

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

ORIGINAL

APPEAL FROM PICKENS COUNTY
Court of General Sessions

RECEIVED

Robin B. Stilwell, Circuit Court Judge

JAN 04 2016

SC Court of Appeals

Case No. 2013-GS-39-3151

The State of South CarolinaRespondent

V.

Cynthia Mansell GreenfieldAppellant

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the Court err in qualifying Detective Chad Brooks as Expert in the amount of Meth allegedly produced by Appellant?
2. Did the Court err in not granting a Directed Verdict when:
 - a. All evidence of the level of Meth involved in the case was circumstantial and the State had not adduced substantial circumstantial evidence as to the amount of Meth involved in any conspiracy beyond a reasonable doubt;
AND
 - b. The State charged Appellant with trafficking of over twenty-eight (28) grams of Meth when no evidence existed that an amount of Meth was possessed, produced, trafficked or otherwise involved that reached the level of twenty-eight (28) grams by Appellant under S.C. Code of Laws SECTION 44-53-375, as charged, within any viable timeframe of the ongoing investigation, and when experts disagree as to the yield of Meth that can be produced from a given amount of Sudafed, presuming all of it was used to produce Meth AND all used in one conspiracy to produce Meth.

STATEMENT OF THE CASE

Appellant, along with her husband and many other defendants, were arrested after authorities had conducted a long term investigation from December, 22 2011 (R. p. 65, lines 16-20) to December 31, 2011. (R. p. 190, line 4.)

Appellant was arrested after a legal purchase of Sudafed. She was allegedly conspiring to use the Sudafed to produce Methamphetamine (Meth).

At the trial, most of the approximately 40 witnesses were co-defendants who had made deals with the State to testify against the two (2) defendants on trial, Appellant and her husband. The two were initially charge with trafficking in Meth, over 100 grams. (R. p. 4, lines 13-21) The State during the trial agreed to reduce the amount to 28 to 100 grams. (R. p. 5, lines 9-14) which also falls under trafficking, after the Court expressed misgivings as to the alleged amounts produced in evidence. (R. p. 210, line 13–p. 211, line 25.)

No Meth lab nor any Meth at all was in evidence, thus the case was based solely on the amount of Sudafed purchased by all of the co-defendants over the course of the long investigation. (R. p. 6, line 22–p. 7, line 4.)

Witnesses testified that some part of the Sudafed purchased was kept by that witness and the rest was given to Appellant and her husband allegedly to use in production of Meth. (R. p. 93, lines 15-24) Attorneys for Co-defendant, her husband Michael Mealor, also presented evidence that some part of the sinus medications purchased was most likely used for a medical condition of the co-defendant, Appellant's husband. (R. p. 189, lines 20-24.)

Appellant was found guilty along with her husband of trafficking in Meth of 28 to 100 grams under S.C. Code Section 44-53-375. (R. p. 217)

Appellant filed timely notice of appeal. This appeal follows.

FACTS OF THE CASE

The State's case was that the amount of Sudafed purchased was used to produce Meth. Respondent offered as an expert witness, over objection of Appellant, Detective Chad Brooks of the Pickens County Sheriff's Office (R. p. 142, line 19–p. 143, line 5) who had only a high school education in chemistry. (R. p. 154, lines 5-6) Detective Brooks testified that he learned how to determine an amount of Meth producible from a given amount of Sudafed by reading information on the internet (R. p. 173, lines 20-23) and from common training of sheriff's deputies through continuing education classes (R. p. 146, line 1–p. 147, line 21).

The officer did testify that the yield varied from 40 to 92%. He also testified on questioning, that the 92% was produced under conditions of a State controlled lab of the sheriff's department (R. p. 168, lines 2-3, 10-11). Appellant argued that experts disagree as to the amount of Meth than can be yielded from a given amount of Sudafed and that the yield ranges from 0% to the 90% range under perfect conditions (R. p. 182, lines 12-20; R. p. 194, lines 6-8).

Respondent did not have testimony or evidence that the sheriff's department seized any Meth or that a Meth Lab existed or was ever found under control of Appellant, her husband or any co-defendants (R. p. 6, line 22–p. 7, line 4).

Because no Meth or Meth lab were in evidence or seized as part of the long investigation, the evidence at the trial was circumstantial and speculative as to amounts of

Meth produced and therefore the charge of trafficking in an amount of over 28 grams and less than 100 grams cannot be supported by evidence.

Appellant moved for a Directed Verdict, which was denied (R. p. 219, lines 12-20), and in the same motion and in prior motions for the amount of Meth produced to be reduced due to the speculative nature of evidence. Both motions were denied by the Court even though the Court expressed misgivings as to the amounts and the methods used to determine amounts of Meth allegedly produced, or conspired to be produced (R. p. 210, line 13–p. 211, line 25).

ARGUMENT

1. The Court erred in qualifying as Expert Detective Chad Brooks as an expert in the amount of Meth allegedly produced by Appellant.

The Court qualified Chad Brooks as Expert witness over objection of Appellant when this witness did not meet the level of expertise that would qualify him as an expert in the amount of Meth allegedly produced by Appellant. This was an error.

The determination as a fact, of an amount of Meth produced from any given amount of one of the ingredients, namely Sudafed, was beyond the scope of his expertise and he was unqualified to testify as to a chemical analysis in that he admittedly lacked any chemical training other than having taken a chemistry class in high school.

Detective Brooks supervises a large area of investigations within the sheriff's department, as he stated under questioning:

Technically, I supervise everybody that falls under the umbrella of the detective division, which includes general investigations, juvenile investigations, school resource officers, victim services, special operations and narcotics, forensics and aviation.
(R. p. 143, lines 8-12)

In Appellant's objection, defense counsel objected to the witness' testimony as a scientific expert when the witness has had no scientific training and has no scientific knowledge otherwise.

I do object if they intend -- and I believe they are going to try to get in these formulas, which are chemistry, probably goes to scientific area, which requires scientific knowledge and needs a properly trained scientist to testify to such expert knowledge. He's never been qualified as such an expert by his own testimony. He's never had any training in chemistry. He has no chemical degree. He's never studied chemistry as far as we've heard. So he does not rise to the level of scientific expert in the field of

chemistry, which I believe is what they're trying to get into.
(R. p. 149, lines 4-14)

The admission of expert testimony is governed by Rule 702, SCRE, which provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

And in Watson v Ford, the S.C. Supreme Court states:

First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. See State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009) (holding that the witness was improperly qualified as a forensic interviewing expert where the nature of her testimony was based on personal observations and discussions with the child victim). Next, while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. See Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997) (observing that to be competent to testify as an expert, a witness must have acquired by reason of study or experience such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony). Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable. See State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (evaluating whether expert testimony on DNA analysis met the reliability requirements). Expert testimony is not admissible unless it satisfies all three requirements with respect to subject matter, expert qualifications, and reliability.

Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 at 175 (S.C., 2010)

In the instant case, Detective Brooks does not meet the second level of requirements, and the court incorrectly determined reliability, the third element of analysis.

The jury was prejudiced by the testimony of Detective Brooks given his stature as

a sheriff's detective. While the defense had no burden, had the Jury heard testimony from an expert refuting the calculations of Detective Brooks, the verdict may have reflected the difference in calculation because experts disagree as to the yield possible from a given amount of Sudafed.

2. The Court erred in not granting a Motion for Directed Verdict (R. p. 219, lines 12-20) made by Appellant (R. p. 218, lines 14-23), when:

a. All evidence of the level of Meth involved in the case was circumstantial and the State had not proven the allegations as to amount of Meth produced or conspired to be produced beyond a reasonable doubt.

In State v. Logan, 747 S.E.2d 444, 405 S.C. 83 (S.C., 2013), the South Carolina Supreme Court restated the circumstances wherein a Court may not allow a jury to convict.

“The traditional circumstantial evidence definition illustrates the deficiency in the State's evidence against [the defendant]. This definition provided that if the State relies on circumstantial evidence to prove its case, the jury may not convict the defendant unless: Every circumstance relied upon by the State be proven beyond a reasonable doubt; and ... all of the circumstances proven be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis. Despite the Court's abandonment of the use of this particular definition as a jury charge in State v. Cherry, the definition illustrates the lack of evidence against [the defendant]. The State's key circumstantial evidence: (1) [The defendant's] location in the getaway car a relatively short time after the robbery; (2) [The defendant's] flight from law enforcement; and (3) [The defendant's] attempt to enlist the assistance of an uninvolved individual, do not point to his guilt for the crimes charged to the exclusion of every other reasonable hypothesis—namely, the notion that he did in fact join [the defendants] at a gas station following the crime. Id. at 590–91, 720 S.E.2d at 52–53 (citing State v. Hernandez, 382

S.C. 620, 626 n. 2, 677 S.E.2d 603, 606 n. 2 (2009); *State v. Edwards*, 298 S.C. 272, 274–76, 379 S.E.2d 888, 889 (1989), abrogated by *Cherry*, 361 S.C. at 595–606, 606 S.E.2d at 478–82.”

State v. Logan, 747 S.E.2d 444 at 449, (S.C. 2013)

In the instant case, the circumstantial and speculative nature of the evidence pertaining to an amount of Meth produced, or conspired to be produced by the Defendants, did not meet the burden of proof beyond a reasonable doubt and a directed verdict should have been granted to Appellant.

In *State v. Bostick*, the S. C. Supreme Court set the criteria for a Directed Verdict as well and stated:

A case should be submitted to the jury when the evidence is circumstantial "if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced." *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000); see also *State v. Williams*, 321 S.C. 327, 332, 468 S.E.2d 626, 629 (1996). "The jury weighs the evidence but when there is an absence of evidence, it becomes the duty of the trial judge to direct a verdict" *State v. Schrock*, 283 S.C. 129, 134, 322 S.E.2d 450, 452-53 (1984). Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt. *Id.* at 133, 322 S.E.2d 452 (citing *State v. Manis*, 214 S.C. 99, 51 S.E.2d 370 (1949)). "Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error." *State v. Irvin*, 270 S.C. 539, 543, 243 S.E.2d 195, 197 (1978) (citing *State v. Massey*, 267 S.C. 432, 229 S.E.2d 332 (1976)). On appeal of the denial of a directed verdict of acquittal, this Court must look at the evidence in the light most favorable to the State. *State v. Martin*, 340 S.C. 597, 602, 533 S.E.2d 572, 574 (2000).

State v. Bostick 392 S.C. 134, 708 S.E.2d 774 (S.C., 2011)

In the instant case, there is an absence of evidence of the true amount of Meth that was produced by the defendants, but only speculation as to an amount that possibly could have been produced. There was no positive proof of the fact of a quantity of Meth produced. Here there is a failure of competent evidence of the charges alleged, that is, of an amount of Meth greater than 28 grams and less than 100 grams as charged.

- b. The State charged Appellant with trafficking of over twenty-eight (28) grams of Meth when no evidence existed that an amount of Meth was possessed (R. p. 6, line 22–p. 7, line 4), produced, trafficked or otherwise involved that reached the level of twenty-eight (28) grams by Appellant under S.C. Code of Laws SECTION 44-53-375, as charged, within any viable timeframe of the ongoing investigation, and when experts disagree as to the yield of Meth that can be produced from a given amount of Sudafed, presuming all of it was used to produce Meth AND all used in one conspiracy to produce Meth.

In Dervin v State, the South Carolina Supreme Court agreed with the U.S. Supreme Court decisions that the amount of drugs needs to be proven beyond a reasonable doubt.

United States Supreme Court's decisions in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) require the amount of drugs to be submitted to the jury to be proven beyond a reasonable doubt. We agree.
Dervin v State, 687 S.E.2d 712, 386 S.C. 164 (S.C., 2009)

The State offered no proof other than speculation and circumstantial evidence as to what amount of Meth was produced or conspired to be produced and therefore did not meet the burden of proof for the amounts charged in the indictment nor for the amounts later agreed to when the State conceded that the charge of over 100 grams may be too hard to prove and added the lesser 28 to 100 grams. (R. p. 216, lines 18-25) The State offered only that Appellant purchased during the investigation only 68.64 grams of Sudafed (R. p. 60, line 22), when the legal limit for purchase by an individual is 108 grams per year (R. p. 12, lines 20-25).

The length of the investigation covered a substantial amount of time, from December, 22 2010 (R. p. 65, lines 16-20), to December 31, 2011 (R. p. 190, line 4) and Appellants as well as other co-defendants testified that Sudafed was used for other than the production of Meth, such as for its intended medical use, and Respondent failed to meet the burden of proof otherwise.

Testimony as to the yield from production of Meth from Sudafed was not offered from a qualified chemist with expertise in the area but rather by a deputy sheriff who was not a chemist or qualified as a laboratory expert. Testimony as to the range of production varied and experts disagree as to the amounts obtainable and in particular, under less than controlled laboratory conditions.

No laboratory for the production of Meth was seized or offered as

evidence in the case.

The calculations are speculative and circumstantial at best due partly to the length of time covered in the investigation and the lack of agreement as to yield.

An argument exists as to how long an investigation should last before the time frame becomes unreasonable in determining a speculative calculation as to amounts of Meth produced or conspired to be produced. The question arises under a hypothetical situation. A person buys Sudafed over the course of twenty-eight (28) years in the legal amount allowed under the law and the sheriff's office monitors the purchases. Each year, the person uses the medication as prescribed, except that one (1) gram of Meth is produced and consumed by the person or others. After twenty-eight (28) years, can the person be charged under the trafficking statute because twenty-eight (28) grams of Meth was produced? What if the time frame were 10 years and just 3 grams produced each year? At what point does a series of conspiracies to produce 1 gram of Meth become a conspiracy to produce 28 to 100 grams of Meth? In the instant case, no Meth was presented into evidence, no large stash of Sudafed and no meth lab were produced into evidence.

The Jury was prejudiced by the testimony that evoked a percentage of Meth produced solely based on a random calculation of the amount of Meth possible. The qualification of Chad Brooks as an Expert, when Mr. Brooks did not have sufficient expertise as to the yield from Sudafed in

producing Meth may have prejudiced the jury as to the amounts produced, or conspired to be produced, by Appellant. But no evidence of a conspiracy to produce a given amount of Meth greater than 28 grams was presented.

The calculations were speculative at best and not scientifically reliable. In State v. Jones, 681 S.E.2d 580, 383 S.C. 535 (2009), the South Carolina Supreme Court reversed on the grounds that the expert testimony concerning “Barefoot insole impression evidence,” as presented by an expert witness, is not scientifically reliable. In this instant case, the testimony as to yield is not scientifically reliable as the witness is not a scientist, and no evidence of the exact amount of Meth produced was entered by the State/Respondent.

Cognizant of these cases and our limited standard of review, we find the evidence presented in the instant case does not satisfy the requisite reliability factors in Jones. As stated in Jones I, these reliability factors take into consideration: (1) the publications and peer reviews of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. Jones I, 343 S.C. at 573, 541 S.E.2d at 819. State v. Jones, 681 S.E.2d 580 at 591, 383 S.C. 535 (S.C., 2009)

CONCLUSION

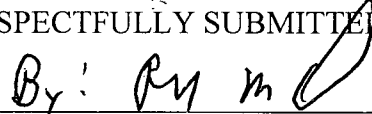
1. The Case should be reversed and remanded based on expert testimony given by an unqualified expert in the area of yield.
2. The case should be reversed and a directed verdict for Appellant be granted:

- a. Based on the level of circumstantial evidence, and:
- b. The State did not prove amounts of Meth conspired to be produced or produced beyond a reasonable doubt, and an amount must be proven without speculative calculations as to chemical yields, but yields based on actual amounts produced.

By reason of the foregoing arguments, Appellant's convictions should be reversed.

This 4th day of January, 2016

RESPECTFULLY SUBMITTED

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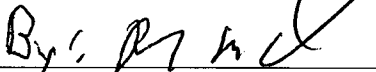
The State of South CarolinaRespondent

V.

Cynthia Mansell GreenfieldAppellant

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."



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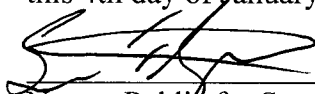
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, this 4th day of January, 2016.

By: 

ROBERT M. DUDEK
Chief Appellate Defender

Attorney for Appellant

SUBSCRIBED AND SWORN TO before me
this 4th day of January, 2016.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.