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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

TIPHANI MARIE PARKHURST,

APPELLANT

APPELLATE CASE NO. 2013-000909

Appeal from Spartanburg County

R. Lawton McIntosh, Circuit Court Judge

Opinion No. 2015-UP-446

PETITION FOR REHEARING

On September 9, 2015, this Court affirmed Appellant's conviction for trafficking in methamphetamine in State v. Parkhurst, 2015-UP-446 (S.C. Ct. App. Filed September 9, 2015). Pursuant to Rule 221(a), SCACR, Appellant respectfully petitions this Court for rehearing in light of the significant points overlooked and misapprehended by this Court in rendering its opinion.

First, this Court incorrectly found the trial court properly denied Appellant's motion to dismiss the indictment based on a plain reading of S.C. Code Ann. § 44-53-375(C). Second, this Court also incorrectly held the trial court properly denied Appellant's motion for a directed verdict

where there was no direct evidence or substantial circumstantial evidence that Appellant knowingly engaged in trafficking methamphetamine. In so doing, this Court overlooked several significant points.

Prior to the jury being sworn, defense counsel for both Appellant and her co-defendant, Charles Cain, moved to dismiss the respective indictments for trafficking in methamphetamine, ten grams or more, but less than twenty-eight grams, on the grounds that neither could be convicted of the charge under the plain meaning of the S.C. Code Ann. § 44-53-375(C). R. 11, ll. 9-23; R. 21, ll. 7-8; R. 20, ll. 14-21. The court acknowledged "that the state intends to have a fairly novel approach to this case in that they're gonna establish trafficking through extrapolation from the aggregate components to say that a yield would have been more than the trafficking amount." R. 8, ll. 1-4. The court thus required the state to identify the plain language of § 44-53-375 that "allows the state to pursue this case in the method that it intends to." R. 13, ll. 6-8.

The state maintained it was relying on the language of subsection (C) of the statute requiring an "attempt" to manufacture ten grams or more of methamphetamine. The solicitor said, "Judge, in this case we would argue that they are attempting to manufactur[e] methamphetamine" with "a theoretical yield of more than ten grams . . ." The solicitor concluded, "Their attempt to manufacture falls directly within the statute, and if you take the statute based on the plain meaning, and apply that to the facts of this case, I believe that a charge of trafficking would be appropriate." R. 13, l. 9 – 14, l. 1.

Defense counsel for Cain argued that the plain meaning of "attempt" in this context means one has the "components" to manufacture methamphetamine, but has not actually manufactured any. He stated, "[G]iven the Sudafed they have, given the other components, they could have manufactured this much. That would be attempt." Defense counsel argued that is not

what the state found in this case. He stated, "This is a theoretical yield saying we have the empty blister packs, we have these other things in the trash that, if you look at all that, they could have manufactured this much." R. 15, l. 22 – 16, l. 6. In essence, defense counsel maintained that because the state only found discarded items in the trash, specifically empty blister packs, and did not actually find any pseudoephedrine or methamphetamine, under the plain meaning of the statute Appellant could not be convicted of trafficking in methamphetamine, ten grams or more, but less than twenty-eight grams, pursuant to § 44-53-375(C).

The trial judge repeatedly took the issue under advisement, but ultimately ruled that the state could proceed with its case and refused to dismiss the indictments based on the plain language of the statute and the "persuasive authority that was handed in by Mr. Holliday [the solicitor]." R. 20, ll. 7-8; R. 24, ll. 19-25; R. 125, ll. 4-14. The court stated "it's not necessarily a question of law as much as it is a question of fact for the jury if they believe your theoretical yield theory yields more than ten, less than twenty-eight grams, then I guess they can find him guilty of trafficking." R. 25, ll. 11-16. Subject to defense counsels' objection, the parties agreed to send a special interrogatory to the jury to determine whether the state proved beyond a reasonable doubt that the theoretical yield was ten grams or more, but less than twenty-eight grams. R. 125, l. 15 – 126, l. 11; R. 162, ll. 10-25.

The circuit court erred in denying Appellant's motion to dismiss because under the plain meaning of § 44-53-375(C), Appellant could not be convicted of trafficking in methamphetamine under the facts of the case.

The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. Bryant v. State, 384 S.C. 525, 683 S.E.2d 280 (2009). As such, a court must abide by the plain meaning of the words of a statute. State v. Jacobs, 393 S.C. 584, 713 S.E.2d 621 (2011).

Moreover, penal statutes must be strictly construed against the state and in favor of the defendant. Hair v. State, 305 S.C. 77, 78, 406 S.E.2d 332, 334 (1991); State v. Cutler, 274 S.C. 376, 378, 264 S.E.2d 420, 420-421 (1980); State v. Muldrow, 348 S.C. 264, 559 S.E.2d 847 (2002).

When § 44-53-375(C) is strictly construed against the state it does not apply to this case. The narrow inquiry is whether the evidence constituted an "attempt" to "manufacture" ten grams or more, but less than twenty-eight grams of methamphetamine under the statute. Manufacture is defined in S.C. Code § 44-53-110 as "the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container . . ." "Attempt" is not defined.

Under the plain language of the statute the state cannot prove an attempt to produce, prepare, propagate, compound, convert or process **ten grams or more, but less than twenty-eight grams** of methamphetamine by means of chemical synthesis without first proving possession of either pseudoephedrine, the main component, or methamphetamine, the end product. Because neither pseudoephedrine nor methamphetamine were found by law enforcement in this case, the state should not have been permitted to proceed with the trafficking charge. Instead, Appellant's indictment for trafficking in methamphetamine should have been dismissed by the trial judge.

The state at trial relied on Iowa v. Knapp, 778 N.W.2d 218 (Iowa App. 2009), an unpublished disposition that is easily distinguishable from the case at hand. In Knapp, the defendant was tried for conspiracy to manufacture more than five grams of methamphetamine among other charges after ***a bag containing 16.8 grams of pure pseudoephedrine***, which has a

theoretical yield of 15.4 grams of pure methamphetamine, was ***found on his person***. Knapp argued on appeal that the trial court erred in denying his motion for a judgment of acquittal. However, the Court of Appeals of Iowa held "the State can rely on evidence of the potential yield to prove the amount of methamphetamine conspired to be produced." Because the amount of crushed pseudoephedrine found on Knapp's person had the potential to yield more than five grams of methamphetamine, the court held there was "sufficient evidence for a factfinder to infer a conspiracy to manufacture more than five grams of methamphetamine." Id. Here, there was no pseudoephedrine found in the house or on Appellant's person and Appellant was charged with trafficking not "conspiracy to manufacture."

While the record is unclear, it appears the state also presented and relied on the case of U.S. v. Spencer, 439 F.3d 905 (8th Cir. 2006).[1] See R. 114, ll. 21-25. Spencer is also easily distinguishable from the facts of this case. In Spencer, law enforcement ***seized bottles of pseudoephedrine*** from Spencer's home that "could have produced a theoretical yield of 79.1 grams and a practical yield of forty-two to sixty-four grams of actual (pure) methamphetamine" and the jury found him guilty of "attempting to manufacture five grams or more of actual (pure) methamphetamine" among other drug related offenses. Id. at 911-912. The Eight Circuit held that there was sufficient evidence to support Spencer's conviction because "although Spencer may not have possessed a fully working methamphetamine lab, Spencer had ordered, received, and ***possessed chemicals*** and equipment necessary to manufacture methamphetamine." Id. at 916.

In both Knapp and Spencer, law enforcement actually seized a quantity of pseudoephedrine. Because pseudoephedrine is the main component in the manufacture of methamphetamine a jury

[1] The case is cited on the record as "United States of America versus Joseph Nelson." As best as can be ascertained by undersigned counsel, the case referred to is U.S. v. Joseph Nelson Spencer, 439 F.3d 905 (8th Cir. 2006).

could assume in both those cases that the defendant intended to attempt to manufacture methamphetamine or assist another in attempting to manufacture methamphetamine. Moreover, the jury could find based on the amount of pseudoephedrine seized that the defendants in both cases intended to manufacture a specific amount of methamphetamine as required under the respective statutes in both cases.

However, in Appellant's case, law enforcement found ***no*** methamphetamine or pseudoephedrine in the Spartanburg home. In fact, **there was no evidence that 19.2 grams of pseudoephedrine was ever in the Spartanburg home or was ever in Appellant's possession**. R. 91, ll. 7-9. Furthermore, there was no testimony regarding how long the empty blister packs had been in the residence or how they got there. Without an actual quantity of the main component to manufacture methamphetamine that could be used to establish a theoretical yield and without any actual methamphetamine, Appellant could not be prosecuted pursuant to § 44-53-375(C) and thus her indictment for trafficking in methamphetamine should have been dismissed and her motion to dismiss granted. Therefore, this Court erred by holding the circuit court properly denied Appellant's motion to dismiss the indictment based on a plain reading of § 44-53-375(C).

Moreover, this Court erred by affirming the trial court's denial of Appellant's motion for a directed verdict where there was no direct evidence or substantial circumstantial evidence that Appellant knowingly engaged in manufacturing or trafficking methamphetamine.

At the conclusion of the state's case, Appellant moved for a directed verdict on the grounds that the state failed to provide sufficient evidence of trafficking to present the case to the jury. Defense counsel argued that "merely being in the proximity of something that appears to be a meth lab is not enough." Counsel noted there was no evidence of who actually owned the property or whether Appellant and Cain had a lease to the entire house. Rather, the testimony

indicated that Appellant and Cain rented only a single bedroom in the residence. Defense counsel also noted that there was no evidence of methamphetamine production found within the bedroom Appellant and Cain admittedly lived in and there was no nexus connecting Appellant and Cain to the rest of the house. Defense counsel for Appellant further argued that the evidence presented by the state "does not rise to the level of enough evidence to present to the jury that these clients [Appellant and Cain] ***knowingly*** engaged in manufacturing or trafficking methamphetamine . . ." R. 112, l. 23 – 114, l. 20.

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. State v. Brown, 103S.C. 437, 88 S.E.21 (1916); State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. McHoney, 344 S.C. 85, 97 544 S.E.2d 30, 36 (2001). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused," the trial judge may deny the motion for directed verdict. State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001); State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000); State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000). When the prosecution relies exclusively on circumstantial evidence, the trial judge must direct a verdict in the defendant's favor unless there is any ***substantial circumstantial evidence*** which reasonably tends to prove the guilt of the defendant or from which his guilt may be fairly and logically deduced. State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011); State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000).

Likewise, a directed verdict is proper when the evidence produced "merely raises a suspicion the accused is guilty." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Arnold, 361 S.C. 386, 389-390, 605 S.E.2d 529, 531 (2004); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984). Our courts define suspicion as "a belief or opinion as to guilt based upon facts

or circumstances which do not amount to proof." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963).

In this case, the trial judge erred in denying Appellant's motion for a directed verdict where there was no direct evidence or substantial circumstantial evidence that Appellant knowingly engaged in manufacturing or trafficking methamphetamine and where the evidence indicated Appellant and Cain rented only a single bedroom and had no connection to the rest of the residence where methamphetamine had allegedly been or was being manufactured.

In Mitchell, 341 S.C. at 409, 535 S.E.2d at 127, our Supreme Court held the trial judge erred by failing to direct a verdict where the only evidence presented against Mitchell was his fingerprint at the scene of the burglary. Likewise, in Lollis our Supreme Court directed a verdict of acquittal in the defendant's favor where the state presented no direct evidence that Lollis was involved in setting fire to his home. The circumstantial evidence against Lollis was that his wife admitted to the arson, he had placed valuables in storage prior to the fire, he possessed a key to the storage unit, and he allegedly had financial troubles. Our Supreme Court found this evidence insufficient to survive a directed verdict motion. Lollis, 343 S.C. at 581-586, 541 S.E.2d at 256-257.

In State v. Odems, 395 S.C 582, 720 S.E.2d 48 (2011), our Supreme Court held Odems was entitled to a directed verdict based upon a lack of direct and substantial circumstantial evidence that he was involved in the burglary. The evidence presented against Odems was (1) less than ninety minutes after the burglary, police located him in the getaway car with the admitted burglars and the stolen goods; (2) Odems fled from law enforcement, and (3) Odems asked an uninvolved person to lie for him. Id. at 585-588, 720 S.E.2d at 49-51. Even with this evidence, our Supreme Court held that the state failed to provide substantial circumstantial evidence that Odems was present during the home invasion. Id. at 592, 720 S.E.2d at 53.

In State v. Bostick, 392 S.C. 134, 141, 708 S.E.2d 774, 778 (2011), our Supreme Court held the prosecution failed to present direct or substantial circumstantial evidence of Bostick's guilt. Rather, according to the Court, the state's evidence was capable of producing only a suspicion of the defendant's guilt. Id. The state accused Bostick of killing his neighbor and burning down her home. The state presented the following circumstantial evidence at trial: (1) the neighbor's personal items were found in a burn pile located on the Bostick family property; (2) Bostick's shoes contained a pattern that matched gasoline, and gasoline was the accelerant used to start the house fire; and (3) investigators found blood on the clothes Bostick was wearing the day of the murder, but the blood evidence could not be matched to the neighbor's DNA. Id. at 142, 708 S.E.2d at 778. The Supreme Court held this evidence was insufficient to survive a directed verdict motion.

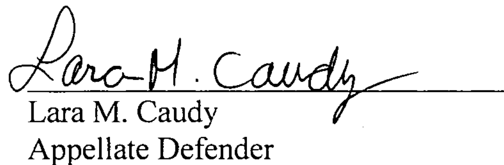
The prosecution in this case failed to present direct or substantial circumstantial evidence that Appellant was knowingly engaged in trafficking methamphetamine. Specifically, the state failed to produce sufficient circumstantial evidence to establish Appellant and Cain had knowledge of the alleged manufacturing operation or any connection to it. Deputy Kyle testified Appellant and Cain both said they rented only a single bedroom and "had nothing to do with the rest of the house." R. 35, ll. 19-23. Additionally, Deputy Wilbanks testified that it appeared Appellant and Cain were living only in the bedroom and had food and drinks in the bedroom. R. 65, ll. 8-21. There was also no testimony that any of Appellant or Cain's possessions were found in any other area of the house besides their bedroom. Moreover, no evidence of methamphetamine production was found inside the bedroom.

Additionally, the state failed to present any evidence regarding whether Appellant and Cain had a lease to the entire house or a right to use the entire house. The police failed to question the homeowner of the residence or investigate whether the homeowner or someone else

was responsible for the alleged manufacturing operation. The police also failed to question neighbors, including Mr. Leon Fowler, Sr., or attempt to locate Travis Kirby, who law enforcement believed lived at the home since they came looking for him at that location with a bench warrant. In short, nothing linked Appellant to the rest of the residence and the state failed to investigate other parties who may have been responsible for the alleged manufacturing operation or who may have had more information about who had possession of the remainder of the house or access to it. The state's evidence merely raised a suspicion that Appellant and Cain were involved in the manufacture or trafficking of methamphetamine and thus this Court erred by failing to direct a verdict in her favor.

In light of the factors listed above that were overlooked and misapprehended by this Court in reaching its opinion, Appellant respectfully requests this Court grant rehearing and reverse her conviction or direct a verdict in her favor.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

This 18th day of September, 2015.

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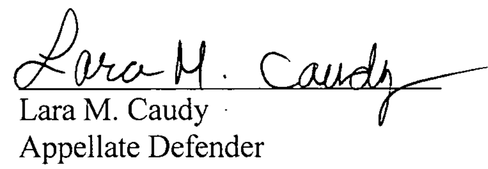
CERTIFICATE OF SERVICE

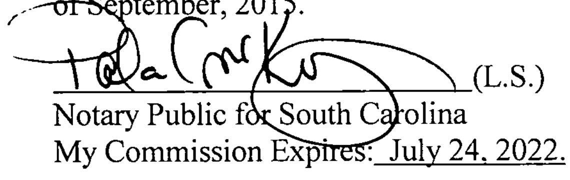
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-captioned case has been served upon David Spencer, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 18th day of September, 2015.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 18th day
of September, 2015.


(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.