

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

R. Lawton McIntosh, Circuit Court Judge

RECEIVED

JAN 02 2014

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JOHN DWAYNE GARVIN,

APPELLANT

APPELLATE CASE NO. 2013-001209

INITIAL BRIEF OF APPELLANT

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES.....2

STATEMENT OF ISSUES ON APPEAL.....3

STATEMENT OF THE CASE4

ARGUMENT9

CONCLUSION13

TABLE OF AUTHORITIES

Cases

In the Interest of TRACY B., 391 S.C. 51, 704 S.E.2d 71 (Ct. App. 2010) 9

Jackson v. Denno, 378 U.S. 368 (1964) 7, 8, 9

State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998)..... 11

State v. Moses, 390 S.C. 502, 702 S.E.2d 395 (Ct. App. 2010)..... 9

State v. Odems, 395 S.C. 582, 720 S.E. 48 (2011) 11

State v. Weston, 367 S.C. 279,625 S.E.2d 641 (2006)..... 11

Withrow v. Williams, 507 U.S. 680 (1993)..... 9

STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in admitting the statement of Appellant Garvin when the state did not prove by a preponderance of the evidence that Garvin's statement was freely and voluntarily and knowingly given?
2. Did the trial court err in not granting a directed verdict to Appellant Garvin when the only evidence against him was his statement which he recanted because he testified that he did not make the confession statement but was tricked into signing it?

STATEMENT OF THE CASE

In December 2012, the Spartanburg County Grand Jury indicted John Dwayne Garvin on the charge of trafficking heroin more than fourteen grams. On May 21-23, 2013, Garvin proceeded to trial before the Honorable R. Lawton McIntosh and a jury. Garvin was represented by Scott Robinson, and the state was represented by Eddie Hunter. The jury returned a verdict of guilty as indicted. Judge McIntosh sentenced Garvin to the mandatory sentence of twenty-five years and a \$200,000 fine. Tr. 296, ll. 3 – Tr. 297, ll. 18. Garvin's attorney filed a notice of appeal. This appeal follows.

STATEMENT OF FACTS

On July 17, 2012, Investigator Ken Hancock with the Spartanburg County Sheriff's Department, gave an informant by the name of Fred Jerman, \$4200 to purchase heroin at a destination on Highway 9 across I-85 in Spartanburg County. Jerman was equipped with a video to record the transaction with sound and vision. After the transaction, Investigator Hancock turned the drugs into the evidence locker. Tr. 90, ll. 1 – Tr. 97, ll. 25.

Investigator Hancock was across the street from the incident site when the transaction occurred. The informant was sitting at the gas pumps when the car of the alleged dealer pulled up beside it. Investigator Hancock saw the driver, who was identified as Garvin, get out and go into the store. The passenger, who was later identified as Perez, got out and went to the informant Jerman's car. It appeared that some transaction was occurring. Then Garvin came out, and it appeared that some communication occurred. Then they returned to their car and left. Tr. 98, ll. 11 – Tr. 99, ll. 23.

On cross examination, Investigator Hancock revealed that he did not see Garvin do anything with the informant as far as the drug transaction. Tr. 100, ll. 21 – Tr. 101, ll. 25.

Fred Jerman, the informant, admitted that on July 17, 2012, he was paid \$300 to make a controlled heroin buy. He also admitted that he had worked for law enforcement for several years and usually had charges dismissed or reduced for his cooperation. In this case, he was arrested for distribution of heroin and was cooperating with the police for that charge although he had not been made any promises. Tr. 103, ll. 19 – Tr. 108, ll. 25.

On July 17, he was to meet with Garvin known as "Big Unc" and Perez known as "Grills" to buy heroin. Tr. 108, ll. 17 – 25. During the buy, Garvin went in the store and came back and was pumping gas. Jerman gave the money to Perez who counted it. Garvin

came over to the car and Jerman spoke with him that everything was straight. Tr. 111, ll. 1 – Tr. 114, ll. 25.

Deputy William Tillinghess testified that he shot the video of the drug buy. He saw Garvin was the driver and saw him go into the store. When he came out of the store, he went to the vehicle and spoke to the informant briefly. Then Garvin pumped gasoline. Tr. 154, ll. 11 – Tr.157, ll. 25. Tillinghess admitted that he did not know what Garvin and the informant talked about and the conversation lasted about five seconds . Tr. 158, ll. 1 – 15.

Deputy Roger Luther also took a video of the drug buy at the same time that Deputy Tillinghess did. Deputy Luther admitted that he did not know what Garvin said to the informant as Garvin was in the store during the buy. Garvin went to the informant's car briefly when he came out of the store. Tr. 158, ll. 24 – Tr.163, ll.13.

Special Agent David Pait was with ATF. After Garvin and Perez were arrested, Agent Pait Mirandized Garvin and was present when Garvin gave a statement. He testified that the statement and interview with Garvin were not taped. Tr. 166, ll. 1 – Tr. 174, ll. 23.

Sled Agent Ashley Asbill took a statement from Garvin. Agent Asbill actually wrote the statement as he said Garvin was nervous and did not want to write it. Garvin did sign the statement. According to the written statement, Garvin admitted he was involved in the drug deal as he contributed \$200 to buy the heroin with Perez. Tr. 175, ll. 1 – Tr. 182, ll. 25.

On cross examination, Agent Asbill revealed that there was no video nor audio of the interview and statement. Tr. 183, ll. 1 – Tr. 184, ll. 18.

Beth Stuart, the forensic chemist with the Spartanburg County Sheriff's Office, examined the drug which was packaged in 746 little wax envelopes. The total weight was 14.53 grams. Tr. 145, ll. 4 – 25; Tr. 149, ll. 1 – Tr. 151, ll. 25.

At the close of the state's case, defense counsel moved for a directed verdict. Counsel incorporated his objections from the Jackson v. Denno¹ hearing. The judge denied the motion. Tr. 187, ll. 24 – Tr. 188, ll. 25.

Garvin testified in his own defense. When Garvin came out of the store, he went to the informant's car to tell Perez to come on as they needed to go. He was not speaking to the informant. They left after he pumped the gas. Tr. 198, ll. 6 – Tr. 200, ll. 10. Garvin said the statement the officers have was not the statement he signed as he told the officers he did not know anything about the drug deal. All he did was bring Perez from North Carolina to South Carolina. The officers had a "bunch" of papers and just flipped one up for Garvin to sign. He thought he was signing a statement that he knew nothing about it. Tr. 200, ll. 1 – Tr. 208, ll. 5; Tr. 213, ll. 15 – Tr. 215, ll. 25.

Jonathan Perez testified for the defense. At the time of trial, he was serving a sentence of ten years as he was sentenced prior to trial. He was promised nothing by the defense to testify. According to Perez, Garvin had nothing to do with the drug transaction. Garvin drove him to meet a friend and Perez gave him gas money. Garvin did not know of Perez's intentions. Tr. 230, ll. 1 – Tr. 231, ll. 25. The only money Garvin received was gas money. Perez met with Jerman when Garvin went into the store. Tr. 233, ll. 1 – Tr. 234, ll. 10.

At the close of the defense's case, defense counsel renewed his motion for a directed verdict on the same grounds. The judge denied the motion. Tr. 243, ll. 14 – Tr. 244, ll. 11.

In a pretrial motion, defense counsel told the trial court that they needed to have a hearing pursuant to Jackson v. Denno. Tr. 13, ll. 5 – 14. During the hearing, Agent David Pait with the Bureau of Alcohol, Tobacco, Firearms, and Explosives.(ATF), testified that he

¹ Jackson v. Denno, 378 U.S. 368 (1964).

issued the Miranda warnings to Garvin at the Sheriff's Office in Spartanburg. Garvin and Perez were arrested shortly after leaving the scene. Agent Pait was present when agent Asbill wrote down the statement from Garvin. Tr. 45, ll. 5 – Tr. 47, ll. 25. Garvin was not coerced, not under duress, not promised anything, and not under the influence of drugs or alcohol. Garvin never asked for an attorney. Tr. 48, ll.1 – Tr. 50, ll. 25.

Agent Asbill testified in the hearing that he interviewed Garvin after he was taken into custody. He admitted that he wrote Garvin's statement although Garvin was able to read and write. Tr. 53, ll. 16 – Tr. 59, ll. 25.

Garvin chose not to testify at the hearing. Tr. 60, ll. 1 – Tr. 63, ll. 10. Garvin's attorney made the "standard motion in terms of voluntariness—just the regular Jackson v. Denno objection." The judge admitted the statement for the time and said he would have to determine later as to whether it's a voluntary statement or not. Tr. 63, ll. 10 – Tr. 64, ll. 14.

ARGUMENT

The trial court erred in admitting the statement of Appellant Garvin when the state did not prove by a preponderance of the evidence that Garvin's statement was freely and voluntarily and knowingly given.

In Jackson v. Denno, 378 U.S. 368 (1964), the United States Supreme Court ruled that "a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." In conducting the due process analysis, courts look to the totality of the circumstances to determine whether a confession was voluntary. Withrow v. Williams, 507 U.S. 680 (1993); In the Interest of TRACY B., 391 S.C. 51, 704 S.E.2d 71 (Ct. App. 2010).

In State v. Moses, 390 S.C. 502, 702 S.E.2d 395 (Ct. App. 2010), the South Carolina Court of Appeals held that the test in South Carolina for determining whether a defendant's confession was given freely, knowingly, and voluntarily focused upon whether the defendant's will was overborne by the totality of the circumstances surrounding the confession. The court wrote that among the appropriate factors that may be considered in a totality of the circumstances analysis include: background; experience; conduct of the accused; age; maturity; physical condition and mental health; length of custody; police misrepresentations, *et al.*

There was evidence that the confession statement allegedly made by Garvin was not knowingly and voluntarily given. Garvin testified that he did not make that statement but was tricked into signing the wrong statement. Garvin said he knew nothing about the drug

transaction. The co-defendant, Perez, testified that Garvin knew nothing about it. The law enforcement officers did not see Garvin involved in the drug transaction.

There was evidence to support Garvin's testimony that he did not give a statement confessing to this crime. Agent Asbill testified that he did the actual writing of Garvin's alleged statement, and there was no video nor audio of the statement.

ARGUMENT

The trial court erred in not granting a directed verdict to Appellant Garvin when the only evidence against him was his statement which he recanted because he testified that he did not make the confession statement but was tricked into signing it.

In State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998), the Supreme Court held that in considering a directed verdict motion, the trial court is concerned with the existence of evidence rather than its weight. In reviewing the denial of a directed verdict motion, the evidence must be viewed in the light most favorable to the state. Id.

In State v. Weston, 367 S.C. 279, 625 S.E.2d 641 (2006), the Supreme Court ruled that a defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged. However, an appellate court must find that a case was properly submitted to the jury if any direct evidence or any substantial circumstantial evidence reasonably tends to prove the guilt of the accused. Id.

The trial court should grant a directed verdict motion when the evidence merely raises a suspicion that the defendant is guilty. State v. Odems, 395 S.C. 582, 720 S.E. 48 (2011). In State v. Odems, *supra*, the Supreme Court held that the circumstantial evidence did not tend to prove the defendant's guilt, and the defendant was entitled to a directed verdict because the state failed to produce evidence of the offense charged. The evidence against Odems consisted of his location in the getaway car in this burglary case ninety minutes after the burglary; the defendant fled from law enforcement; and Odems asked an uninvolved person to lie for him to the police.

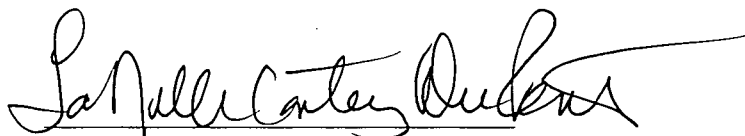
The only evidence against Garvin was his alleged statement to police which was not substantial evidence because he recanted and claimed police misrepresentation. Agent Asbill

did the actual writing of the statement in his handwriting. There was no video nor audio of the alleged statement. The co-defendant, Perez, said Garvin knew nothing about the drug transaction. The two officers conducting the video did not see Garvin involved in the drug transaction. The trial judge should have granted the directed verdict because the state did not prove beyond a reasonable doubt that Garvin was guilty. The evidence only raised a mere suspicion that Garvin was involved.

CONCLUSION

Based on the above, Garvin's case should be remanded for the entry of a directed verdict, or in the alternative, a new trial.

Respectfully submitted,

A handwritten signature in black ink, reading "LaNelle Cantey DuRant". The signature is written in a cursive style with a long horizontal flourish extending to the right.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of January, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

Appeal from Spartanburg County
R. Lawton McIntosh, Circuit Court Judge

JAN 02 2014

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JOHN DWAYNE GARVIN,

APPELLANT

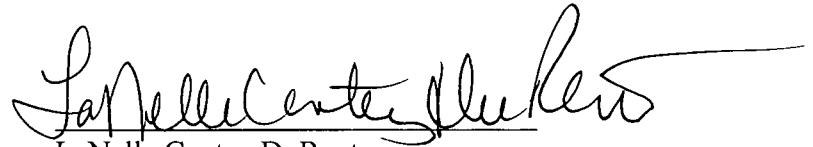
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s);
- (2) State's Exhibit 1: Statement
- (3) Trial Transcript pages: 1-5, 45-50, 53-64, 73-101, 103-108, 111-114, 145, 149 - 151, 154-163, 166-184, 187-188, 198-208, 213-215, 230-231, 233-234, 243-287, 294, 296-297.

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

January 2nd, 2014.



LaNelle Cantey DuRant
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

JAN 02 2014

SC Court of Appeals

Appeal from Spartanburg County
R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

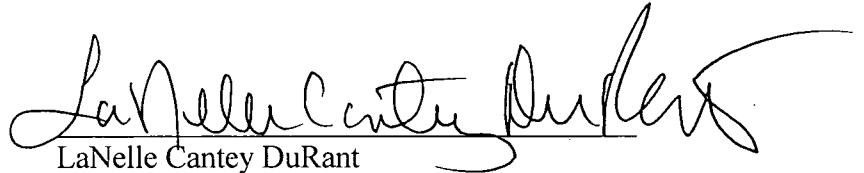
V.

JOHN DWAYNE GARVIN,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 2nd day of January, 2014.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 2nd day of January, 2014.

Naiva Nudor (L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.