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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County

Edward W. Miller, Circuit Court Judge

THE STATE;

RESPONDENT,

V.

RANDY HOWZE,

APPELLANT

APPELLATE CASE NO. 2014-000718

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS1

TABLE OF AUTHORITIES.....2

STATEMENT OF ISSUE ON APPEAL.....3

STATEMENT OF THE CASE.....4

ARGUMENT

The trial judge erred in failing to exclude testimony that crack pipes are not found on drug dealers because this evidence shifted the burden of proof to Appellant and invited an impermissible inference that Appellant was a drug dealer because the police did not find a crack pipe in Appellant’s possession.....5

CONCLUSION.....10

TABLE OF AUTHORITIES

Cases

State v. Crocker, 366 S.C. 394, 621 S.E.2d 890 (Ct. App. 2005)..... 8

State v. Gillian, 373 S.C. 601, 646 S.E.2d 872 (2007)..... 8

State v. White, 372 S.C. 364, 642 S.E.2d 607 (Ct. App. 2007)..... 8

State v. Wiles, 383 S.C. 151, 679 S.E.2d 172 (2009)..... 8

Statutes

S.C. Code Ann. § 44-53-375 (1976)..... 8

S.C. Code Ann. § 44-53-375 (B) (1976) 8

STATEMENT OF ISSUE ON APPEAL

Whether the trial judge erred in failing to exclude testimony that crack pipes are not found on drug dealers because this evidence shifted the burden of proof to Appellant and invited an impermissible inference that Appellant was a drug dealer because the police did not find a crack pipe in Appellant's possession?

STATEMENT OF THE CASE

On August 16, 2012, a York County grand jury indicted Appellant for possession with intent to distribute cocaine base. R. *(Indictment). The matter proceeded to a jury trial before the Honorable Edward Miller on October 17, 2012. Tr. 9, line 25. Rebecca McNerney and Chris Epting represented the State. Tr. 12, lines 3 – 8. Mark McKinnon represented Appellant. Tr. 12, lines 9 – 11. Appellant was absent during the trial.

After a two-day trial, the jury found Appellant guilty. Tr. 188, lines 4 – 11. Judge Miller sentenced Appellant and sealed the sentence. Tr. 192. On March 31, 2014, Appellant was brought before the Honorable Lee Alford for sentencing. Tr. 4 – 5. Appellant was sentenced to twelve years. Tr. 4 – 5.

Appellant appealed his conviction and sentence. This brief follows.

ARGUMENT

The trial judge erred in failing to exclude testimony that crack pipes are not found on drug dealers because this evidence shifted the burden of proof to Appellant and invited an impermissible inference that Appellant was a drug dealer because the police did not find a crack pipe in Appellant's possession.

Relevant Facts

Officer Justin Spencer of the Rock Hill Police Department was the State's first witness. Tr. 51, line 6. Officer Spencer testified that on the evening of April 23, 2012, he initiated a traffic stop on a car traveling on Saluda Street with the front headlight out. Tr. 51, line 21 – Tr. 52, line 14. He turned on the emergency blue lights until the vehicle pulled to the side of the road. Tr. 52, line 14. He approached the driver's side of the vehicle and asked the driver, Frederica Archie, for her identification and vehicle information. Tr. 52, lines 14 – 15; Tr. 60, lines 14 - 15. Appellant was the passenger. Tr. 52, line 16.

Officer Spencer explained that when he asked Appellant for his identification, Appellant told him that his name was "Jeff Burris" and his date of birth was "March 6, 2000." Tr. 52, line 16 – Tr. 53, line 1. After realizing Appellant had given him an incorrect name and date of birth, Officer Spencer asked Appellant to get out of the car. Tr. 53, line 23 – Tr. 54, line 17. Officers William Morales and Bryson, who had arrived at the scene and walked to the passenger side of the car, patted Appellant down for weapons. Tr. 54, line 21 – Tr. 55, line 8. During the pat down, Appellant pushed away from the officers, slipped out of his shirt, and ran into the woods. Tr. 55, lines 8 – 20; Tr. 86, line 24. After a brief chase, Officers Spencer and Morales detained and searched Appellant. Tr. 59, lines 5 – 11. According to Officer Spencer, no weapons, drugs, or drug paraphernalia were found on Appellant's person. Tr. 59, line 12 – Tr. 60, line 1.

Officer Spencer went back to the scene of the traffic stop and searched the area. Tr. 61, lines 17 – 23. During a search of the front yard next to the traffic stop, he discovered a plastic baggie on the ground containing 3.5 grams crack cocaine. Tr. 61, lines 23 – 25; Tr. 111, lines 15 - 17. Officer Spencer went back to the police station and dropped the crack cocaine in the evidence locker. He watched the patrol car video of the traffic stop and typed a warrant for Appellant's arrest. Tr. 64, line 11 – Tr. 65, line 23.

Officer William Morales was the State's next witness. Tr. 89, lines 16 – 17. He testified that Archie, the driver, gave him consent to search the vehicle. Tr. 89, lines 14 – 15. He and Officer Spencer searched the passenger side where Appellant was sitting. Tr. 89, lines 15 – 16. They did not find any drug paraphernalia, crack pipes, or drugs. Tr. 70, lines 9 – 24. They did not find any weapons, cell phones, or cash. Tr. 94, line 21 – Tr. 95, line 7.

Commander Marvin Brown, supervisor of the York County Drug Enforcement Unit, was the State's expert witness. Tr. 113, line 5. Over Appellant's objection, as will be seen infra, Commander Brown testified that he had interviewed crack dealers and users "hundreds of times." Tr. 117, lines 2 – 9. He explained that there are different habits between a drug user and a drug dealer. Tr. 122, lines 3 – 11. He testified that "it's common for crack dealers not to have scales and baggies." Tr. 131, lines 1 – 3. He said a "crack user" will have crack pipes and lighters. Tr. 132, lines 5 – 11. A crack dealer normally will not have crack pipes. Tr. 133, lines 3 – 6.

On cross-examination, Commander Brown again offered that "users usually have crack pipes and dealers almost never have crack pipes." Tr. 135, lines 12 – 14.

Appellant's Objection to Commander Brown's Expert Testimony

The State offered Commander Brown as an expert in "how crack cocaine is packaged, sold, going price, the typical intoxicated dose and the different habits between the typical addict, the user, and the typical drug dealer." Tr. 117, lines 19 – 23. Defense counsel conducted voir dire, specifically about Commander Brown's experience investigating narcotics cases. Tr. 117, line 25 – Tr. 120, line 6. After counsel's objection, Judge Miller excused the jury and allowed the State to proffer Commander Brown's testimony. Tr. 120, line 7 – Tr. 123, line 21. The State argued that Commander Brown's testimony "would largely be limited to essentially whether you would expect to find a crack pipe on a dealer or a crack pipe on a user." Tr. 121, lines 20 – 22. Counsel argued that the testimony proffered "sounds like [an] attempt to shift the burden of proof on the defense to prove that the defendant is a drug addict, not a drug salesman." Tr. 123, lines 22 – 25.

Judge Miller admitted the proffered testimony that drug dealers do not carry crack pipes, reasoning that "it's just of a common every day experience" and that it is "sort of common sense too." Tr. 123, lines 20 – 21; Tr. 124, lines 3 – 4. He further ruled that "[it is] reasonable efforts to be drawn from the fact that...he didn't have a pipe." Tr. 124, lines 7 – 9.

Discussion

The trial judge erred in failing to exclude Commander Brown's testimony that crack pipes are not found on drug dealers because this evidence shifted the burden of proof from the State to Appellant on the issue of intent to distribute. This invited an impermissible inference that Appellant was a drug dealer because the police did not find a crack pipe in Appellant's possession.

It is elementary that all evidence must be relevant to be admissible. Rule 402, SCRE. Relevant evidence is evidence having the tendency to make some matter in issue more or less probable. Rule 401, SCRE; State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009); State v. Crocker, 366 S.C. 394, 408, 621 S.E.2d 890, 898 (Ct. App. 2005). To determine the prejudicial effect of offered evidence, an appellate court must look at the entire record. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007). The result will generally turn on the facts of each case. *Id.* Before an appellate court reverses a case based on erroneous admission or exclusion of evidence, it must find error in the lower court's ruling and prejudice resulting from that ruling. State v. White, 372 S.C. 364, 373, 642 S.E.2d 607, 611 (Ct. App. 2007).

Here, Appellant was indicted for possession with intent to distribute crack cocaine pursuant to S.C. Code Ann. § 44-53-375 (1976). R. * (Indictment). Under that provision, there is a permissive inference that if an individual is in possession of 1 gram or more of crack cocaine, he intends to distribute it. S.C. Code Ann. § 44-53-375 (B) (1976). Other than Commander Brown's testimony, the only evidence the State presented of Appellant's intent to distribute was the weight of the crack cocaine found, 3.5 grams, which was greater than the threshold amount. Each officer who testified admitted to not locating any other evidence that would indicate intent to distribute. There were no weapons or large amounts of cash found at the scene or on Appellant's person. There were **no baggies** or crack pipes discovered. Other than the actual weight of the drugs, there was no evidence located at the scene of the traffic stop that indicated Appellant intended to distribute the crack cocaine.

Commander Brown's testimony that a drug dealer would not possess crack pipes prejudiced Appellant because it invited an impermissible inference that because Appellant

did not have a crack pipe, he must be a drug dealer. Commander Brown's testimony further prejudiced Appellant because it shifted the State's burden of proof to Appellant. The admitted testimony shifted the State's burden of proving that Appellant was a drug dealer from the State to Appellant to prove that, although a crack pipe was not found in his possession, he is a drug user and not a drug dealer. Such a shift in burden would require Appellant to introduce evidence, in violation of due process. In addition, the fact that Commander Brown was the State's expert witness afforded more credibility to his testimony.

The trial judge erred in failing to exclude Commander Brown's testimony that crack dealers never have crack pipes because it invited a guilty verdict on more than one improper basis. There is more than a reasonable probability that this evidence improperly influenced the jury's verdict and, therefore, prejudiced Appellant.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests this Court to reverse his conviction and sentence and remand to the lower court for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Butler', written over a horizontal line.

Tiffany L. Butler
Appellate Defender

ATTORNEY FOR APPELLANT

This 25th day of November, 2014.