

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

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RECEIVED  
AUG 05 2015  
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

DALE GOULD,

APPELLANT

APPELLATE CASE NO. 2014-0025547

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ANDERS BRIEF OF APPELLANT

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LAURA R. BAER  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in denying Appellant's motion for directed verdict on the charge of distribution of cocaine where the undercover officer picked up the baggie containing cocaine from the ground in a restaurant and neither the officer nor the confidential informant saw Appellant place the baggie there, raising only a mere suspicion of Appellant's guilt?

## STATEMENT OF THE CASE

On October 10, 2013, the Charleston County grand jury indicted Appellant Dale Gould for distribution of cocaine. R. 294 – 295 (Indictment).

On November 19 – 20, 2014, Gould appeared before the Honorable Deadra Jefferson and a jury for a trial on the above offense. Gould was represented by Melissa Gay, and the State was represented by assistant solicitors Whit Sowards and Stephanie Linder. R. 1.

The jury found Gould guilty of distribution of cocaine. R. 256 – 260. Judge Jefferson sentenced Gould to the mandatory minimum sentence of ten years incarceration and \$50,000 fine, with the fine to be suspended upon the service of the ten years.<sup>1</sup> R. 280.

This appeal follows.

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<sup>1</sup> Gould was previously convicted of two drug-related offenses such that his conviction constituted a third offense pursuant to S.C. Code Ann. § 44-53-370(b)(1). R. 270, l. 16 – 271, l. 3.

## ARGUMENT

**The trial court erred in denying Appellant's motion for directed verdict on the charge of distribution of cocaine where the undercover officer picked up the baggie containing cocaine from the ground in a restaurant and neither the officer nor the confidential informant saw Appellant place the baggie there, raising only a mere suspicion of Appellant's guilt.**

### *Relevant Facts*

Taylor Boyd was a student at the College of Charleston who was arrested for being a minor in possession of alcohol. R. 78, l. 8 – 80, l. 4. In order to have her charges dismissed, she told police that she knew someone who was selling illegal narcotics out of Joe Pasta restaurant and was willing to cooperate with law enforcement. She was also paid one hundred dollars. R. 103, l. 13 – 104, l. 17. Though Boyd was unsure exactly what happened to her charges, Detective Gill, the case agent, was clear that the charges were dismissed in exchange for her cooperation in this case. R. 86, l. 16 – 87, l. 1.

Boyd engaged in an undercover “buy operation” with the Charleston City Police Department's narcotics unit. She and an undercover officer, Melanie Frederick, went to Joe Pasta restaurant, where Gould worked as a manager. Frederick was wearing an audio wire and a front facing camera. They sat at the bar and eventually made contact with Gould. R. 60, l. 4 – 63, l. 17; R. 64, l. 12 – 65, l. 24; R. 71, l. 24 – 73, l. 5; R. 80, l. 17 – 82, l. 14. The jury was able to view and listen to the forty-five minutes of footage from the evening, with the exception of certain portions muted by agreement of the State and the defense. See State's Ex. 1 (DVD of Buy Operation); R. 31, l. 19 – 32, l. 15.

On the video, the three all went outside of the restaurant and Gould told Boyd that he did not understand what she was referring to in the text messages that she sent him.<sup>2</sup>

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<sup>2</sup> None of Boyd's alleged text messages to Gould were admitted into evidence.

They then returned inside the restaurant and went into an office in the back. Frederick shut the door. Gould pointed out that there was something on the ground, which Frederick picked up. Gould suggested that they see what it was and split it three ways. Frederick and Boyd refused to try the substance, but eventually Gould tried it. He told Boyd and Frederick that he was going to throw the rest away. R. 73, l. 8 – 74, l. 17; R. 82, l. 15 – 84, l. 11; State’s Ex. 1 (DVD of Buy Operation). Neither Boyd nor Frederick left the office with the item picked up from the floor. R. 84, l. 12-16; R. 87, ll. 2-17.

Boyd and Frederick returned to the bar. Gould eventually came out and allegedly pointed out something on the ground near the bar. Though it is not shown on the video, Frederick purportedly picked it up. She testified at trial that it was “another small plastic bag of white powder” containing what she noted was “possibly cocaine.” She and Boyd then left the restaurant and made contact with the rest of the undercover team. R. 74, l. 20 – 75, l. 3; R. 84, l. 17 – 85, l. 13. The bag and its contents were logged into evidence and subsequently tested. It was determined that the bag contained 0.23 grams of cocaine. R. 134, l. 18 – 138, l. 25.

At the close of the State’s case, defense counsel made a motion for directed verdict. She renewed the motion at the end of the defense’s case. Both motions were denied. R. 142, l. 8 – 149, l. 14; R. 156, ll. 3-15; see also R. 264, l. 15 – 268, l. 16.

### ***Discussion***

The video of the undercover buy operation showed two separate incidents – the first in an office and the second at the bar. First, the undercover officer, Frederick, and the confidential informant, Boyd, went into an office in the back of the restaurant where Gould was sitting. After talking for a few minutes, Gould asked, “What’s that; what’s

that on the floor?” When Frederick picked it up, Gould told her “you’ve got to do it, so I know you’re not law enforcement.” Frederick testified that what she picked up in the office was a bag of white powder, which she noted was “possibly cocaine.” Gould eventually did “a bump” but when neither Frederick nor Boyd would try the contents of the package, Gould said “well, I’m gonna, I found it on the floor, so I’m probably going to throw it away.” He then told them to go finish their drinks but not to leave. Frederick and Boyd left the office empty-handed and returned to the bar. State’s Ex. 1 (DVD of Buy Operation); R. 73, l. 8 – 74, l. 17; R. 83, l. 24 – 84, l. 19.

Though you can hear his voice, Gould cannot be seen on the video after they left the office. According to Frederick, Gould then came up between her and Boyd at the bar. She could not remember what he said, but claimed Gould “pointed down to the ground where another small plastic bag of white powder was found.” She said that she recognized that the bag contained what was “possibly cocaine.” R. 74, l. 18 – 75, l. 3. Boyd also testified that Gould followed them out of the office and that once they sat down again, “he pointed to the ground and there was another bag of cocaine on the ground.” Frederick picked up the bag and then they left the restaurant. R. 84, ll. 17 – 85, l. 6.

Contrary to the State’s contention during argument on the motion for directed verdict, Frederick never said that the bag she picked up at the bar was the same bag that she picked up in the office. She called it “**another** small plastic bag of white powder.” R. 74, ll. 20-25. When the solicitor asked her whether she “recognize[d] the bag,” she simply responded “again, with my training and experience that it was possibly cocaine.” R. 75, ll. 1-3. She did not say that the second baggie appeared to be the same as the one

that she saw in the office. Rather, Frederick made the conclusory statement that Gould “distributed cocaine to myself and the confidential informant.” R. 76, ll. 14-17. As such, what occurred in the office was a nullity since the contents of the bag were never tested and were never confirmed to be cocaine. Regarding the second bag, neither Frederick nor Boyd testified that they saw Gould place the bag there. Although they said that he pointed out the baggie, that is not substantial circumstantial evidence that he placed the baggie there.

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.2d 1916; State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. McHoney, 344 S.C. 85, 97 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 appropriate 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); State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637

(Ct. App. 1999). 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).

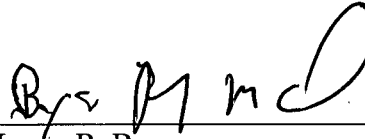
In one of the Supreme Court’s most recent circumstantial evidence case, State v. Bostick, 392 S.C. 134, 141, 708 S.E.2d 774, 778 (2011), the Court held the prosecution failed to present substantial circumstantial evidence of Bostick’s guilt. The Court began its analysis with a review of “three seminal cases from our jurisprudence analyzing the proof necessary in cases with circumstantial evidence,” which included State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984), State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004), and State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000). Each of those cases resulted in reversal and remand for entry of judgment of acquittal because the State failed to produce substantial evidence to overcome the motion for directed verdict. 392 S.C. at 139-41, 708 S.E.2d at 777-78. The court likewise determined that the evidence presented in Bostick “raised only a suspicion of guilt.” Id. at 141, 708 S.E.2d at 778. Although the police found items belonging to the victim in a burn pile behind the home of Bostick’s mother, the Court held no evidence linked Bostick to the evidence in the burn pile and the prosecution presented no testimony that Bostick had control over the burn pile. Id. at 137-141, 708 S.E.2d at 775-778. The only other evidence presented against Bostick was that he had a chemical pattern that matched gasoline on his shoes and gasoline was used to start the fire at the victim’s home, and DNA from blood on Bostick’s jeans excluded ninety-nine percent of the population, but the expert could not testify the DNA matched the victim. Id. at 142, 708 S.E.2d at 778.

Shortly after Bostick, the Supreme Court noted in State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011), that it has “repeatedly affirmed the principle that when the State fails to produce substantial circumstantial evidence that the defendant committed a particular crime, the defendant is entitled to a directed verdict.” The court held that the circumstantial evidence presented in Odems’ case did not reasonably tend to prove his guilt, and thus failed the “*well-settled directive* that circumstantial evidence that is not substantial is insufficient to go to a jury.” 395 S.C. at 592, 720 S.E.2d at 53 (emphasis added). The primary pieces of circumstantial evidence against Odems were: “(1) the fact that less than ninety minutes after the burglary, police located Petitioner in the getaway car with the burglars and the stolen goods; (2) Petitioner fled from law enforcement; and (3) Petitioner asked an uninvolved person to lie for him.” Id. at 588, 720 S.E.2d at 51. The court found that even though Odems’ overall actions may have appeared suspicious, mere suspicion is insufficient to support a guilty verdict. Id. at 590, 720 S.E.2d at 52. Likewise, in the present case, Gould’s behavior at most appeared suspicious. He was thus entitled to a directed verdict. Accordingly, Gould’s conviction should be reversed.

CONCLUSION

For the foregoing reasons, Appellant Dale Gould respectfully requests that this Court enter a directed verdict of acquittal.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Laura R. Baer', written over a horizontal line.

Laura R. Baer  
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of August, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

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THE STATE,

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APPELLATE CASE NO. 2014-0025547

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PETITION TO BE RELIEVED AS COUNSEL

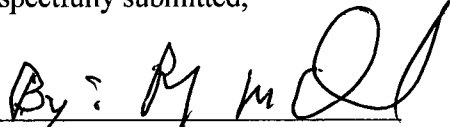
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Counsel for Dale Gould states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Deadra L. Jefferson, which was held on November 20, 2014, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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, she asks the Court to relieve her as counsel for Dale Gould.

Respectfully submitted,

By:   
\_\_\_\_\_  
Laura R. Baer

Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of August, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DALE GOULD,

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APPELLATE CASE NO. 2014-0025547

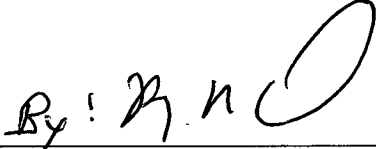
**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s);
- (2) Transcript of trial held November 19-20, 2014;
- (3) Court's Exhibits 1-8 (Jury Notes and Responses);
- (4) State's Exhibit 1 (DVD of Undercover Buy); and
- (5) State's Exhibit 3 (Drug Analysis Report).

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

August 5<sup>th</sup>, 2015

  
\_\_\_\_\_  
Laura R. Baer  
Appellate Defender

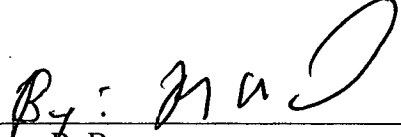
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PO Box 11589  
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Attorney for Appellant

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."

August 5, 2015

By:   
\_\_\_\_\_  
Laura R. Baer  
Appellate Defender

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APPELLATE CASE NO. 2014-0025547

\_\_\_\_\_  
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 on Dale Gould, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 5th day of August, 2015.

*By: [Signature]*  
\_\_\_\_\_  
Laura R. Baer  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 5th day of August, 2015.

*Burley Wolfe* (L.S.)  
\_\_\_\_\_  
Notary Public for South Carolina

My Commission Expires: October 24, 2021.