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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Anderson County

Alexander S. Macaulay, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

TIMOTHY CROSBY,

APPELLANT

APPELLATE CASE NO. 2015-000325

ANDERS BRIEF OF APPELLANT

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in denying Appellant Crosby's directed verdict motion on the conspiracy to traffic cocaine one hundred but less than two hundred grams when the state did not establish that one hundred or more grams had been sold because the state's key witness, William Johnson, could not remember the amount?

STATEMENT OF THE CASE

On November 13, 2013, the State Grand Jury indicted Appellant Timothy Crosby and six others (William Johnson, Clifton Garrett, Demetrice Dogan, Bernard Freeman, Talvus Simpson, and Jeffrey Parker) on the charge of conspiracy to traffic cocaine one hundred grams or more but less than two hundred grams. (Count One). Crosby was also indicted for trafficking cocaine base ten to twenty-eight grams. (Count Thirteen). On January 26 – 28, 2015, Crosby proceeded to trial before the Honorable Alexander Macaulay and a jury. Crosby was represented by M. Scott McElhannon, and the state was represented by assistant attorney generals Larry Wedekind and Joshua Underwood. R. 1. The jury found Crosby guilty of the lesser included charge of conspiracy to traffic cocaine twenty-eight grams or more but less than one hundred grams, and trafficking in cocaine base ten grams or more but less than twenty-eight grams. R. 377, ll. 5 – 19. Judge Macaulay sentenced Crosby to seven years on the conspiracy to traffic cocaine and three years on the trafficking cocaine base which was to run consecutively to the conspiracy to traffic. R. 387, ll. 1 – 25. Crosby's attorney filed a notice of appeal. This appeal follows.

ARGUMENT

The trial court erred in denying Appellant Crosby's directed verdict motion on the conspiracy to traffic cocaine one hundred but less than two hundred grams when the state did not establish that one hundred or more grams had been sold because the state's key witness, William Johnson, could not remember the amount.

Agent Casey Collier of the State Law Enforcement Division (SLED) told the trial court that she was with the SLED narcotics unit which was conducting a State Grand Jury narcotics investigation. They were focused on the "Toys R Us" investigation that covered several counties. Toys R Us was an auto repair and paint shop in Piedmont. They had information that drugs were being used and sold out of the Toys R Us auto shop. R. 82, ll. 24 - R. 85, ll. 7.

On February 5, 2013, SLED used a confidential informant (CI), whom they wired with an audio recording device, to go to Toys R Us and purchase an ounce of crack cocaine for one thousand dollars. The CI was Anthony Murray, and SLED provided the one thousand dollars to him. Their target person they hoped to catch was a man named Bernard. R. 85, ll. 8 – R. 88, ll. 25.

The CI Murray was fitted with the audio device and took the money to Toys R Us, but Bernard did not show. Another man whom they did not know sold the drugs to the CI. The man left in a Dodge Ram pickup truck. The CI saw the tag number which he conveyed to Agent Collier. Agent Collier asked Lieutenant Baker, also a team member, to have a deputy stop the Dodge so they could identify the person driving. They identified the driver as Crosby. They arrested Crosby later as they were still trying to arrest the entire group involved. R. 90, ll. 1 – R. 96, ll. 2; R. 103, ll. 1 – R. 106; ll. 25. SLED conducted

approximately ten controlled buys at Toys R Us with CI Murray. R. 115, ll. 21 – R. 116, ll. 14.

Anthony Murray admitted that he was paid one hundred dollars by SLED per drug buy. He was a CI because he had been in trouble with the law. R. 122, ll. 22 – R. 124, ll. 25. On February 5, 2013, he wore a wire and went into Toys R Us and bought one thousand dollars worth of crack cocaine which was an ounce. He did not know the person who sold the drugs to him. However, he did identify Appellant Crosby in court as the person who sold him the drugs. R. 127, ll. 1 –R. 130, ll. 11.

Jeffrey Parker worked at Toys R Us painting cars. The owner was William Angelo Johnson. Ne became aware that Johnson was involved with illegal drugs after Johnson's father died. Johnson would get Jeffrey to call the drug dealer which was usually Bernard or Terrell and tell them when to bring the drugs. Johnson would give Jeff a small amount of cocaine for his use each time. Jeff knew Terrell because he brought cars for Jeff to paint. Jeff identified Crosby in court as Terrell. R. 215, ll. 17 – R. 222, ll. 25. Jeffrey was charged in this and pled guilty. He was on probation at the time of Appellant Crosby's trial. R. 224, ll. 12 – R. 225, ll.4.

William Johnson testified that he was currently incarcerated because he had pled guilty to the charges in this case. He owned the Toys R Us auto shop. He admitted that he became involved with illegal drugs for the second time in 2012 after his father died. He used alcohol and cocaine. He bought his drugs from Bernard and Tee primarily but others also. He bought various amounts and did buy whole ounces sometimes but was not sure how many times. R. 262, ll. 17 – R. 266, ll. 25.

He would take some cocaine for his use and then sell the rest. He identified Crosby in court as being Tee. He knew him because Crosby had bought cars from him. R. 267, l. 1 – R. 268, ll. 25.

Johnson could not remember how much drugs he bought. He was an alcoholic and heavy drug user at the time. He did not know how many times drug transactions occurred and could not remember the amounts. R. 269, ll. 1 – R. 274, ll. 21. He would start drinking alcohol at 5:30 or 6:00 in the morning and drink during the day. He also used drugs heavily during the same time. R. 279, ll. 14 – R. 280, ll. 24.

Johnson thought it was likely that he bought at least two ounces of cocaine from Bernard, but was not sure if he bought that much from Crosby. He could not remember the numbers. R. 278, ll. 9 – R. 280, ll. 16. When asked if he purchased more than a total of a hundred grams of drugs, he responded that it was possible and most likely but he was not sure. He could not tell a specific number. R. 278, ll. 22 – R. 279, ll. 7.

Jill Clark was the drug chemist with SLED during this investigation. R. 247, ll. 1 – 25. Her test results of the crack submitted was that it was 22.5 grams of crack cocaine. R. 255, ll. 1 – 18.

At the close of the state's case, defense counsel moved for a directed verdict on both charges. The basis for the directed verdict on the conspiracy to traffic was that the state did not prove that one hundred grams or more had been the subject of the trafficking. Counsel argued that William Johnson, the main player in the trafficking, did not remember weights and dates, and was not sure how much he bought. The state argued in terms of ounces sold. An ounce was twenty-eight grams, and Johnson talked about two deals with Crosby and two

with Bernard which would be a total of one hundred twelve grams. R. 285, ll. 19 – R. 289, ll. 22.

Then the state admitted that they were trying to “recollect our memory on it.” Assistant attorney general Wedekind told the court that he wanted to be honest because he did not remember the one hundred grams. He did remember the ounces. The judge denied the directed verdict motion. R. 289, ll. 23 – R. 291, ll. 8.

Appellant Crosby testified that he did take wrecked cars to Johnson’s shop, Toys R Us, to be worked on, and then Crosby would sell them. R. 301, ll. 14 – R. 304, ll. 24. On February 5, 2013, he went to the shop, Toys R Us, driving a white pickup truck. He was probably checking on a part or a vehicle. R. 304, ll. 25- 23. He did not remember seeing the CI Murray because he did not know him before the trial. He did not sell drugs to Murray and did not take any money from him. R. 304, ll. 25 – R. 307, ll. 10. When the deputies stopped Crosby after he left the Toys R Us, they did not find anything on Crosby nor in the car. R. 307, ll. 11 – R. 310, ll. 13.

After the defense rested, defense counsel renewed his motions which were denied. R. 321, ll. 1 – R. 322, ll. 13.

Defense counsel then made a motion for a jury charge on the lesser included offense of conspiracy to traffic twenty-eight to a hundred grams. He argued there was evidence that not one hundred grams were sold. The state concurred with the request and had no objection to the lesser included. The judge agreed to charge the jury on the lesser included offense. R. 322, ll. 14 – R. 323, ll. 25. During the jury charges, the judge did give the charge on the lesser included of conspiracy to traffic twenty-eight grams or more but less than one hundred grams. R. 359, ll. 11 – R. 360, ll. 3.

The jury found Crosby guilty of the lesser included trafficking cocaine conspiracy twenty-eight grams or more but less than one hundred grams. The jury also found him guilty of the second offense of trafficking cocaine base ten grams or more but less than twenty-eight grams. R. 377, ll. 1 – 19.

A directed verdict motion should not be granted if there is direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused. State v. Latimore, 397 S.C. 9, 723 S.E.2d 589 (2012). A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged. State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) State v. McCombs, 368 S.C. 489, 629 S.E.2d 361 (2006)

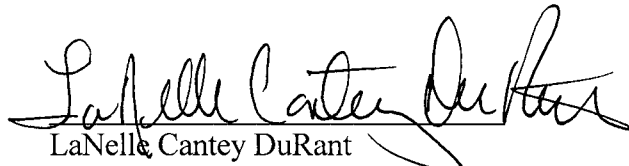
When reviewing the denial of a motion for a directed verdict, if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Supreme Court must find the case was properly submitted to the jury. State v. Harris, 413 S.C. 454, 776 S.E.2d 365 (2015).

The trial judge should have granted the directed verdict motion on the conspiracy to traffic one hundred grams or more but less than two hundred grams because there was not sufficient evidence of the required amount. William Johnson, who was the primary witness in the conspiracy to traffic, could not confirm that the amount sold was at least one hundred grams of cocaine. He vacillated in his testimony on the amount. He never said definitely that the amount was one hundred grams.

CONCLUSION

Based on the above, the conviction and sentence should be reversed, and the case remanded for the entry of a directed verdict.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of December, 2015.

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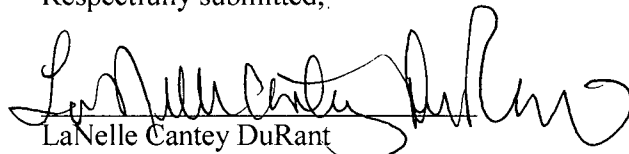
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Timothy Crosby states:

1. She is 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 Alexander S. Macaulay, which was held on January 28, 2015, 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 Timothy Crosby.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of December, 2015.

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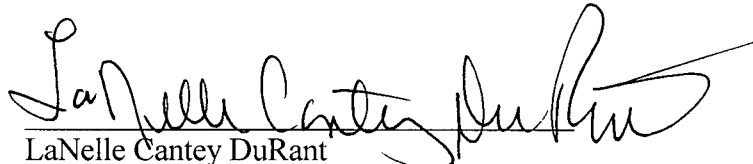
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s);
- (2) Sentencing Sheets
- (3) Transcript Jury Selection January 26, 2015
- (4) Trial Transcript January 26-28, 2015

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

December 16th, 2015


LaNelle Cantey DuRant
Appellate Defender

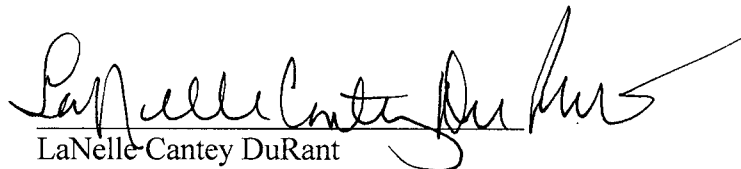
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Attorney for Appellant

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."

December 16, 2015


LaNelle Cantey DuRant
Appellate Defender

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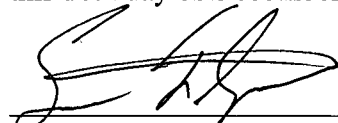
CERTIFICATE OF SERVICE

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 Joshua R. Underwood, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant, Designation of Matter and Record on Appeal have been served on Timothy Crosby, #247353 at Walden Correctional Institution, 4340 Broad River Road, Columbia, SC 29210, this 16th day of December, 2015.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 16th day of December, 2015.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.