

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Georgetown County

Lee S. Alford, Circuit Court Judge

RECEIVED

JUL 09 2014

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ROBERT JENKINS,

APPELLANT

APPELLATE CASE NO. 2013-002577

ANDERS BRIEF OF APPELLANT

BENJAMIN JOHN TRIPP
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 ISSUE ON APPEAL 3

STATEMENT OF THE CASE 4

ARGUMENT 5

CONCLUSION..... 7

PETITION TO BE RELIEVED AS COUNSEL 9

TABLE OF AUTHORITIES

Cases

In re Jeremiah W , 353 S.C. 90, 576 S.E.2d 185 (Ct. App. 2003)
 (*rev'd on other grounds*, 361 S.C. 620, 606 S.E.2d 766 (2004))..... 6

In re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970)..... 6

State v Brown, 360 S.C. 581, 602 S.E.2d 392 (2004) 6

State v Buckmon, 347 S.C. 316, 555 S.E.2d 402 (2001) 7

State v Jackson, 395 S.C. 250, 717 S.E.2d 609 (Ct. App. 2011)..... 6

State v Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001)..... 7

State v Odems, 395 S.C. 582, 720 S.E.2d 48 (2011) 7

STATEMENT OF ISSUE ON APPEAL

Whether the trial judge erred in failing to enter a directed verdict of acquittal on Appellant's possession of heroin charge where the State only adduced circumstantial evidence that two officers stopped the vehicle in which Appellant was riding in an area of high drug activity; that, while the two officers violently struggled with the driver some distance away, they allegedly saw Appellant throw an object; and that the officers later found heroin in the area.

STATEMENT OF THE CASE

On November 16, 2011, the Georgetown County Grand Jury indicted Appellant Robert Jenkins on one count of possession of heroin. R. 128. On November 18, 2012, Appellant's case proceeded to trial before The Honorable Lee S. Alford and a jury. Wyn Bessent represented Appellant and Alicia A. Richardson represented the State. R. 1.

On November 19, 2012, the jury found Appellant guilty. R. 1; R. 122, lines 17-24. The trial judge handed down a five-year sentence. R. 126, lines 8-22

ARGUMENT

THE TRIAL JUDGE ERRED IN FAILING TO DIRECT A VERDICT OF ACQUITTAL BECAUSE THE POLICE OFFICER'S OBSERVATIONS OF APPELLANT'S ACTIONS ONLY RAISED A MERE SUSPICION THAT HE HAD HEROIN.

STATEMENT OF FACTS

At trial the State alleged that on September 24, 2011, a Georgetown police officer pulled over a vehicle in which Appellant was a passenger for a traffic stop. After the driver allegedly failed to fully comply with the officer's instructions, a physical altercation between the two ensued in the vehicle's cabin, and Appellant exited to remove himself from the fracas. The State alleged a backup officer arrived and caught Appellant throwing a small bag of heroin away from his person. R. 35, line 1—R. 37, line 4.

Officer Donald Tempalsky testified he stopped the vehicle in an area he knew for drug trafficking based on his suspicion of drug trafficking as well as speeding and failure to wear a seatbelt. During the physical struggle with the driver, a second officer arrived. At the same time, Appellant exited the front passenger side. Officer Tempalsky claimed he saw Appellant remove an object from his mouth and throw it. The State introduced into evidence Officer Tempalsky's dash cam video recording, which showed the struggle and Appellant's exit from the vehicle. R. 41, line 2—R. 51, line 25.

Officer Danny Scogin testified that as he arrived at the scene, Appellant was exiting the vehicle. As he helped Officer Tempalsky physically subdue the driver, who at that point had also exited the vehicle, he claimed to see Appellant "go[] to his mouth, sweep[] it back and his hands go back to flailing again I go to take custody of Mr. Jenkins who I just saw an object come out of his hand, go to the ground behind him." He testified he later went to the area where the object hit supposedly hit the ground: "When I see that [the driver]

is okay I take the guy I saw to the object that he threw to the ground. I see it hit the ground. I take him. We walk straight to it.” Officer Scogin then picked up a plastic bag containing two smaller bags of heroin. R. 53, line 9—R. 56, line 4.

At the close of the State’s case, Appellant moved for a directed verdict of acquittal, arguing, “The State has not proved its case with . . . substantial circumstantial evidence. They have established that there were drugs found on the ground. They have not been able to link it to my client either by . . . DNA . . . or fingerprints.” The trial judge denied the motion for a directed verdict. R. 95, line 20—R. 96, line 20.

DISCUSSION

The trial judge erred in failing to direct a verdict of acquittal because the officers’ observations of Appellant’s actions only raised a mere suspicion that he had heroin. South Carolina Code section 44-53-370 makes unlawful the possession of certain controlled substances, including heroin. “Conviction of possession of [illegal drugs] requires proof of possession—either actual or constructive, coupled with knowledge of its presence.” *State v Jackson*, 395 S.C. 250, 255, 717 S.E.2d 609, 611-12 (Ct. App. 2011) (quotations omitted).

An accused is entitled to a directed verdict when the State fails to present evidence to support every element of the charged offense. *See State v Brown*, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004); *In re Jeremiah W*, 353 S.C. 90, 93-94, 576 S.E.2d 185, 187 (Ct. App. 2003) (*rev’d on other grounds*, 361 S.C. 620, 606 S.E.2d 766 (2004)); *see also In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970) (“Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except

upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”). Where an element must be proven by circumstantial evidence, to justify denial of a directed verdict the circumstantial evidence must be substantial; in other words, the evidence must do more than “merely raise a suspicion that the accused is guilty.” *State v Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011). “Suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof.” *See State v Buckmon*, 347 S.C. 316, 322, 555 S.E.2d 402, 404-05 (2001) (citing *State v Lollis*, 343 S.C. 580, 541 S.E.2d 254 (2001)).

In this case, the State adduced only circumstantial evidence raising a mere suspicion that Appellant possessed the heroin. Neither officer offered testimony that he witnessed exactly what Appellant threw as he threw it; that he saw exactly where the object landed; or that he walked to the object on the ground without taking his eyes off of it. The dash cam video recording showed the struggle and Appellant’s exit from the vehicle but did not show an object leaving Appellant’s hand and landing on the ground. The State adduced no DNA or fingerprint evidence to put the bag in Appellant’s actual possession.

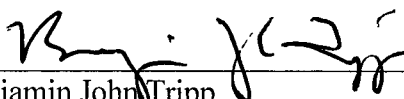
The only evidence that Appellant threw the heroin was the officers’ circumstantial testimony that they saw Appellant throw the object while both were engaged in a violent struggle with another individual some distance away and that they later found the heroin in the area. However, Officer Tempalsky testified the incident occurred in an area known for drug trafficking; thus, police could be expected to find in the area drugs with which Appellant had no connection. Neither officer testified to any incidental behavior from Appellant or the driver specifically connected with drug activity. The evidence paints a picture of Officer Tempalsky’s inchoate hunch about drugs in the vehicle, his biased

treatment of Appellant, and his willingness to connect him to any drug evidence possible.

CONCLUSION

For the foregoing reasons, Appellant requests that the Court reverse his conviction and enter a directed verdict of acquittal.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of July, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

JUL 09 2014

SC Court of Appeals

Appeal from Georgetown County
Lee S. Alford, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT JENKINS,

APPELLANT

APPELLATE CASE NO. 2013-002577

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Robert Jenkins states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Lee S. Alford, which was held on November 19, 2013, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial
3. He 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, he asks the Court to relieve him as counsel for Robert Jenkins.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

. This 9th day of July, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Georgetown County

Lee S. Alford, Circuit Court Judge

RECEIVED

JUL 09 2014

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ROBERT JENKINS,

APPELLANT

APPELLATE CASE NO. 2013-002577

**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) Transcript of November 18 - 19, 2013.

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

July 9th, 2014



Benjamin John Tripp
Appellate Defender

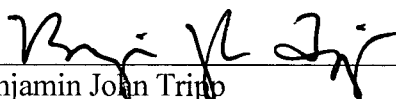
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

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."

July 9, 2014



Benjamin John Trippe
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

RECEIVED

JUL 09 2014

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Georgetown County

Lee S. Alford, Circuit Court Judge

RECEIVED

JUL 09 2014

SC Court of Appeals

THE STATE,

RESPONDENT,

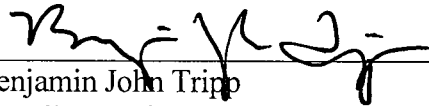
V.

ROBERT JENKINS,

APPELLANT

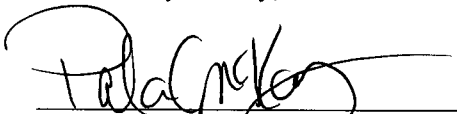
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Robert Jenkins, #305652 at Wateree River Correctional Institution, PO Box 189, Rembert, SC 29128-0189, this 9th day of July, 2014.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 9th day of July, 2014.


Notary Public for South Carolina

(L.S.)

My Commission Expires: July 24, 2022 .