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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2012-210208

THE STATE,RESPONDENT

v.

NANCY HAWORTH,APPELLANT.

FINAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

Whether the trial court properly denied Appellant's motion for a directed verdict where the State presented substantial evidence from which the jury could fairly and logically find Appellant guilty of distribution of methamphetamine by way of aiding, abetting and/or conspiring to distribute?

STATEMENT OF THE CASE

Appellant was indicted at the February 11, 2011 term of the grand jury of Pickens County for distribution of methamphetamine (2011-GS-39-1484). She was represented by Robert L. Newton, Jr., Esquire, of Greenville. (R.p.1). On January 25-26, 2012, Appellant proceeded to trial by jury pursuant to which she was found guilty as indicted. She was sentenced by the Honorable Brooks P. Goldsmith to ten (10) years' imprisonment. (R.p.216, lines 1-7). Appellant timely filed a notice of intent to appeal her conviction and sentence and subsequently submitted a Brief of Appellant. This Brief of Respondent follows.

STATEMENT OF FACTS

At the beginning of trial, the solicitor told the jury the State's theory of the case. He said the State intended to prove that Appellant aided, abetted and/or conspired with another individual, Ashley Timms, to distribute methamphetamine (meth) to a confidential informant, Tonya Smith. (R.p.2, line 13-p.5, line 1; p.6, line 25-p.7, line 5). First, the State called State Law Enforcement Division (SLED) Agent Ashley Asbill of the Special Operations Unit to the stand. He described a March 30, 2010 joint drug investigation conducted with the Greenville County Sheriff's Office and the Pickens County Sheriff's Office, using confidential informant Tonya Smith to attempt to purchase meth from suspected dealers. (R.p.8, line 8-p.12, line 13). Asbill described the specifics of the operation, including having Smith make a phone call to set up the deal, having law enforcement officers search her car and person to ensure she did not already have narcotics in her possession, having officers wire Smith with an audio recorder/transmitter, and providing her cash from SLED "confidential funds" to pay for the meth. (R.p.12, line 14-p.15, line 11). A Greenville County investigator drove Smith to the pre-arranged sale location in Smith's car, while Asbill and a Pickens County detective followed in a separate car and parked across the street where they could observe the transaction and monitor the audio transmission from the wire. After the deal was complete, Asbill took a written statement from Smith. He saw the Tylenol container purchased by Smith but did not take possession of it after the buy. (R.p.15, line 13-p.21, line 8). On cross-examination, Asbill testified that the phone calls between Smith and the person who set up the drug deal were not recorded. (R.p.23, line 4-p.24, line 3).

Next, investigator Chad Ayers with the Greenville County Sheriff's Office testified. Ayers explained he had used Smith in a number of drug investigations

following her arrest in 2008 or 2009, after she came to him and expressed an interest in cooperating with law enforcement. (R.p.25, line 19-p.29, line 2). He described the common police practice of conducting joint, multi-agency drug investigations, including the use of confidential informants to call their contacts to set up deals. In regard to the March 30, 2010 investigation, Ayers was standing next to Smith listening to the initial phone call on speakerphone. He said he heard an older female with a raspy voice set up the details of the meth deal with Smith. (R.p.29, line 3-p.32, line 19). Ayers then drove with Smith, in Smith's car, to the pre-arranged meeting location and parked. Smith made another phone call to let the target know they were ready and a few minutes later, a dark, four-door car pulled into the parking lot. The driver was the only person in the car. Smith got out of her car and into the other car, and returned two minutes later with a Tylenol pill bottle containing a clear baggie with a crystal-like substance inside. Ayers testified Appellant was not the person in the second car but that he noted and reported the vehicle's tag number. (R.p.32, line 20-p.38, line 9). On cross-examination Ayers testified he believed Smith made a total of three phone calls to the contact number, none of which were recorded; however, Ayers was not asked about any return phone calls from the target to Smith. (R.p.48, lines 4-22). On re-direct he testified he heard a younger, non-raspy, female voice on the second and third phone calls made by Smith. He said he was sure there were two different voices. (R.p.52, lines 5-19.)

During a break in the testimony, outside the presence of the jury, the solicitor explained he would call Smith as the next witness and planned to question her about her relationship with Appellant. Specifically, he wanted to ask Smith about their history of drug deals over the years, in an attempt to prove absence of mistake under Rule 404(b),

SCRE. In doing so, he again noted the State's burden of proving Appellant distributed, aided, abetted or conspired to distribute the meth. Ultimately, the trial court sustained Appellant's objection and would not permit questions about the prior bad acts. (R.p.56, line 16-p.64, line 19).

Smith then took the stand and explained how she became a confidential informant, and how she was used to provide information to law enforcement officials about people she had purchased drugs from in the past. On March 30, 2010, she provided the investigative team with Appellant's name and agreed to contact her to try to set up a meth deal. Smith testified she had known Appellant for a couple of years and had frequent contact with Appellant, on a weekly or at least monthly basis throughout that time. She said she knew Appellant both personally and through their frequent telephone conversations and described Appellant as being in an intimate relationship with a younger woman named Ashley Timms (Ashley). Smith said Appellant and Ashley were always together, actually lived together, and shared use of Appellant's car. She testified she knew she was talking to Appellant on the phone when she made the initial call because Ashley's voice and Appellant's voice are very different. (R.p.66, line 7-p.74, line 25).

On the night in question, Smith called Appellant and asked Appellant if she had any "work" Smith could sell so Smith could go make some money. Smith explained "work" meant meth and that her request was to buy a quantity she could then re-sell to other users. Appellant and Smith discussed an amount (3.5 grams or an "8-ball") and a price of \$300, but Appellant said she didn't have that much meth and would have to call back. Appellant then called Smith and offered half the original amount (1.7 grams or half of an "8-ball") for \$170. They agreed on a meeting place to complete the deal. (R.p.74,

line 4-p.78, line 9). Smith testified she knows Ashley's voice and was 100% sure she was speaking to Appellant and not Ashley when they agreed to the drug deal. (R.p.78, line 14-p.79, line 11). Smith acknowledged she actually ended up purchasing the meth from Ashley and described the details of the transaction; however, she said Ashley was not the person she negotiated a price with, not the person she asked for dope, and not the person who told her to meet at the pre-arranged location. (R.p.79, line 14-p.92, line 23). On cross-examination, Smith explained that Appellant is the person she always purchased drugs from, not Ashley, because Appellant, rather than Ashley, was the one with the dope connection. (R.p.107, line 14-p.109, line 22).

Finally, the State called Detective Brett Barwick of the Pickens County Sheriff's Office to the stand. He described the March 30, 2010 multi-jurisdictional investigation and his role in setting up the wire on Smith. Barwick said he checked the tag number that had been reported by Ayers and it was registered to Appellant, for a 1995 four-door Toyota Camry. (R.p.120, line 12-p.127, line 18). Barwick took possession of the drugs after the deal and submitted them to the lab for analysis. (R.p.130, line 4-p.132, line 12).

At the conclusion of the State's case, Appellant moved for a directed verdict "on the basis that the only evidence whatsoever tying [Appellant] to this drug transaction is the testimony of someone who said she recognized her voice on the phone. After admittedly doing meth the day before." The trial judge denied the motion after finding: "All right, I really think that goes to veracity of believability to the weight of the evidence. Therefore, would be a matter for the jury." (R.p.145, lines 1-10).

Appellant called Ashley Timms in her defense. Ashley described her connection to Appellant as similar to a mother/daughter relationship. She explained she had pled

guilty to distribution of methamphetamine earlier that morning and that Appellant had no knowledge of the drug deal for which she was on trial. Ashley claimed she answered the phone call from Smith on March 30, 2010, and along with a dealer named Becky Moore, arranged the entire deal and then conducted the transaction on Moore's behalf. She claimed Moore has a raspy voice, but also claimed her own voice was a bit raspy because she had been smoking meth. (R.p.147, line 17-p.166, line 17). Appellant also testified in her own defense. She admitted she used to have a drug addiction problem and had pled guilty to possession of meth in the past; however, on March 30, 2010, she was still on probation for the earlier conviction and did not participate in the drug deal. She claimed she did not take any of the phone calls described by Smith. (R.p.182, line 10-p.187, line 5).

After the defense rested, Appellant renewed her motion for a directed verdict for the "same reasons as before." The trial judge denied the motion. (R.p.196, lines 11-21). In closing arguments, the solicitor restated the State's theory of the case, namely that Appellant aided, abetted and/or conspired with Ashley to distribute methamphetamine. (R.p.199, line 9-p.201, line 6)

Thereafter, the trial judge charged the jury on the applicable law. The trial judge instructed the jury that Appellant was presumed to be innocent, that the burden was on the State to prove Appellant's guilt beyond a reasonable doubt, and that the jury was tasked with determining the weight of the evidence and assessing the credibility of the witnesses. (R.p.204-p.211). Specifically in regard to accomplice liability, the judge charged:

A person who is present at the scene of a crime and intentionally or through a common scheme or plan, aided, abetted or assisted in the

commission of that crime through some overt act is guilt[y] as an accomplice. To be liable as an accomplice, the Defendant must have knowledge of the criminal conduct. Mere presence at the scene of the crime is not sufficient to establish guilt as an accomplice. Intentionally means willfully intending the result which actually occurs. A person may be constructively present at the commission of a crime even though that person is some distance away from the actual scene [sic]. If it is shown beyond a reasonable doubt that the person played a role in the commission of the crime as a result of some prior arrangement.

(R.p.209, line23-p.210, line 11).

At the conclusion of trial, the jury convicted Appellant of distribution of methamphetamine. (R.p.212, line 11-p.213, line 17). After a discussion about the appropriate statutory sentencing range, the trial court initially sentenced Appellant to fifteen (15) years' imprisonment suspended upon the service of three (3) years' imprisonment and five (5) years' probation. (R.p.214, line 23-p.215, line 6). However, after hearing arguments on a motion to reconsider, the court changed the sentence to ten (10) years' imprisonment. (R.p.216, lines 1-7).

ARGUMENT

The trial court properly denied Appellant's motion for a directed verdict where the State presented substantial evidence from which the jury could fairly and logically find Appellant guilty of distribution of methamphetamine by way of aiding, abetting and/or conspiring to distribute.

Appellant argues the trial court erred in denying her motion for a directed verdict of acquittal on the distribution of methamphetamine via accomplice liability charge because she had no knowledge of, or any intent to engage, in a drug sale. Appellant contends there was "no evidence" she and Ashley acted together to sell methamphetamine and no proof of any formal or informal agreement involving Appellant to make the drug buy in question. The State disagrees and submits Appellant's contentions are without merit. The testimony of confidential informant Tonya Smith was direct evidence of such an agreement and combined with the circumstantial evidence presented at trial, provided substantial proof of Appellant's knowledge of the criminal conduct and of her participation in the commission of the crime. The trial judge properly considered the existence of evidence as opposed to its weight in denying Appellant's motion for a directed verdict and in submitting the case to the jury. Appellant's conviction should be affirmed.

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). When reviewing a denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). When ruling on a motion for a directed verdict, the trial court is concerned with the existence or non-existence of evidence, not its weight. State v.

Condrey, 349 S.C. 184, 190, 562 S.E.2d 320, 323 (Ct. App. 2002). If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must find the case was properly submitted to the jury. Weston, 367 S.C. at 292-93, 625 S.E.2d at 648; State v. Cherry, 361 S.C. 588, 593-94, 606 S.E.2d 475, 477-478 (2004). Critically, the appellate court may only reverse the trial judge's denial of a directed verdict motion if there is no evidence supporting the trial judge's ruling or if the ruling is based on an error of law. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002); State v. Dantonio, 376 S.C. 594, 603, 658 S.E.2d 337, 342 (Ct. App. 2008). Indeed, "**unless there is a total failure of evidence** tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict must stand absent an error of law." State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986) (emphasis added).

The South Carolina Code describes the offense of "distribution of methamphetamine" as follows:

A person who manufactures, distributes, dispenses, delivers, purchases, or otherwise aids, abets, attempts, or conspires to manufacture, distribute, dispense, deliver, or purchase, or possesses with intent to distribute, dispense, or deliver methamphetamine or cocaine base, in violation of the provisions of Section 44-53-370, is guilty of a felony . . .

S.C. Code Ann. § 44-53-375 (B) (emphasis added). Thus, the statute encompasses every action taken by every person involved in a common design or purpose to manufacture, distribute, dispense, deliver or purchase methamphetamine. The theory of the State's case was one of "accomplice liability" by which the State intended to prove Appellant aided, abetted, and/or conspired with Ashley Timms to distribute methamphetamine to a

confidential informant, Tonya Smith. (R.p.2, line 13-p.5, line 1; p.56, line 16-p.63, line 4; p.199, line 9-p.201, line 6; p.202, line 20-p.203, line 24).

“To aid and abet in South Carolina, one must ‘[help], assist, or facilitate the commission of [the] crime, promote the accomplishment thereof, help in advancing or bringing it about, or encourage, counsel, or incite [the] commission [of the crime].’ State v. Claypoole, 371 S.C. 473, 479 n.3, 639 S.E.2d 466, 469 n.3 (Ct. App. 2008) (quoting State v. Smith, 359 S.C. 481, 491, 597 S.E.2d 888, 894 (Ct. App. 2004). It comprehends all assistance rendered by words, acts, encouragement, support, or presence, actual or constructive, to render assistance if necessary. Smith 359 S.C. at 491, 597 S.E.2d at 894. In order to be guilty as an aider or abettor, the participant must be chargeable with knowledge of the principal’s criminal conduct. State v. Mattison, 388 S.C. 469, 480, 697 S.E.2d 578, 584 (2010); State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987).

By comparison, a conspiracy is a combination between two or more persons for the purpose of accomplishing an unlawful object or a lawful object by unlawful means. State v. Condrey, 349 S.C. 184, 191, 562 S.E.2d 320, 323 (Ct. App. 2002). The gravamen of the offense of conspiracy is the agreement or combination. State v. Dasher, 278 S.C. 454, 455, 298 S.E.2d 215, 216 (1982). Thus, prior knowledge that a crime is going to be committed, without more, is not sufficient to make a person guilty of the crime. State v. Collins, 266 S.C. 566, 225 S.E.2d 189 (1976). Generally, the agreement, which is the essence of the conspiracy, is proven by various overt acts committed in furtherance of the conspiracy. State v. Amerson, 311 S.C. 316, 319, 428 S.E.2d 871, 873 (1993); Condrey 349 S.C. at 192, 562 S.E.2d at 324. However, a conspiracy may be

proved by direct or circumstantial evidence, or by circumstantial evidence alone. State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989); Condrey 349 S.C. at 192-93, 562 S.E.2d at 324.

Contrary to Appellant's assertions, the evidence presented at her trial did more than merely raise a suspicion of guilt. Instead, the State presented substantial evidence to support a finding that Appellant both aided and abetted Ashley in distributing methamphetamine and conspired with Ashley to distribute. Tonya Smith's testimony alone provided direct evidence that Appellant had knowledge of Ashley's criminal conduct and that Appellant assisted, facilitated, helped in advancing, and encouraged the commission of the crime. Smith explained it was Appellant who set the specific terms of the drug deal, including the sale price and the quantity of meth, and it was Appellant who set the location for the deal. (R.p.74, line 4-p.78, line 9). Smith testified she knows Ashley's voice and was 100% sure she was speaking to Appellant and not Ashley when they agreed to the drug deal. (R.p.78, line 14-p.79, line 11). Smith acknowledged she actually ended up purchasing the meth from Ashley and described the details of the transaction; however, she said Ashley was not the person she negotiated a price with, not the person she asked for dope, and not the person who told her to meet at the pre-arranged location. (R.p.79, line 14-p.92, line 23).

Smith's testimony also provided direct evidence of Appellant's overt act in furtherance of her agreement with Ashley to accomplish an unlawful object – distribution of methamphetamine. Beyond the overt act, Appellant's agreement with Ashley was also supported by the substantial circumstantial evidence presented by the State, including the

close personal relationship between Appellant and Ashley, the use of Appellant's car to complete the transaction, sharing the cell phone that was used both in setting up and during the drug transaction, and Smith's history of obtaining drugs from Appellant in the past.

Viewing the evidence in a light most favorable to the State, the evidence presented established issues requiring jury resolution. The evidence adequately demonstrated Appellant's role as a confederate of Ashley in their common enterprise to distribute meth to Smith. But for Appellant's participation, encouragement, persuasion, and other assistance, the transaction would not have taken place. Therefore, the evidence was sufficient, as a matter of law, to submit the case to the jury. See State v. Brown, 205 S.C. 514, 520, 32 S.E.2d 825, 827 (1945) ("Where there is any evidence, however slight, on which the jury may justifiably find the existence or the non-existence of material facts in issue, or if the evidence is of such character that different conclusions as to such facts reasonably may be drawn therefrom, the issues should be submitted to the jury."). The trial judge committed no error in denying the directed verdict motion, and Appellant's conviction should be affirmed.

CONCLUSION

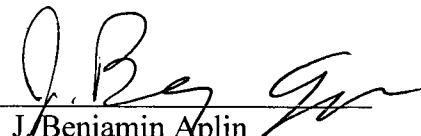
For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

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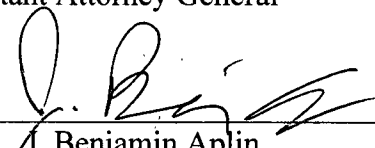
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies
with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Angela Bennett, Executive Legal Assistant, hereby certify that I have served the within *Final Brief of Respondent*, dated July 1, 2013, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

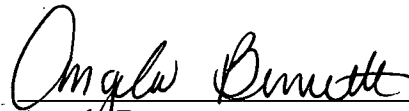
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SC Court of Appeals

I further certified that all parties required by Rule to be served have been served.
This 2nd day of July, 2013.



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