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JUL 14 2016

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Anderson County

Alexander S. Macaulay, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TIMOTHY CROSBY,

PRO SE APPELLANT,

APPELLATE CASE NO. 2015-000325

PRO SE BRIEF OF APPELLANT

Timothy Crosby
Appellant

Livesay Correctional Institution
Dorms Bed 26-A
P.O. Box 580
Una, SC 29378
PRO SE APPELLANT,

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STATEMENT OF ISSUE ON APPEAL

Did the amendment to indictment to conspiracy to traffic in cocaine in the amount of 28 grams or more but less than 100 grams, as a lesser included offense, deprive the court of jurisdiction to impose the conviction when the court presented no evidence of the greater offense.

On January 26 - 28, 2015 the appellant's case was called to trial. Based on the testimony of the state's key witness, William Angelo Johnson. App. 271 - 272 there was no evidence of the amount of narcotics sold nor planned to be sold. There's no proof of any phone calls made to or from the appellant nor any arranged meetings discussing the transaction of narcotics. All "evidence" brought against the appellant is solely hearsay. The appellant contends the fact the counsel requested a lesser included offense (which wasn't in the indictment) when the greater offense was never established.

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 (count one). Crosby was also indicted for trafficking cocaine base ten to twenty-eight grams (count two). On January 26 - 28, 2015, 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. S.377,11.5-19. Judge Macaully 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.387.1-25. Crosby's attorney filed a notice of appeal. This appeal follows.

ARGUMENT

Appellant argues the amendment to his indictment from conspiracy to traffic in cocaine in the amount of 100 grams or more but less than 200 grams to trafficking in the amount of 28 grams or more but less than 100 isn't a lesser included offense, deprived the trial court's jurisdiction to impose the conviction.

See State v. Gosnell, 341 S.C. 627, 535.SE.2d 453 (200) (defendant was indicted for conspiracy to traffic in 400 or more grams of cocaine but was convicted of trafficking in cocaine in the amount of at least 200 grams, but less than 400 grams, as a lesser included offense, though the individual amount that the defendant allegedly handled was 252 grams where evidence clearly established that the amount trafficked by conspiracy far exceeded 400 grams).

Applying the analysis in GOSNELL to present case, appellant argues that trafficking 28 grams or more but less than 100 grams is not a lesser included offense of trafficking 100 or more but less than 200 grams, and his conviction cannot stand.

The Supreme Court of the United States, in Schmuck v. United States, 489 U.S. 705, 109 S.Ct. 1443 (1989) held; One offense is necessarily included in another only when elements of the lesser offense form a Subset of the elements of the offense charged.

In the present case, the trial court gave the jury an instruction on the purported lesser included offense of trafficking in cocaine in the amount of 28 grams or more but less than 100 grams, pursuant to S.C. Code Ann. 44-53-370(e)(2)(b). (See appendix 362-363) (here in after APP). Appellant argues the amendment to the purported less charge "deprived him of sufficient notice of the charge."

Appellant was originally indicted for conspiracy to traffic in the amount of 100 grams or more but less than 200 grams, pursuant to S.C. Code Ann. 44-53-370(e)(2)(c).

Strictly, construe the two offenses, S.C. Code Ann. 44-53-370(e)(2)(b) is not a lesser included offense of S.C. Code Ann. 44-53-370(e)(2)(c) under the elements test enunciated in Schmuck v. State.

Under the elements test, one trafficking offense is not a lesser included offense of another trafficking offense. Under Schmuck v. State there has to be at least (1) one additional element to differentiate the lesser offense from the greater offense.

Here the fundamental plan in the trial court charge to the jury on the lesser charge is the mistaken belief that the amount of substance beyond the requisite ten grams is an element of the charge.

Significantly the jury returned a verdict on the purported lesser charge of trafficking in the amount of 28 grams or more but less than 100, pursuant to S.C. Code Ann. 44-53-370(e)(2)(b) an offense in which Appellant (1) Never received notice of, (2) nor was contained within his indictment (APP. 386-387). Therefore, the amendment to appellant indictment to a purported lesser included offense deprived the trial court of jurisdiction to impose the conviction.

CONCLUSION

Appellate was convicted for an offense not contained within the indictment, and his conviction cannot stand and should be reversed.

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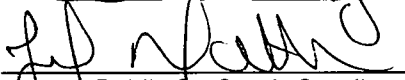
CERTIFICATE OF SERVICE

The undersigned appellant hereby certifies that a true copy of the PRO SE Brief of Appellant in the above reference 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 PRO SE Brief of Appellant, Designation of Matter and Record on Appeal have been served upon South Carolina Court of Appeal, Calhoun Building, 1220 Senate St., Columbia SC 29201.



Timothy Crosby, #247353

SUBSCRIBED AND SWORN TO before me
this 5 day of July, 2016



Notary Public for South Carolina
My Commission Expires: 1/14/2018

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