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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

HENRY NESBIT,

APPELLANT

APPELLATE CASE NO. 2014-001231

ANDERS BRIEF OF APPELLANT

ROBERT M. PACHAK
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

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in not instructing the jury on possession of cocaine as a lesser included offense of trafficking in cocaine?

STATEMENT OF THE CASE

Appellant was convicted of failure to stop for a blue light, possession with intent to distribute cocaine, and possession with intent to distribute methyldone after a jury trial held before the Honorable Deadra L. Jefferson on May 5 – 8, 2014, in Charleston County. Respective sentences of five (5) years, fifteen (15) years, and one (1) year were imposed. Melissa Gray, Esquire, and Michael Nelson, Esquire, were the trial attorneys. Lauren Mulkey, Esquire, and Stephanie Linder, Esquire, were the assistant solicitors.

This appeal follows.

ARGUMENT

The trial court erred in not instructing the jury on possession of cocaine as a lesser included offense of trafficking in cocaine.

Appellant was originally indicted for trafficking in cocaine. That indictment read as follows:

That in Charleston County, South Carolina, on or about June 16, 2013, the Defendant, HENRY OLIVER NESBIT JR, unlawfully and knowingly did sell, manufacture, cultivate, deliver, purchase, or bring into this State; or did provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, cultivate, deliver, purchase, or bring into this State; or did possess or attempt to possess a controlled substance or a controlled substance analogue, to wit: cocaine, in excess of 10 grams; in violation of 44-53-370 of the South Carolina Code of Laws (1976) as amended.

What happened in this case was that Deputy Chavez with Charleston County Sheriff's Office was assigned to off-duty patrol at the Isle of Palms Police Department to assist them with extra traffic enforcement and crowd control during the busy time of the beach season. He was parked in front of the Windjammer in the median. He observed appellant approaching the intersection of JC Long Boulevard at Ocean Boulevard and make a turn without using his turn signal. Deputy Chavez initiated a stop. (R. p. 91, line 17 – p. 93, line 19).

Appellant was driving a brown Harley Davidson motorcycle. When the blue lights were activated, appellant started to slow down and make a right-hand turn onto a side street and then took off at a high rate of speed. (R. p. 97, lines 1 – 15). Deputy Chavez pursued appellant and during the chase, appellant got in a wreck. Chavez arrested appellant for failing to stop and he placed him in handcuffs. He then searched him and found a large amount of cash and several bags of narcotics. (R. p. 100, line 21 –

p. 101, line 5). One bag of cocaine contained 1.72 grams of cocaine. The other bag contained 19.53 grams of cocaine. (R. p. 196, lines 3 – 7).

The trial judge agreed to charge the law of possession with intent to distribute cocaine as a lesser included offense of trafficking in cocaine. (R. p. 212, lines 3 – 4). No mention, however, was made of charging on possession of cocaine as a lesser included offense of trafficking in cocaine. The trial court committed error in failing to charge on possession of cocaine.

Article 5, § 21 of the South Carolina Constitution mandates that judges “shall declare the law.” An indictment will sustain a conviction for a lesser offense if the lesser offense is included within the greater charged offense. State v. Gosnell, 341 S.C. 627, 535 S.E.2d 453 (Ct.App. 2000); State v. Fennell, 263 S.C. 216, 209 S.E.2d 433 (1974). Because possession of cocaine is a lesser included offense of possession with intent to distribute cocaine and possession with intent to distribute cocaine is a lesser included offense of trafficking in cocaine, Matthews v. State, 300 S.C. 238, 387 S.E.2d 258 (1990), possession of cocaine should be a lesser included offense of trafficking in cocaine.

CONCLUSION

Because the trial court failed to charge on the lesser included offense of possession of cocaine, appellant's conviction should be reversed.

Respectfully submitted,

Robert M. Pachak

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of December, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Deadra L. Jefferson, Circuit Court Judge

THE STATE,

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V.

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APPELLATE CASE NO. 2014-001231

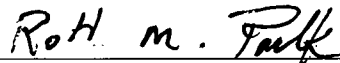
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Henry Nesbit 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 Deadra L. Jefferson, which was held on May 8, 2014, 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 Henry Nesbit.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of December, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

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V.

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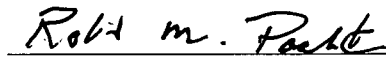
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s);
- (2) Entire Trial Transcript (May 5 – 7, 2014)
- (3) Entire Trial Transcript (May 8, 2014)

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

December 9, 2014



Robert M. Pachak
Appellate Defender

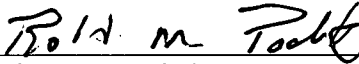
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

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."

December 9, 2014



Robert M. Pachak
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
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Columbia, South Carolina 29211-1589

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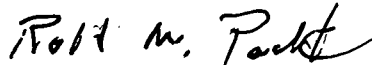
V.

HENRY NESBIT,

APPELLANT

CERTIFICATE OF SERVICE

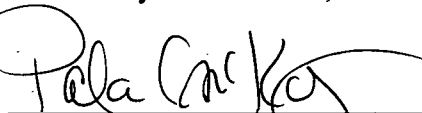
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Henry Nesbit, #292341 at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 9th day of December, 2014.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

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



(L.S.)

Notary Public for South Carolina
My Commission Expires: July 24, 2022