THE STATE OF SOUTH CAROLINA

ORIGINAL

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

JEFFREY DODD THOMAS,

APPELLANT

APPELLATE CASE NO. 2012-212428

Appeal from Lexington County

George C. James, Jr., Circuit Court Judge

Unpublished Opinion No. 2014-UP-143

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Petitioner seeks rehearing of this Court's opinion filed on April 2, 2014 affirming his conviction for manufacturing methamphetamine based upon this Court having overlooked or misapprehended the lack of evidence presented by the prosecution and the governing legal principles.

This Court issued a one paragraph opinion in this matter. After citing the governing case law concerning evaluations of motions for directed verdict, this Court cited the statutory definition of manufacturing and a statutory provision providing that "[p]ossession of equipment or paraphernalia used in the manufacture of ... methamphetamine is prima facie evidence of intent to

manufacture." Thus, it appears this Court concluded the prosecution presented sufficient evidence to survive a directed verdict motion based simply upon Petitioner's possession of items that could be used in the manufacture of methamphetamine and the statutory presumption of intent based upon the possession of those items. This was error. The trial court erred in failing to direct a verdict of acquittal in Appellant's favor where the prosecution failed to present any direct or substantial circumstantial evidence that Appellant engaged in the production of the methamphetamine constructively in his possession.

As explicitly stated at trial, the state's only theory was that Appellant had manufactured methamphetamine that was in his possession. The prosecutor stated unequivocally and specifically that the state was not pursuing any other theories permitted under the statute.[1] R. 238, lines 1-18; R. 286-287; R. 153, lines 18-25; R. 154, lines 15-20 (The prosecutor argued during the directed verdict motion that the methamphetamine's "existence is proof that it was made, and the evidence that links him to making the manufacturing, to making the drug is the trail he left behind."); R. 155, lines 15-21 (The prosecutor made clear that "if that meth had not been in the car," then he would not have proceeded with the charge of manufacturing methamphetamine.); R. 226, lines 12-15; R. 226, lines 18-19; R. 227, lines 13-14; R. 228, lines 1-10; R. 253 (Court's Exhibit #2) (During jury deliberations, the jury asked: "[I]s the state charging that [Appellant] was manufacturing in his

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[1] South Carolina's statutory scheme provides as follows concerning manufacturing of methamphetamine:

> 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).

vehicle or just that he manufactured meth?" The prosecutor responded "[t]hat he manufactured meth in his, in your vehicle." The prosecutor then stated "[t]hat the State must prove that on or about this day he manufactured methamphetamine." The judge informed the jury that "the state must prove, beyond a reasonable doubt, that the defendant, on or about May 29, 2011, manufactured meth."). Thus, the prosecution was required to present direct or substantial circumstantial evidence that Appellant had engaged in the

> production, preparation, propagation, compounding, conversion, or processing of a [methamphetamine], either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container

in order to survive a directed verdict motion.[2] See S.C. Code Ann. § 44-53-110 (defining "manufacture").

This Court appears to have erred in the same way as the trial court erred by relying solely upon the statute allowing possession of equipment or paraphernalia to supply prima facie evidence of intent in order to conclude that the prosecutor's weak circumstantial evidence case survived the directed verdict motion. Specifically, the statutory scheme provides "[p]ossession of equipment or paraphernalia used in the manufacture of cocaine, cocaine base, or methamphetamine is prima facie evidence of intent to manufacture." S.C. Code Ann. § 44-53-375(D).[3] As demonstrated below, the

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[2] "'Methamphetamine' includes any salt, isomer, or salt of an isomer, or any mixture or compound containing amphetamine or methamphetamine." S.C. Code Ann. § 44-53-110 (defining "methamphetamine").

[3] "'Paraphernalia' means any instrument, device, article, or contrivance used, designed for use, or intended for use in ingesting, smoking, administering, manufacturing, or preparing a controlled substance and does not include cigarette papers and tobacco pipes." The non-exhaustive list of paraphernalia includes items such as carburetion tubes and devices, cocaine spoons and vials, bongs, and ice pipes or chillers. S.C. Code Ann. § 44-53-110 (defining "paraphernalia").

items found in Appellant's truck, which the solicitor argued were paraphernalia, were not illegal and showed no evidence of having been used to manufacture methamphetamine.

After Officer Jessie Laintz arrested Appellant for trespassing, he conducted an inventory search of Appellant's truck in preparation for its towing. R. 7, lines 3-5. Laintz described the truck as "[a]n absolute mess" in terms of cleanliness. There were "[c]lothes everywhere, trash everywhere." Clothes were piled high in the driver's seat and trash almost completely filled the passenger seat. R. 13, lines 12-22; R. 14, lines 4-6. Laintz found an Altoids box containing four clear baggies, two of which had a white crystal-like substance in them, and two of which had a residue of white crystal-like substance.[4] R. 7, lines 7 – 19. On the floor on the passenger side, Laintz found a large container of salt and a three-foot piece of clear tubing. In the center console of the truck, Laintz found lithium batteries. Under the driver's seat, Laintz found a full box of Sudogest containing ten pills. In the truck bed, Laintz found a starter fluid spray can with a hole in the bottom. In the back seating area of the truck, Laintz found a blue backpack. In the backpack, Laintz found coffee filters, a digital scale, and some papers. R. 7, line 25 – R. 8, line 11; R. 32, lines 18-25; R. 63, lines 19 – 21. All of the items recovered, except for the white crystal like substance, were the legal and available for purchase. R. 33, lines 13-15; R. 34, line 15 – R. 35, line 2. Regarding the plastic tubing, no tests were performed on the tubing to determine whether it had been used for any foreign substance. According to Laintz, the tubing had not been used for any foreign substance. R. 36, lines 4-13. Laintz did not smell any strong odors in the vehicle during his inventory search. He admitted that in his experience, the most distinguishing thing about a working

[4] Emily Homer, a chemist at the sheriff's department, tested the two items found in the plastic bags inside of the Altoids container. She found 0.02 grams of methamphetamine in one bag and 0.08 grams of methamphetamine in the other bag. R. 98, lines 6 – 10. Homer did not test the bags containing possible residue. R. 98, lines 11 – 14.

methamphetamine lab is this smell of ether. R. 36, line 24 – R. 37, line 9. Another officer found a small green cylinder, one bottle of alcohol, and one box of aluminum foil. R. 57, line 16 – R. 58, line 9. This officer also observed one starter fluid can that had been punched and two others fluid cans in the bed of the vehicle. R. 58, lines 10 – 14.

Thomas Hamilton, the chief of the narcotics unit in Lexington County, testified as an expert in the production and distribution of methamphetamine, and disposal of the meth products. R. 119, lines 12-14; R. 120, line 24 – R. 121, line 11. Hamilton testified that the starting drug in the production of methamphetamine is pseudoephedrine hydrochloride, which can be purchased without a prescription. R. 123, lines 15-19.[5] The base ingredient must be crushed, usually with a coffee grinder or blender. R. 124, lines 13-15. Next, a person must acquire ether. According to Hamilton, starter fluid cans contain a large amount of ether, which is removed from the cans by punching a hole in the bottom of the can to pour it out R. 125, lines 1-18. Coleman camping fuel also contains ether and may be used instead of starter fluid. R. 125, line 24 – R. 126, line 6. The next ingredient is ammonium nitrate, which is found in cold packs and fertilizer. R. 126, lines 7-20. According to Hamilton, sodium hydroxide, which is commonly called lye and found in drain openers, is a necessary ingredient in the manufacturing of methamphetamine. R. 126, line 22 – R. 127, line 2. Drain openers may be purchased at Wal-Mart or any hardware store. R. 127, lines 3-6. The final ingredient in the first step of the process is lithium metal, which is commonly found in camera batteries. In order to obtain the lithium, a person would have to open the batteries using wire cutters or pipe cutters, then remove the wadding to recover a gray thin sheet of metal. R. 127, lines 7-23.

[5] Hamilton testified that "[t]he normal recipe that we see uses one to two boxes" of pseudoephedrine. R. 129, lines 7-11.

After acquiring all five of the necessary ingredients for the first step, one must combine the sodium hydroxide and ammonium nitrate in a bottle to create anhydrous ammonia. A second chemical reaction occurs in the bottle at the same time – the ammonia reacts with the lithium. Per Hamilton, "the ammonia with the lithium converts pseudoephedrine methamphetamine." R. 124, lines 1-3; R. 128, lines 4-16. After these reactions, "the actual meth is inside that liquid." R. 128, lines 17-21. The normal "cook time" for the first step is forty-five minutes to an hour. R. 129, lines 1-6. During this process, pressure builds and someone must continue to shake it to keep it reacting and vent it to release the pressure. R. 129, lines 12-20. Next, the mixture is strained using common household items, such as clothing or paper towels, to produce only a cloudy liquid. R. 130, lines 6-21.

The second step requires combining sulfuric acid, such as the type found in drain openers, with salt in a small bottle to produce hydrochloric acid. The second bottle must have a tube connected to it to allow the gas to exit. R. 131, lines 1-8. The acid gas then "bubble[s]" across the container containing the ether and methamphetamine solution. The hydrochloric acid bonds with the methamphetamine making methamphetamine hydrochloride, which is salt. This salt is not soluble in ether, and as a result, falls to the bottom. R. 131, lines 13-19. A coffee filter is then used to strain the fine salt from the liquid. The salt in the coffee filter is left to dry and the finished product is methamphetamine. R. 131, line 23 – R. 132, line 7.

Concerning the items recovered from Appellant's truck, Hamilton testified that each item had a "legitimate legal lawful use." R. 136, lines 1-2. Nevertheless, Hamilton testified that if the items were found in the same automobile, then the items would be "for the product of methamphetamine." He based this opinion primarily on the "punched out ether can." R. 136, line 22 – R. 137, line 5; R. 144, line 16 – R. 145, line 3. He admitted, however, that all of the items

necessary to create methamphetamine were not present. Importantly, ammonium nitrate, sodium hydroxide, and sulfuric acid were not present. R. 145, lines 4-11; R. 151, lines 12-15.[6]

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. State v. Brown, 103S.C. 437, 88 S.E.21 (1916); State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. McHoney, 344 S.C. 85, 97 544 S.E.2d 30, 36 (2001). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused," the trial judge may deny the motion for directed verdict. State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001); State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000); State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000). When the prosecution relies exclusively on circumstantial evidence, the trial judge must direct a verdict in the defendant's favor unless there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the defendant or from which his guilt may be fairly and logically deduced. State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011); State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000). Likewise, a directed verdict is appropriate when the evidence produced "merely raises a suspicion the accused is guilty." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Arnold, 361 S.C. 386, 389-390, 605 S.E.2d 529, 531 (2004); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984); State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999). Our courts define suspicion as "a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963).

[6] No one testified regarding finding bottles in the truck. A bottle, or container of some sort, would have been necessary for the manufacture of methamphetamine.

No published opinions have interpreted South Carolina's manufacturing methamphetamine statute. "[G]enerally, a crime includes both an actus reus component and a mens rea compenent." State v. Reid, 383 S.C. 285 n.2, 679 S.E.2d 194 n. 2 (Ct. App. 2009). In State v. Evans, 216 SC 328, 57 S.E.2d 756 (1950), the South Carolina Supreme Court overturned a conviction for manufacturing whiskey where the "evidence strongly tend[ed] to show an intention on the part of [Evans] to engage in the manufacture of liquor" but the prosecution failed to present any evidence of an overt act toward putting the intent into effect. "The law does not concern itself with the mere guilty intention, unconnected with any overt act." Id. at 332, 57 S.E.2d at 758. The only evidence against Evans was the testimony of three officers who saw Evans sitting around a little fire near the still. When Evans saw the police, he ran. In the area, officers found a 100-gallon copper still, two barrels of mash, tin tub buckets, shovels, and several other items. Additionally, officers found some whiskey in a small container on the site. The still showed evidence of usage approximately one week prior. In fact, the officers testified that everything was ready for meal and sugar to be added to the beer from the first batch to make a second one; however, neither meal nor sugar was found at the site. The state of the fermentation of the mash found at the site was favorable to be used for making whiskey. Nevertheless, the Court held "there is not a scintilla of evidence of any overt act on the part of [Evans], or anyone else in his presence, which would constitute the offense of manufacturing whiskey without a license." Id. at 331-332, 57 S.E.2d at 757.

Similarly, in State v. Quick, 199 S.C. 256, 19 S.E.2d 101 (1942), the South Carolina Supreme Court held Quick was entitled to a directed verdict on the charge of unlawful manufacture of intoxicating liquor where officers found two stills on Quick's property, and found Quick approaching the property by automobile, which contained five hundred pounds of sugar, a stack of mill feed, and three cases of yeast cakes. Id. at 256, 19 S.E.2d at 102. Neither of the stills was in

operation at the time the officers found them. One contained mash, and the other appeared to have been recently operated. The officers testified they did not know to whom the stills belonged. Id. The Court found the evidence "overwhelmingly tend[ed] to show an intention on the part of [Quick] to manufacture of liquor." However, the Court determined that the state had failed to prove that Quick engaged in any overt act. Id.

Although the Court provided no definite rule as to what constituted an overt act, the Court explained that each case would depend upon the particular facts and inferences drawn therefrom "with a view to working substantial justice." Id. The Court explained "the act must always amount to more than mere preparation, and move directly toward the commission of the crime." Id.

> There is a wide difference between the preparation for the commission of an offense and the commission of the offense itself, or even the attempt to commit. The preparation consists in devising or arranging the means or measures necessary for the commission of the crime; the attempt or overt act is the direct movement toward the commission, after the preparations are made.

Id. at 256, 19 S.E.2d at 103. The Court held that the testimony showed nothing more than an act by Quick in preparation to the commission of the crime and not an act proximately leading to its consummation. Id. The Court further found the jury instruction telling the jury that if it found Quick intended to manufacture intoxicating liquors illegally then Quick had violated the statute was an incorrect statement of the law. As provided by the Court, the statute made it unlawful for a person to manufacture liquor; however, the statute did not make it an offense to intend to manufacture liquor. Id. Therefore, Quick was entitled to a directed verdict.

On the other hand, our Supreme Court addressed the manufacture of liquor and found sufficient evidence to warrant denial of the directed verdict motion in State v. Jackson, 210 S.C. 214, 42 S.E.2d 230 (1947).

> Ordinarily, the manufacture of alcoholic liquors would contemplate the finished product, but the rule has been established in this state that an overt act in the process

> of manufacturing, is sufficient to show unlawful manufacture, and that each case must be decided dependent upon its particular facts, especially as to the issue whether a verdict of acquittal should be directed.

Id. at 218, 42 S.E.2d at 232. The South Carolina Supreme Court found the testimony of police officers tending to show that the initial steps involved in the manufacture of alcoholic liquors had been taken in that the mash in the still had nearly reached the stage of fermentation and all that remained to be done was to build a fire thereunder was sufficient for the case to go to the jury on the charge of the unlawful manufacture of alcoholic liquors. Id. at 221, 42 S.E.2d at 234.

In State v. Cunningham, 239 S.C. 212, 122, S.E.2d 289 (1961), Cunningham was charged with manufacturing alcoholic liquors and with unlawfully having in his possession one case of fruit jars being an apparatus, appliance, or device to be used for the purpose of manufacturing alcoholic liquors. The jury acquitted Cunningham of manufacturing liquor, but found him guilty of possession of one case of fruit jars to be used for the purpose of manufacturing alcoholic liquors. At the time, a statute declared that the unexplained possession of any apparatus, appliance, or any device commonly or generally used for the manufacture of prohibited alcoholic liquors was prima facia evidence of a violation of the possession statute. Id. at 213-214, 122 S.E.2d at 289.

One night, officers observed three unidentified men start working at a still. Shortly thereafter, two of the men, one of whom was later identified as Cunningham, walked away from the still. The two men saw the officers and ran. Cunningham was carrying two cases of new empty half-gallon fruit jars, which he dropped when he ran. Id. at 214-215, 122 S.E.2d at 290. The prosecution contended the fruit jars were to be used as receptacles for the liquor, and as such, would be an apparatus, appliance, or device used for the purpose of manufacturing liquor. However, no one testified as to what type of receptacle was being used to receive the liquor at this particular still. "In fact, there [was] no evidence that fruit jars [were] suitable for use in manufacturing liquor." The

Court noted that the jars were "in common use in many if not most homes for other purposes." Id. at 215, 122 S.E.2d at 290. In light of the jury's acquittal of Cunningham of manufacturing, the most that could be said against him was that he was transporting the jars to the still for the purpose of transporting liquor already manufactured. However, such use would not be for the purpose of manufacturing liquor, which was what the statute required. Id.

The proper interpretation of section 44-53-375(D) is that possession of paraphernalia used in the manufacture of methamphetamine is prima facie evidence of intent or mens rea. Of course, the analysis does not end there. The law requires an actus reus coupled with this intent. The prosecution simply failed to present direct or substantial circumstantial evidence of any actus reus by Appellant in manufacturing methamphetamine. Located in various places within Appellant's truck were items that could be used for manufacturing methamphetamine, but may be legally and innocently purchased and used. According to the officer's testimony, the tubing did not appear to have been used for the manufacture of methamphetamine. The batteries were whole and intact, indicating they had not been opened to remove the lithium, which would have been necessary to manufacture methamphetamine. The coffee filters were unused – they showed no signs of having been used to strain or dry methamphetamine. The officer who searched Appellant's vehicle testified he did not smell anything unusual, and that based upon his experience, working meth labs smell strongly of ether. The box of pseudoephedrine contained all of the pills with which it was sold – no pills were missing to indicate the product had been used in any way. Importantly, officers found no plastic or glass bottle in Appellant's vehicle. Obviously, if officers found no bottle in the vehicle, then officers found no bottle containing residue or any appearance of being used in the manufacture of methamphetamine. Additionally, officers found no ammonium nitrate, sodium hydroxide, or sulfuric acid, all of which are required for the manufacture of methamphetamine.

Although Appellant possessed items that may be used to manufacture methamphetamine, the items are not illegal to possess and serve legitimate purposes outside the manufacture of methamphetamine. As explained by the trial, the prosecutor presented no evidence, such as residue or odor, to show indicia of manufacturing. The manufacturing methamphetamine statute requires the prosecution to prove an overt act. It is not enough for the prosecution to prove a guilty intention on the part of Appellant; rather, the prosecution must prove Appellant engaged in an overt act connected to a guilty intention. The prosecution simply failed to produce direct or substantial circumstantial evidence that Appellant manufactured the methamphetamine found in his constructive possession.

Therefore, Appellant respectfully requests this Court rehear the matter based upon the points addressed that were overlooked or misapprehended when this Court issued its opinion.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

This 17th day of April, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

APR 17 2014

SC Court of Appeals

Appeal from Lexington County

George C. James, Jr., Circuit Court Judge

THE STATE,

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JEFFREY DODD THOMAS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Christina J. Catoe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Jeffrey Dodd Thomas, 117 Ira Caughman Rd, Leesville, SC 29070, this 17th day of April, 2014.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 17th day
of April, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.