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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

R. Keith Kelly, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MATTHEW GUNTER,

APPELLANT

APPELLATE CASE NO. 2015-000716

ANDERS BRIEF OF APPELLANT

JOHN H. STROM
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

The trial court erred in allowing the State to qualify Lieutenant Sam Gunter, of the Lexington County Sheriff's Department narcotics division, as an expert in "the field of distribution and street valuation of narcotics including marijuana," where he testified to the street value of drugs, the normal means of packaging and selling marijuana, typical amounts of marijuana carried for personal use as opposed to distribution, because he was not qualified as an expert under Rule 702, SCRE.

STATEMENT OF THE CASE

On August 11, 2014, the Lexington County Grand Jury indicted Appellant on one count of Possession with Intent to Distribute Marijuana. R. p. 234 - 235.

On March 18 - 19, 2015, Appellant proceeded to trial before the Honorable R. Keith Kelly and a jury. David M. Mauldin represented Appellant and Assistant Solicitors Rick Collins and Gill Bell represented the State. R. 1.

The jury found Appellant not guilty of possession of with intent to distribute, but convicted Appellant of the lesser included charge of possession of marijuana. The trial court sentenced Appellant to one year imprisonment. R. 226, lines 2-14; R. 231, lines 23-25.

STATEMENT OF THE FACTS

Procedural Facts

On the evening of May 11, 2014, Richland County Sheriff Deputy Josh Newsom was traveling north on Huger Street in Columbia approaching the intersection with Taylor Street. R. 62, ll. 4 - 63, ll. 10. Newsom stopped at the intersection waiting for the red light to change. *Id.* However, the car in the lane next to Newsom - which had arrived at the intersection before he did - slowly accelerated through the intersection, running the red light. *Id.*

Newsom activated his blue lights. The other vehicle turned into an adjoining hotel parking lot, Newsom followed and prepared for a traffic stop. At trial, Newsome claimed that he saw the driver “looking for his shoulder . . . and looking at me in the side view mirror. R. 63, ll. 22-25. The vehicle then pulled through the hotel parking lot and accelerated back onto the roadway. A chase ensued as the vehicle crossed the river and headed into West Columbia. R. 64, ll. 1 - 65, ll. 22.

Newsom was joined by police from West Columbia, Cayce, Columbia, and the Lexington County Sheriff’s Department. The escaping vehicle turned into a West Columbia neighborhood and began to pull away from law enforcement. *Id.* Once the vehicle came to a stop, the driver and passenger fled on foot in diverging directions.¹ R. 65, ll. 23 - 66, ll. 9.

Newsom briefly pursued the driver, but lost sight of him when a fence he was climbing over collapsed underneath him. *Id.* Newsom then returned to his SUV and deployed his K-9. R. 74, ll. 10 - 75, ll. 19. Newsom alleged that the dog immediately started “tracking” in the direction that the two individuals fled. R. 78, ll. 5-23.

¹ Newsom would testify that he searched the vehicle and uncovered small amounts of a leafy green substance he believed was marijuana in a partially smoked, hand-rolled cigarettes in both the driver and passenger seats. R. 90, ll. 18 - 91, ll. 9.

The K-9 eventually led police to a house on the 900 block of Raleigh Street in West Columbia. R. 84, ll. 8 -85, ll. 4. The four officers present decided to conduct a “knock and talk” investigation at the residence. R. 89, ll. 1-14. One of the officers, City of Columbia Police Officer Eric Walker knocked on the door of the house. R. 107, ll. 16 - 109, ll. 20.

An elderly man opened the door; Walker and West Columbia Police Officer Doug Hook asked to search the house after “making it perfectly clear we were there to look for another suspect.” *Id.* Appellant was also present in the house as was his girlfriend, Shaneria Howell. *Id.*

As police searched the house, Walker and Hook claimed to see Appellant throw two packages towards the bathroom. R. 108, ll. 13-22. Both officers would allege at trial that, based on his training and experience, they believed that the packages contained marijuana. R. 111, ll. 6 - 112, ll. 19; R. 137, ll. 3-24. Appellant was arrested. Subsequent testing determined that the two bags contained 137.4 grams of marijuana. R. 149, ll. 6-19.

Trial

Newsom, Walker, and Hook all testified at trial. The State also called Lieutenant Sam Gunter of the Lexington County Sheriff’s Department to testify as an expert in the “field of distribution and street valuation of narcotics including marijuana.” R. 155, ll. 14-15. Defense counsel renewed a pretrial objection arguing that Gunter’s experience was purely anecdotal and that the State had failed to prove that his methodology was sufficiently reliable. R. 5, ll. 8 - R. 7, ll. 14.

The State countered that since the only evidence that Appellant intended to distribute marijuana was the amount of marijuana police found; expert testimony was “invaluable” to their case as it would help the jury understand that the amount of marijuana at issue was beyond what a normal user would carry. R. 8, ll. 22 - 9, ll. 9. The State further posited that it would limit Gunter’s

testimony to “street value and the amount a user typically uses versus an amount a distributor typically [carries]. R. 10, ll. 18-23.

The trial court denied the defense’s motion pre-trial. R. 14, ll. 11-21. The court again denied the motion when it was renewed prior to Gunter taking the stand. R. 155, ll. 12-19.

Trial Testimony of Sam Gunter

Gunter testified that over his twenty-three year law enforcement career, he had conducted thousands of investigations, many of which were investigations into drug sales. R. 154, ll. 18 - 155, ll. 6. Gunter stated that, based on his experience, he would be able to form an opinion on whether the amount of marijuana a person carried was for “personal use” or was to sell. R. 155, ll. 21-25.

Gunter claimed that an individual would usually carry somewhere between a half-gram and one gram worth of marijuana for personal consumption. R. 156, ll. 1-13. Gunter opined that anyone possessing over a single ounce of marijuana was likely drug dealer. R. 158, ll. 3-20. When presented with the marijuana recovered by police, Gunter stated its street value was approximately three hundred dollars and that he would associate that amount of marijuana with distribution as opposed to personal use. R. 158, ll. 21 - 159, ll. 4.

On cross-examination, Gunter conceded that police did not recover any evidence that Appellant was distributing marijuana; police did not find scales, guns, smaller “personal use” size bags, or cash on Appellant or in the residence. R. 159, ll. 20 - 161, ll. 17. Gunter also admitted that he had no involvement or personal knowledge of Appellant’s case. R. 159, ll. 9-19.

ARGUMENT

The trial court erred in allowing the State to qualify Lieutenant Sam Gunter, of the Lexington County Sheriff's Department narcotics division, as an expert in "the field of distribution and street valuation of narcotics including marijuana," where he testified to the street value of drugs, the normal means of packaging and selling marijuana, typical amounts of marijuana carried for personal use as opposed to distribution, because he was not qualified as an expert under Rule 702, SCRE.

Trial courts have a gatekeeping role with respect to all proffered expert testimony sought to be admitted under Rule 702, SCRE, whether the evidence is scientific or nonscientific. *State v. White*, 382 S.C. 265, 274, 676 S.E.2d 684, 688 (2009). In the discharge of its gatekeeping role, a trial court must assess an expert's qualifications before determining if the expert's proposed testimony is sufficiently reliable. *State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) (trial court erred in permitting testimony from criminal profiler without first assessing his qualifications as an expert).

Rule 702, SCRE, imposes on the trial courts an affirmative and meaningful gatekeeping duty. *White*, 382 S.C. at 270, 676 S.E.2d at 686. Rule 702, SCRE 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.

Qualification as an expert "depends on the particular witness' reference to the subject." *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252-253, 487 S.E.2d 596, 598 (1997) (internal citations omitted).

An expert's testimony may not exceed the scope of her expertise. *State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001) (police officer, qualified as an expert in crime scene processing and fingerprint identification, exceeded the scope of his expertise when he testified to conclusions drawn

from the location and position of the victim's body at the time of the shooting). Our Supreme Court has admonished trial judges to be cautious in conferring an expert label upon a witness as juries may accord excessive, undue weight to "expert" testimony. *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010).

The trial court erred in qualifying Investigator Gunter as an expert because he is not qualified as an expert under Rule 702. *Ellis*, 345 S.C. at 177-178, 547 S.E.2d at 491. The rule is not intended to allow police officers, who are charged with the responsibility of removing criminals from the streets, to essentially testify that they are doing their job correctly and have correctly charged the defendant with possession with intent to distribute.

The State was able to elicit Investigator Gunter's expert testimony that anytime an individual has more than one ounce or over a hundred dollars-worth of marijuana in their possession – remarkably Appellant was charged with possessing almost five ounces of marijuana worth approximately three hundred dollars – they are likely a drug dealer. R. 157, ll. 8 - 159, ll. 4. This testimony usurped the jury's fact finding role and was improper:

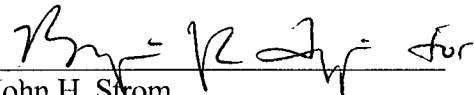
[I]t is a little too convenient that the Government has *found an individual who is expert on precisely those facts that the Government must prove to secure a guilty verdict*—even more so when that expert happens to be one of the Government's own investigators . . . When the Government skips the intermediate steps and proceeds directly from internal expertise to trial, and when those officer experts come to court and simply disgorge their factual knowledge to the jury, *the experts are no longer aiding the jury in its factfinding; they are instructing the jury on the existence of facts needed to satisfy the elements of the charged offense.*

United States v. Mejia, 545 F.3d 179, 191 (2nd Cir. 2008) (*emphasis added*). Where the trial court erred in qualifying Investigator Gunter as an expert, Appellant is entitled to a new trial.

CONCLUSION

For the foregoing reason, Appellant Matthew Gunter respectfully requests that this Court reverse his convictions and remand this case to the Lexington County Court of General Sessions for a new trial.

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of October, 2015.

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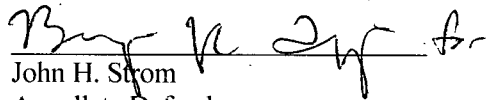
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Matthew Gunter 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 R. Keith Kelly, which was held on March 19, 2015, 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 Matthew Gunter.

Respectfully submitted,


John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of October, 2015.

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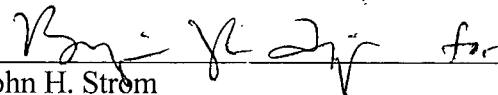
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s); and
- (2) Entire Trial Transcript (March 18 - 19, 2015).

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

October 26th, 2015



John H. Strom
Appellate Defender

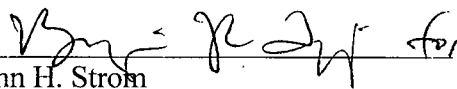
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PO Box 11589
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(803) 734-1343

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."

October 26th, 2015


John H. Strom
Appellate Defender

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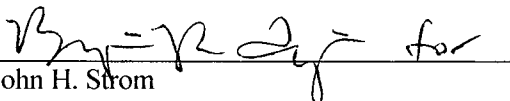
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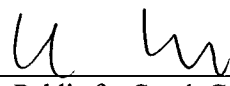
CERTIFICATE OF SERVICE

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 Matthew Gunter, at 3419 Piedmont Avenue, Columbia SC 29203, this 26th day of October, 2015.


John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 26th day of October, 2015.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: May 12, 2025.