C. Code Ann. §44-53-370(2)(b)(2), which carries a prison sentence of not more than five years (first offense).

STATEMENT OF THE CASE

Appellant Octavius Tremain Currence was found guilty of distribution of fentanyl per jury trial held during the January 2024 term of the York County General Sessions Court before Judge Daniel D. Hall. Appellant was sentenced to imprisonment for a period of seven years. Attorneys Deondra Sexton and Melissa Inzerillo represented appellant at trial, and Assistant Solicitors Austin Smith and Leslie Robinson prosecuted the case. Appellant appealed his conviction and sentence. This brief follows.

STANDARD OF REVIEW

A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support. In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010). In criminal cases, the appellate court sits to review errors of law only. State v. Vick, 384 S.C. 189, 197, 682 S.E.2d 275, 279 (Ct. App. 2009) (quoting State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001)). The appellate court is "'bound by the trial court's factual findings unless they are clearly erroneous.'" Id. (quoting Wilson, 345 S.C. at 5-6, 545 S.E.2d at 829). The reviewing court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence." State v. Slocumb, 412 S.C. 88, 91, 770 S.E.2d 436, 438 (Ct. App. 2015).

ARGUMENT

The trial judge erred in sentencing appellant to imprisonment for a period of seven years under S.C. Code Ann. §44-53-370(2)(b)(1), which addresses narcotic offenses and carries a prison sentence of not more than fifteen years (first offense), because the charge in the instant case was for a non-narcotic drug offense under S.C. Code Ann. §44-53-370(2)(b)(2), which carries a prison sentence of not more than five years (first offense).

At trial, confidential informant Tabitha Peterson testified that she used $250.00 to make a controlled buy of pills (allegedly fentanyl) from appellant on February 24, 2021. Tr. 113, l. 8 – p. 127, l. 4. Chemist Cynthia Mitchum testified that she analyzed the pills in question and identified the same as a "controlled II substance." Tr. 150, l. 3 – p. 151, l.4.

Prior to sentencing, defense counsel moved for appellant to be "sentenced under the zero to five years, under [S.C. Code Ann. §44-53-370(2)(b)(2)] as opposed to the zero to fifteen" range of years [under S. C. Code Ann. §44-53-370(2)(b)(1)]. Tr. 204, lines 17-22.

Subsequently, the trial judge sentenced petitioner to imprisonment for a period of seven years. However, shortly after the pronouncement of the sentence, the trial judge questioned the validity of the sentence based on the following grounds:

> After [appellant] he was sentenced, my clerk brought to my attention §44-53-370(2)(b)(2) because fentanyl is any other controlled substance that is classified as a schedule II controlled substance under §44-53-370(a) under (2)(b)(1), [which] clearly states that any schedule I controlled substance or LSD, [is] subject for a first offense is zero to fifteen years…[and] §44-53-370 (b)(2) states that any other controlled substance classified as schedule I, II, or III is up to five years for a first offense, [and] the chemist testified that fentanyl was a class II controlled substance, and so I am going to reconsider the sentence. Tr. 209, l. 14 – p, 210, l. 1.

Thereafter, the solicitor asked whether the resentencing was due to the fact that the word "narcotic" was not uttered by the chemist or because of the wording of the statute. Tr. 210,

lines 15-17. The trial judge ultimately expressed concern over whether "fentanyl was a schedule II narcotic drug," and made clear that it appeared that there was a problem with the solicitor's position that the "controlled substance under (b)(1) [was] a narcotic drug. Tr. 211, lines 10-16. Tr. 212, lines 2-5.

During the resentencing hearing, the trial judge ruled that judicial notice would classify fentanyl is a "schedule II controlled substance narcotic," and that the sentence of seven years was correctly given as proper under the zero to fifteen range authorized under S.C. Code Ann § 44-53-370(2)(b)(1). Tr. 215, lines 14-25.

Defense counsel objected to the court's decision not to resentence appellant within the zero-to-five-year range under §44-53-370(2)(b)(2) on the ground that the substance at issue was allegedly a narcotic because there was no evidence offered at trial as proof that the drug charged was a narcotic for the purpose of the case at bar. Tr. 217, l. 14 – p. 218, l. 18.

It is illegal to distribute a controlled substance classified in schedule I (B) and (C), which would fall in the category of a narcotic drug, or LSD or II, which would also fall in the category of a narcotic drug, wherein the sentence for the crimes range up to fifteen years for a first conviction under S.C. Code Ann § 44-53-370(2)(b)(1). In addition, it is illegal to distribute any other controlled substance classified in schedule I, II, or III, or flunitrazepam, or a controlled substance analogue which would result in a sentence is not more than five years for a first conviction under S.C. Code Ann. § 44-53-370(2)(b)(2). In the instant case, there was no evidence or proof presented at trial indicating that appellant sold a narcotic drug that would qualify him for sentencing under S.C. Code Ann. § 44-53-370(2)(b)(1). The chemist did not report that a narcotic was found per her analysis of the substance submitted to her. Therefore, there was insufficient proof establishing that appellant sold a narcotic drug, and there was a fatal

variance regarding what was alleged and the proof. According to the deficiency in the state's proof, appellant should not have received a sentence of greater than five years because the charge against him fell under S.C. Code Ann. § 44-53-370(2)(b)(2). Due process requires the prosecution to prove every element of the offense charged beyond a reasonable doubt. Jackson v. Virginia, 443 S.C. 307 (1979). Additionally, in criminal cases the proof must correspond to the averments in an indictment without variances. State v. Roof, 106 S.C. 281, 91 S.E. 314 (1917); State v. Cody, 180 S.C. 417, 186 S.E. 165 (1936). The trial judge erred in sentencing appellant under S.C. Code Ann. § 44-53-370(2)(b)(1) in the case.

CONCLUSION

Based on the foregoing argument, appellant's sentence should be vacated, and his case remanded to the lower court for a new proceeding.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of December, 2024.

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APPELLATE CASE NO. 2024-000106

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Octavius Tremain Currence 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 Daniel D. Hall, which was held on Jan. 8-9, 2024, 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 Octavius Tremain Currence.

Respectfully Submitted,

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of December, 2024.

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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, January 8-10, 2024
(2) Indictment
(3) Sentence Sheet

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

Wanda H. Carter
Deputy Chief Appellate Defender

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CERTIFICATE OF COUNSEL

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."

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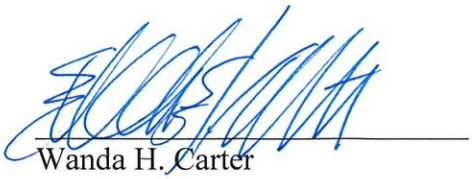
CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the 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 Octavius Tremain Currence, #393057, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 4th day of December, 2024.



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