

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

Appeal From Charleston County  
Judge R. Markley Dennis, Circuit Court Judge

Christopher W. Seabrook

Appellant

v.

The State of South Carolina

Respondent

Appellate Case No 2015-000551

Initial Brief

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MAR 31 2015

SC Court of Appeals

State of South Carolina

South Carolina Court of Appeals

State of South Carolina,  
Respondent

Appellate Case No 2015-000551

VS.

Christopher William Seabrook,  
Appellant.

### Initial Explanation

Indictment No. 2013-GS-1005008 Possession of other controlled substance in  
Schedule I to V - 1<sup>st</sup> offense

Appellant was indicted under violation of S.C. Code of laws Ann. Section 44-53-370 for being in possession of less than 28 grams of marijuana. Appellant pled guilty to 3<sup>rd</sup> offense under subsection (d)(3) and was sentenced to nine years. Appellant was sentenced under subsection 44-53-370(d)(3) which stipulates guidelines for cocaine, not marijuana. Under section 44-53-370(d)(4) "A person who violates this subsection with respects to twenty-eight grams or one ounce or less of marijuana or ten grams or less of hashish is guilty of a misdemeanor, and upon conviction.... For a second or subsequent offense, the offender is guilty of a misdemeanor and, upon conviction, must be imprisoned not more than one year or fined not less than than two hundred dollars nor more than one thousand dollars, or both."

Argument/Citations:

Court lacked subject matter jurisdiction to accept appellant's guilty plea for possession of controlled substance under subsection (d)(3) for cocaine. Appellant was not indicted for cocaine and possession of cocaine is not a lesser included offense of possession of marijuana (subsection (d)(4)).

State v. Jones, 342 S.C. 248, 251, 536 S.E.2d 396, 397 (Ct. App. 2000)

"A criminal defendant is entitled to be tried only on indicted offenses"

State v. Cody, 180 S.C. 417, 423, 186 S.E. 165, 167 (1936)

"It is a rule of universal observance in administering the criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment."

Carter v. State, 329 S.C. 355 495 S.E.2d 773 (1998)

"A circuit Court has subject matter jurisdiction only if: (1) there has been an indictment which sufficiently states the offense; (2) there has been a waiver of indictment; or (3) the offense is a lesser-included offense of the crime charged in the indictment."

State v. Roof 298 S.C. 351 380 S.E.2d 828 (1989)

"defendant cannot be convicted of crime for which he is not indicted if it is not lesser included offense to that charge in indictment."

State v. McFadden 342 S.C. 629, 539 S.E.2d 389 (2000)

"The trial court lacks subject matter jurisdiction to convict the defendant of a crime that is not a lesser included of the offense charged in the indictment"

Browning v. State, 320 S.C. 366, 465 S.E.2d. 358 (1995)

Matters of subject matter jurisdiction may be raised at any time

Indictment No. 2013-GS-1005010 Distribution Marijuana 1<sup>st</sup> offense

Appellant argues that Circuit Court lacked subject matter jurisdiction to hear plea on distribution of Marijuana 2<sup>nd</sup> offense where indictment only charged 1<sup>st</sup> offense. Appellant argues that his plea to 2<sup>nd</sup> offense deprived him of being on notice. Also increased potential punishment from 5 to 10 years. Furthermore, distribution of Marijuana 2<sup>nd</sup> has the added element of prior conviction, an element that would not have to be proven under first offense conviction, and not an element mentioned in indictments body or caption.

Citations

Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998)

"An indictment survives legal scrutiny if the offense is stated with sufficient certainty and particularity to enable the court to know what judgement to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon"

State v. Tabory 262 S.C. 136, 202 S.E.2d. 854

an indictment passes legal muster if it "charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the statute be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided

State v. McIntire 221 S.C. 504, 71 S.E.2d 410

true test of sufficiency of indictment is whether it contains necessary elements of offense intended to be charged and sufficiently apprises defendant of what he must be prepared to meet

State v. Perry 87 S.C. 535, 70 S.E. 304

An "offense should be so plainly stated in the indictment as to enable the court looking alone to the indictment and the verdict to impose the sentence prescribed by law."

Indictment No. 2014-GS-10-4190 Possession >1 gram Cocaine base

Appellant argues that Circuit Court lacked subject matter jurisdiction to hear guilty plea on possession of Cocaine base 3<sup>rd</sup> offense where indictment only charged 1<sup>st</sup> offense. Appellant argues that the charge of 3<sup>rd</sup> offense deprived him of being on notice of being charged with a felony where indicted charge (possession of Cocaine base 1<sup>st</sup> offense) is a misdemeanor and 3<sup>rd</sup> offense is a felony. Also 3<sup>rd</sup> offense changes the nature of offense as potential punishment increase from 3 to 10 years. Furthermore, Possession of Cocaine base

3<sup>rd</sup> offense has the added element of two prior convictions; elements that are not mentioned on indictment's caption or body and would have to be proven to support a 3<sup>rd</sup> offense conviction but not a 1<sup>st</sup> offense conviction.

Citations

Carter v. State 329 S.C. 355; 495 S.E.2d 773

"An indictment survives legal scrutiny if the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon."

State v. Tabory 262 S.C. 136, 202 S.E.2d 854

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State v. McIntire 221 S.C. 504, 71 S.E.2d 410

true test of sufficiency of indictment is whether it contains necessary elements of offense intended to be charged and sufficiently apprises defendant of what he must prepare to meet

State v. Perry 87 S.C. 535 70 S.E. 304

An "offense should be so plainly stated in the indictment as to enable the court looking alone to the indictment and the verdict to impose the sentence prescribed by law"

S.C. Code Ann. Section 17-19-100 (1996)

"an indictment may be amended at trial only if the amendment does not change the nature of offense charged."

Note: Amendment changed charge from a misdemeanor to felony and increased potential punishment increase from 3 to 10 years

Indictment No. 2014-GS-10-4978 Assault and battery 1<sup>st</sup> degree

Appellant argues that Circuit Court lacked subject matter jurisdiction to hear his plea on Assault and battery 1<sup>st</sup> degree as a lesser included offense of Criminal Sexual Conduct first degree. Appellant argues that Assault and battery first degree is not a lesser included offense of Criminal Sexual Conduct first degree.

State v. Cody, 180 S.C. 419, 423; 186 S.E. 165, 167

"It is a rule of universal observance in administering the criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment

Carter v. State

A Circuit court has subject matter jurisdiction only if: (1) there has been an indictment which sufficiently states the offense; (2) there has been a waiver of indictment; or (3) the offense is a lesser included offense of the crime charged in the indictment.

State v. Roof 298 S.C. 351; 380 S.E.2d 828

"defendant cannot be convicted of a crime for which he is not indicted if it is not lesser included offense to that charged in indictment."

State v. McFadden 342 S.C. 629; 539 S.E.2d 389

"The trial court lacks subject matter jurisdiction to convict the defendant of a crime that is not a lesser included offense charged in the indictment."

McFadden at 632; 389 id.

"The test for determining if a crime is a lesser included offense is whether the greater of the two offenses includes all the elements of the lesser offense"

Hope v. State, 328 S.C. 78, 81; 492 S.E.2d. 76, 78

"If the lesser offense includes an element which is not included in the greater offense, then the lesser offense is not included in the greater offense"

Knox v. State 340 S.C. 81 530 S.E.2d 887

"If, under any circumstances, a person can commit the greater offense without being guilty of the purported lesser offense, then the latter is not a lesser-included offense."

South Carolina Code Ann. Section 16-3-652 provides:

(1) A person is guilty of criminal sexual conduct in the first degree if the actor engages in sexual battery with the victim and if any one or more of the following circumstances are proven:

- (A) The actor uses aggravated force to accomplish sexual battery.
- (b) The victim submits to sexual battery by the actor under circumstances where the victim is also the victim of forcible confinement, kidnapping, robbery, extortion, burglary, housebreaking or any other similar offense or act.

South Carolina Code Ann. section 16-3-651(c) defines "Aggravated force" as:

the actor uses physical force or physical violence of a high and aggravated nature to overcome the victim or includes the threat of the use of a deadly weapon.

State v. White 361 S.C. 407; 605 S.E.2d 540 193 states 'Assault and battery of a high and aggravated nature (ABHAN) is an unlawful act of violent injury accompanied by circumstances of aggravation. "Circumstances of aggravation" is an element of ABHAN. Circumstances of aggravation include the use of a deadly weapon, the intent to commit a felony, infliction of serious bodily injury, great disparity in the ages or physical conditions of the parties, a difference in gender, the purposeful infliction of shame and disgrace, taking indecent liberties or familiarities with a female, and resistance to lawful authority

South Carolina Code Ann 16-3-600 provides:

A person is guilty of assault and battery first degree if the person unlawfully:

- (A) Injures another person, and the act
  - (I) involves nonconsensual touching of the private parts of a person, either under or above the clothing, with lewd and lascivious intent; or
  - (II) occurred during the commission of a robbery, burglary, kidnapping, or theft; or
- (b) offers or attempts to injure another person with the present ability to do so, and the act:
  - (I) is accomplished by means likely to produce death or great bodily injury; or
  - (II) occurred during the commission of a robbery, burglary, kidnapping or theft.

Assault and Battery first degree is a lesser included offense of Assault and battery of a high and aggravated nature

State v. Primus 349 S.C. 576, 581; 564 S.E.2d 103, 106 (2002).

ABHAN is a lesser included offense of first degree C.S.C.

Though 1<sup>st</sup> degree Assault and battery is a lesser included offense of Assault and battery of a high and aggravated nature and Assault and battery of a high and aggravated nature is a lesser included offense of Criminal Sexual Conduct first degree, does not automatically make Assault and battery first degree a lesser included offense of Criminal Sexual Conduct first degree.

"Even though two offenses failed the traditional elements test, the South Carolina Supreme Court held that, in order to have a uniform approach to Criminal Sexual Conduct and assault and battery of a high and aggravated nature offenses, Assault and battery of a high and aggravated nature was a lesser-included offense of first-degree Criminal Sexual Conduct." State v. Primus 349 S.C. 576; 564 S.E.2d. 103, (2002 S.C.)

So even though ABHAN is a lesser-included offense of C.S.C., it is because of practical reasons, not because it passed the 'elements' test set by State v. McFadden or State v. Hope. For this reason all 'lesser included offenses' of ABHAN, must be tested independantly of ABHAN to see if they are lesser included offenses of CSC first degree.

Under traditional elements test, Assault and battery first contains the elements of 'Injury', also 'lewd and lascivious intent', two elements that do not have to be proven in Criminal Sexual Conduct 1<sup>st</sup> degree.

1) Injury: To be convicted of Assault and battery first degree it must be proven that "The person unlawfully injures another person" or "offers or attempts to injure another person with the present ability to do so, and the act is accomplished by means likely to produce death or great bodily injury." (emphasis added) C.S.C. 1<sup>st</sup> degree requires 'Sexual battery' and 'aggravated force'. Aggravated force does not mean injury. The threat of the use of a deadly weapon would be aggravated force under C.S.C. 1<sup>st</sup> degree (16-3-651(c)), which causes no injury. In fact, many C.S.C. cases have no injury, which is the reason for S.C. Code Ann. Section 16-3-675 which

states "The testimony of the victim need not be corroborated in prosecutions under Sections 16-3-652 through 16-3-658

(2) Lewd and lascivious intent -

Criminal Sexual Conduct first degree does not require proof of intent as Assault and battery first degree does

42 C.J.S. Indictments and Informations Section 218 states: "A lesser included offense cannot have a mental state greater than or different from that which is required for the charged offense, nor can it have the same or more serious injury or risk of injury as compared to the charged offense.

(Note also that Assault and battery first degree has a risk of "serious bodily injury" or "most likely to produce death".)

All Arguments in Appeal are based on the Circuit Courts Subject Matter Jurisdiction to hear appellants guilty plea. Though none of the matters were raised during trial, "Subject matter jurisdiction may be raised at any time, including for the first time on appeal"

Carter v. State 329 S.C. 355; 495 S.E.2d. 773 (1998) "Lack of Subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by this Court." Anderson v. Anderson 299 S.C. 110, 115; 382 S.E.2d 899, 900 (1989). Furthermore, "the acts of a court with respect to a matter as to which it has no jurisdiction are void State v. Funderburk, 259 S.C. 256, 261; 191 S.E.2d 520, 522.

Record on Appeal

Christopher W Seabrook 291929

4344 Broad River Road

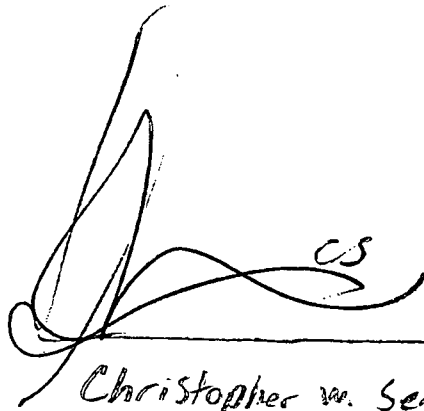
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May 30, 2015

A handwritten signature in black ink, consisting of a large, stylized initial 'C' followed by 'S' and 'B' in a cursive script. The signature is written over a horizontal line.

Christopher W. Senbrook

Pro Se

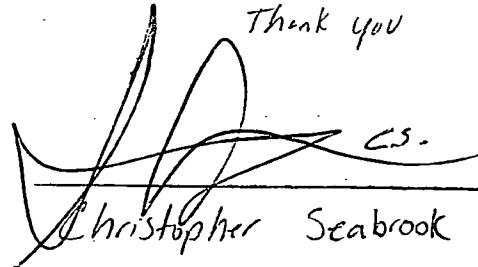
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RE: Appeal

Please find enclosed a copy of my initial brief on my Appeal, Case Number 2015-000551. Due to my status as an inmate in the South Carolina Department of Corrections, Reception and Evaluation stage of intake, I was unable to comply with all of the rules of 267 of SCACR (Example I don't have access to ink, typewriters or staples). Otherwise I have attempted to comply with the rules. Please file enclosed document and send me a copy for my records

Thank you

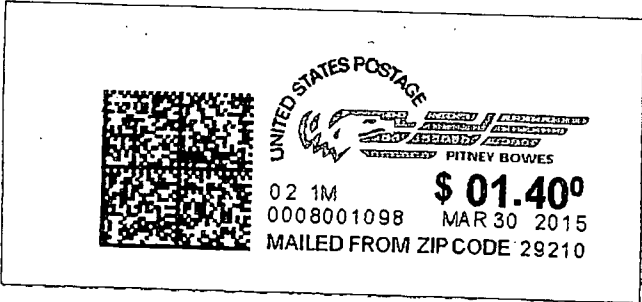
 CS.  
Christopher Seabrook

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