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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Union County

John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID TERRELL GALLMAN,

APPELLANT

APPELLATE CASE NO. 2014-001526

ANDERS BRIEF OF APPELLANT

BENJAMIN JOHN TRIPP
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in admitting evidence of a pending crack cocaine distribution charge at Appellant's trial for a separate crack cocaine distribution charge where the judge merely stated in allowing the evidence that he was required to analyze and weigh the evidence's probative value against the risk of unfair prejudice but where he never actually analyzed these particulars in the context of the case?

STATEMENT OF THE CASE

On February 27, 2014, the Union County Grand Jury indicted Appellant David Terrell Gallman for possession of crack cocaine with intent to distribute. R. 198-199. On July 8, 2014, Petitioner proceeded to trial before The Honorable John C. Hayes, III and a jury. Erik Delaney represented Petitioner and John C. Anthony represented the State. R. 1. The jury found Appellant guilty, and Judge Hayes sentenced Appellant to thirty years' incarceration. R. 186, lines 6-12; R. 193, lines 11-15.

ARGUMENT

THE TRIAL COURT REVERSIBLY ERRED BY FAILING TO CONDUCT AN ON-THE RECORD ANALYSIS OF THE PARTICULAR FACTS AND CIRCUMSTANCES IN DETERMINING WHETHER THE UNFAIR RISK OF HARM FROM EVIDENCE OF THE PRIOR COCAINE SALE OUTWEIGHED THE EVIDENCE'S PROBATIVE VALUE.

STATEMENT OF FACTS

The State alleged that on December 19, 2013, three Union Public Safety officers saw Appellant, whom they knew to have an outstanding warrant, standing in the yard outside a local residence with a number of other people. The officers detained him, and as they escorted him to their vehicle, one of the officers allegedly saw him drop a baggie containing almost six grams of crack cocaine. R. 59, line 15—R. 61, line 4.

Prior to trial, the State sought a determination of the admissibility under Rule 404(b), SCRE, of testimony about a prior crack cocaine sale, for which the State had a pending prosecution against Appellant. R. 38, line 15—R. 41, line 4. Kelly Crawford worked as an undercover informant for the Union County Public Safety office and purchased crack cocaine from Appellant on June 6, 2013. R. 43, line 1—R. 48, line 24. Judge Hayes ruled the testimony was admissible after concluding that clear and convincing evidence supported the occurrence of the sale and that the evidence's danger of unfair prejudice did not outweigh its probative value. R. 50, line 30—R. 52, line 24. Judge Hayes explained, "There of course obviously is prejudicial value or it wouldn't be relevant, but I do find that . . . one being involved in the distribution of a particular substance and it was a charge of possession with intent to distribute that substance. That it is very probative [sic] and that it does go to show intent" R. 50, line 19—R. 51, line 5.

Appellant renewed his objection when the State called Kelly Crawford to testify for the jury. R. 104, lines 6-20.

DISCUSSION

The trial court reversibly erred by failing to conduct an on-the record analysis of the particular facts and circumstances in determining whether the unfair risk of harm from evidence of the prior cocaine sale outweighed the evidence's probative value. Evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged is excluded under South Carolina law except to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan, or (5) the identity of the perpetrator. Rule 404(b), SCRE; *State v. King*, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999); *State v. Lyle*, 125 S.C. 406, 118 S.E. 803, 807 (1923). "Evidence of other crimes must be put to a rather severe test before admission. The acid test of admissibility is the logical relevancy of the other crimes. The trial judge must clearly perceive the connection between the other crimes and the crimes charged." *State v. Cutro*, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998).

"If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." *State v. Fletcher*, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008) (citing *State v. Pagan*, 369 S.C. 201, 631 S.E.2d 262 (2006)). Further, even if evidence is clear and convincing and falls within a *Lyle* exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Rule 403, SCRE; *Fletcher*, 379 S.C. at 23, 664 S.E.2d at 483; *King*, 334 S.C. at 512, 514 S.E.2d at 582. A trial judge must conduct an "on-the-record" analysis of each step

in determining the admissibility of evidence of prior bad acts. *State v. King*, 349 S.C. 142, 155, 561 S.E.2d 640, 647 (Ct. App. 2002).

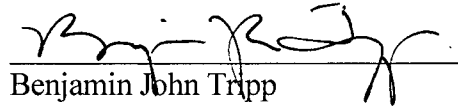
In this case, Judge Hayes failed to conduct an on-the record analysis of the particular facts and circumstances in determining whether the unfair risk of harm from evidence of the prior cocaine sale outweighed the evidence's probative value. By relying only on the notion that with the evidence "there of course obviously is prejudicial value," Judge Hayes merely recognized the issue and did not perform the actual analysis by assessing the nature of the prejudice. Similarly, while he recognized that the evidence was relevant to the issue of intent, he failed to actually assess the extent of the probative value. From these two failures, a third failure to weigh the two considerations necessarily follows.

A thorough application of the Rule 403 analysis would have entailed recognizing first that the probative value of Crawford's testimony was low. His alleged purchase was on June 6, 2013, which was over six months prior to the alleged sale at issue. Additionally, the probative value of the testimony on the issue of intent to distribute was relatively weak considering the baggie contained such a large amount of crack—almost six grams. Secondly, the risk of unfair prejudice was particularly high. The State offered evidence that Appellant had the baggie of cocaine insofar as officers discovered it on the ground in an area where a number of people were standing. Thus, the critical issue was whether Petitioner had the baggie, which the jury should have determined based on witness testimony and not past behavior. Accordingly, Judge Hayes failed to make a sufficient on-the-record analysis in determining the admissibility of Crawford's testimony and thereby committed reversible error.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the decision of the trial court and remand for a new trial.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of February, 2015.

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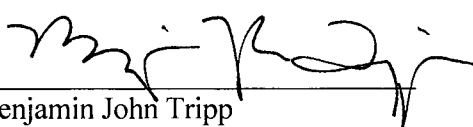
PETITION TO BE RELIEVED AS COUNSEL

Counsel for David Terrell Gallman states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge John C. Hayes, III, which was held on July 10, 2014, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He 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, he asks the Court to relieve him as counsel for David Terrell Gallman.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of February, 2015.

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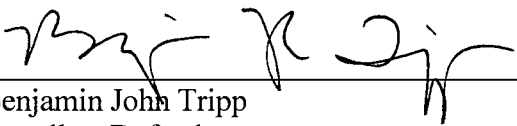
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s);
- (2) Entire Trial Transcript

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

February 17th, 2015



Benjamin John Tripp
Appellate Defender

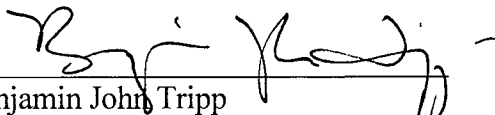
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Attorney for Appellant

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."

February 17, 2015



Benjamin John Tripp
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 Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on David Terrell Gallman, #313796 at Perry Correctional Institution, this 17th day of February, 2015.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 17th day of February, 2015.



Notary Public for South Carolina
My Commission Expires: July 24, 2022 .