

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Letitia H. Verdin, Circuit Court Judge

Case No. 2013-001562

The State of South Carolina, Respondent,

v.

Antonio Emerson Tate, Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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CONSTITUTIONAL PROVISIONS

S.C. Const. Art. I § 11 4

STATEMENT OF ISSUES ON APPEAL

- I. Whether the State failed to provide sufficient evidence that Tate engaged in a conspiracy to sell methamphetamine?
- II. Whether the trial court erred in prohibiting trial counsel from cross-examining co-defendants about their potential sentences in violation of the Confrontation Clause of the United States Constitution?
- III. Whether the trial court erred by permitting testimony by an investigator for the State who made improper legal conclusions?

ARGUMENT

- I. Insufficient Evidence Was Presented To Show Appellant Was a Member of Any Conspiracy.

This appeal originally raised three issues, which issues are restated above for the Court's convenience. Despite that Appellant was convicted of conspiracy to traffic methamphetamines (Tr. p. 737), and despite the State's contention in its heading IA that "the issue of whether there was a lack of evidence of conspiracy is not properly presented to this court as error by the trial court," (State's Brief at p. 19) (emphasis added), the State's brief then continues by arguing that sufficient evidence existed on the charge of trafficking methamphetamine.

The charges of trafficking and conspiracy to traffic are not identical. And, contrary to the State's position, it is not the weight of the evidence but the lack of sufficient evidence of any conspiracy – meaning any agreement or mutual understanding among the alleged participants -- that was challenged by Appellant. Just as in State v. Dudley, 354 S.C. 514, 581 S.E.2d 171 (Ct. App. 2003) (*en banc*), affirmed as modified by 364 S.C. 578, 614 S.E.2d 623

(2005), the State may have introduced evidence of drug sales and potential trafficking of those drugs, no evidence of any agreement or mutual understanding exists.

Indeed, the State's brief indicates only the following:

In the light most favorable to the State, sufficient evidence was presented to submit the case to the jury that Appellant committed the crime of Trafficking Methamphetamine and the trial court did not commit error. The jury was presented sufficient evidence that Appellant was repeatedly selling methamphetamine in large amounts, at the same locations in the Atlanta, Georgia area to individuals known to him to reside in South Carolina.

(State's Brief at p. 21). Though admittedly the State's brief addresses some of the law on conspiracy, and may simply be using a shorthand term based on the fact that trafficking and conspiracy to traffic are set forth in the same statute, it continues to be unclear what crime the State actually contends was supported by the evidence against Appellant. The crux of the State's argument is that sales of more than normal users amounts are enough not only for a trafficking charge, but for a conspiracy charge as well. This position ignores the required agreement or mutual understanding required to show a conspiracy.

No overt acts must be shown to prove a conspiracy, "the crime consists of the agreement or mutual understanding." State v. Wilson, 315 S.C. 289, 433 S.E.2d 864 (1993). For that reason, a mere buyer-seller relationship, even of large quantities, is insufficient to show the essential element of the conspiracy. See, e.g., Direct Sales Co. v. United States, 319 U.S. 703, 712 (1943); United States v. Parker, 554 F.3d 230, 235-36 (2d Cir.

2009); United States v. Thomas, 150 F.3d 743, 745 (7th Cir. 1998). South Carolina courts view conspiracy similarly to other courts across the country.

In reviewing a conspiracy conviction, the court focuses “on the sufficiency of the evidence of an *agreement* between the alleged conspirators, and not, as the State would have us do, on the alleged common *object*, that is, the importation and distribution of [drugs] in a defined geographic area.” State v. Gunn, 437 S.E.2d 75, 80 (S.C. 1993) (emphasis in original). Indeed, what must be shown is the intent that the co-conspirators “act *together* for their *shared mutual benefit* within the scope of the conspiracy charged.” Id. at 80-81 (quoting United States v. Evans, 970 F.2d 663 (10th Cir. 1992) (emphasis in original)).

The testimony generally went something like the following: “Now did Ant know that you lived in South Carolina? A Yes. Q Did he know that you were selling the meth that you bought from him? A I would assume.” (Tr. p. 641.) This same witness said he never saw Appellant in South Carolina. (Tr. p. 641.) Indeed on at least one occasion, defense counsel’s objection to such speculation was sustained, (Tr. pp. 406-07.) And that is all it was, speculation. The most the testimony shows is that Appellant may have had some knowledge that some of these other individuals had “customers” in South Carolina. (Tr. p. 467.) These were not Appellant’s customers and he did not benefit from any transactions with them.

Those witnesses who did claim to have known Appellant to come to South Carolina, testified only to a handful of small drug sales, if any, nothing that

would legally rise to the level of trafficking such that these isolated incidents, if there was even more than one, which is unclear, could amount to a conspiracy, or a conspiracy to traffic. (See Tr. pp. 405-06; 539; 106; 147-48.) And, that testimony suggests Appellant may once have come into the State. (Id.) Coming into the State does not demonstrate or even give rise to an inference of a conspiracy. A mere association with members of a conspiracy does not make one guilty of conspiracy. See United States v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981).

II. The Trial Court's Exercise of Extraterritorial Jurisdiction In This Matter Was Improper.

“Without question South Carolina has jurisdiction to prosecute crimes that occur within its borders. Dudley, 354 S.C. at 524 (citing S.C. Const. art. I, § 11). What is less clear is whether South Carolina had extraterritorial jurisdiction to prosecute Appellant for alleged conduct that occurred outside this State. This issue of territorial jurisdiction was not raised by Appellant's prior counsel – prior trial or appellate counsel – but it may now be raised and Appellant now does raise this issue.

“Although territorial jurisdiction is not a component of subject matter jurisdiction, we hold that it is a fundamental issue that may be raised by a party or by a court at any point in the proceeding.” Dudley, 364 S.C. at 582. “The exercise of extraterritorial jurisdiction implicates the state's sovereignty, a question so elemental that we hold it cannot be waived by conduct or consent.” Id.

“[T]he State’s extraterritorial jurisdiction extends only to those who have performed acts ‘intended to produce and producing detrimental effects within’ our borders.” Id. (citing Strassheim v. Daily, 221 U.S. 280 (1911)). No evidence exists here that Appellant intended any detrimental effect in South Carolina when he allegedly sold methamphetamines to individuals in Georgia. That he may have known those individuals lived in South Carolina does not prove an intent to direct his conduct and its effects into that State. Mere knowledge that a crime may occur in this State is insufficient, there must be evidence that the alleged perpetrator specifically intended to aid and abet a crime in this State. Dudley, 354 S.C. at 535 (citing People v. Blume, 505 N.W.2d 843, 852 (Mich. 1993)).

No witness testified that Appellant intended to benefit from any activity in the State of South Carolina or intended to produce any impact in this State. Indeed, no witness even testified to discussing with Appellant the fact that sales¹ would occur in that State. No evidence exists as to Appellant’s intent, such that extraterritorial jurisdiction in this instance does not exist.

III. The State’s Own Description of What Happened At Trial Highlights the Confrontation Clause Violation Regarding the Inability Effectively to Cross-Examine Witnesses About Their Plea Agreements and Sentences.

¹ The limited testimony alleging that Appellant may have sold a small amount of methamphetamines when he visited South Carolina is insufficient to establish jurisdiction on the conspiracy to traffic charge where that in-state conduct could not rise to the level of trafficking or conspiring to traffic. Had Appellant been charged with some lesser drug offense that may have properly been before the court in this State. But extraterritorial jurisdiction for one crime cannot automatically provide jurisdiction over all other crimes by a particular individual.

Defense counsel sought to cross-examine State witnesses on the plea agreements they reached with the State and the mandatory minimums these witnesses were avoiding by entering into this arrangement. The State and the trial judge were concerned that such questioning could suggest the mandatory minimum faced by Appellant. (State's Brief p. 22.) Instead, the defense could only inquire as to the fact that these witnesses were originally charged with the same offense as Appellant, that they plead to a lesser offense, and to question them about the possible sentencing range of the lesser offense. (State's Brief pp. 22-23.)

The State suggests in its brief that this was intended to address the concerns in State v. Gracely, 399 S.C. 363, 731 S.E.2d 880 (2012). This position misreads Gracely. It is precisely the minimum mandatory sentences the witnesses avoided by their plea arrangements that the Court in Gracely found necessary to comport with the defendant's Sixth Amendment Right to confront the witnesses against him. That the jury could "put two and two together" that the witness "could have gotten more" for the greater offense is insufficient. (State's Brief p. 23.)

It is not the fact that each of the witnesses would or could have faced a longer sentence that the jury needed to hear in order to assess bias, but that they could have faced "significantly longer" sentences had they not cooperated and testified against Appellant. Gracely, 399 S.C. at 373. As the Court in Gracely explained: "To the extent our directive in Brown[303 S.C. 169, 399 S.E.2d 593 (1991)] was unclear . . . The fact that a cooperating

witness avoided a *mandatory minimum* sentence is critical information that a defendant must be allowed to present to the jury.” Gracely, 399 S.C. 374-75.

The bulk of the State’s “evidence” against Appellant was the testimony of these various individuals who had all entered into plea agreements for reduced sentences. And, just as in Gracely, that one witness did testify as to a possible sentence of 30-years does not undo the failure of the defense to inquire not into the possible sentence but into the mandatory minimum sentence. (See State’s Brief p. 23). See Gracely, 399 S.C. at 375 n.4 (“It is important to note that when defense counsel asked Posey whether trafficking four hundred grams or more of methamphetamine carried a minimum of twenty-five years’ and up to thirty years’ imprisonment he answered ‘true.’ It is of no moment that at some point during the proceedings one of the witnesses confirmed the existence of a mandatory minimum sentence. The fact remains that Appellant was unable to fully develop this information through the cross-examination of Posey”).

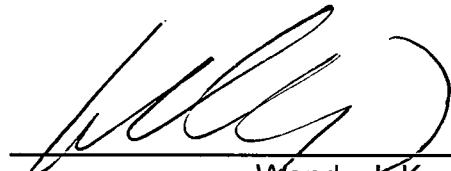
In this case, the mandatory minimum sentences avoided by most of the State’s witnesses in exchange for cooperating in the trial of Appellant was critical and necessary as an area for cross-examination in order for the jury to be able to get a full picture of these witnesses’ potential bias. The Sixth Amendment is not satisfied by merely relying on the assumption that the jury should be able to put two and two together.

Where the only significant evidence against Appellant came from these witnesses this error cannot be harmless and Appellant is entitled to a new trial.

CONCLUSION

For the foregoing reasons and the reasons set forth in Appellant's Initial Brief, Appellant Antonio Emerson Tate respectfully requests this Honorable Court reverse his conviction and order either dismissal of the charge on which he was convicted or a new trial.

Respectfully Submitted,



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JAN 22 2015

SC Court of Appeals

January 20, 2015

Via U.S. Mail

The Honorable Jenny Abbott Kitchings
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Re: The State of South Carolina v. Antonio Emerson Tate
Appellate Case No. 2013-001562

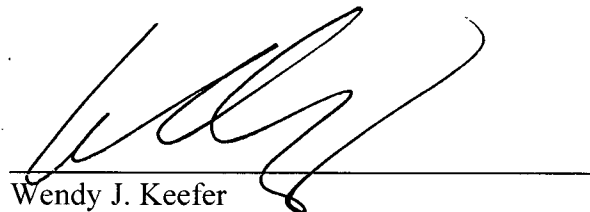
Dear Clerk:

Enclosed for filing please find an original and one copy of the following documents in the above-referenced case:

- (1) Appellant's Initial Reply Brief; and
- (2) Proof of Service of the above.

I would greatly appreciate your returning filed copies of these documents to me in the enclosed, stamped return envelope. Should you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Wendy J. Keefe", is written over a horizontal line.

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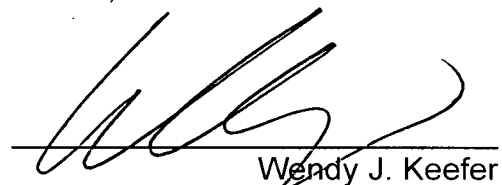
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PROOF OF SERVICE

I certify that I have served that Appellant's Initial Reply Brief on Respondent, by depositing a copy of it in the United States Mail, postage prepaid, on January 21, 2015, addressed to attorneys of record, Salley W. Elliott, Megan B. Burchstead, and Alan McCrory Wilson at the S.C. Attorney General's Office, Post Office Box 11549, Columbia, South Carolina 29211:


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