ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Lancaster County

Honorable Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JERMAINE D. GRIER,

APPELLANT

APPELLATE CASE NO 2016-001045

INITIAL BRIEF OF APPELLANT

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1. In this trial for possession of contraband by a county or municipal prisoner, did the trial judge err in refusing to direct a verdict of acquittal when the State failed to prove that the Department of Corrections Regulation 33-1, designating contraband, was displayed in a conspicuous place available and visible to visitors and inmates at the facility, as required by the statute?

2. Did the trial judge err in refusing to instruct the jury with S.C. Code §24-3-965 to allow the jury to determine if the item in question was a weapon in order to allow enhanced sentencing?

STATEMENT OF THE CASE

In February of 2016, the Lancaster County Grand Jury indicted Appellant Grier for possession of contraband by county or municipal prisoner, indictment #2016-GS-29-271. On May 11, 2016, Appellant proceeded to jury trial before the Honorable Brian M. Gibbons. Mark Grier represented Appellant at trial. Lisa Collins, Cara Walker and Cassity Brewer prosecuted the case. The jury found Appellant guilty and Judge Gibbons sentenced him to eight (8) years in prison. A timely notice of intent to appeal was served on May 13, 2016. This appeal follows.

ARGUMENT

1. In this trial for possession of contraband by a county or municipal prisoner, the trial judge erred in refusing to direct a verdict of acquittal when the State failed to prove that the Department of Corrections Regulation 33-1, designating contraband, was displayed in a conspicuous place available and visible to visitors and inmates at the facility, as required by the statute.

Appellant was indicted for possession of contraband by a county or municipal prisoner, S.C. Code §24-7-155. S.C. Code §24-7-155 provides that:

> It is unlawful for a person to furnish or attempt to furnish a prisoner in any county, municipal, or multijurisdictional jail, prison camp, work camp, or overnight lockup facility with a matter declared to be contraband. It is unlawful for an inmate of a facility to possess a matter declared to be contraband. Matters considered contraband within the meaning of this section are those which are designated as contraband and published by the Department of Corrections as Regulation 33-1 of the Department of Corrections and this regulation must be displayed in a conspicuous place available and visible to visitors and inmates at the facility. The facility manager of a local detention facility, with the approval of the sheriff or chief administrative officer as appropriate, may designate additional items as contraband. Notice of the additional items must be displayed with Regulation 33-1.
>
> A person violating the provisions of this section is guilty of a felony and, upon conviction, must be punished by a fine of not less than one thousand dollars nor more than ten thousand dollars or imprisonment for not less than one year nor more than ten years, or both.

At the time of the incident on November 16, 2015, Appellant was a prisoner at the Lancaster County Detention Center. Officer Smith with the Lancaster County Detention Center testified that while he was preparing to transport Appellant for Court, his sergeant searched Appellant and found a twisted metal piece of a pen in the chest pocket of Appellant's jail jumpsuit. (Tr. p. 78, line 17 – p. 79, lines 1-12). The officer described the object as, "It resembled the – I guess the metal piece of the pen that you use to hang on to your pocket or something." (Tr. p. 79, lines 2-3). When asked if the metal pen piece had edges, Officer Smith

answered, "Seemed like it was sharpened just a little bit." (Tr. p. 79, line 12). Officer Smith admitted that he told the officer who took the report that it was possible that Appellant could have used the metal object to open his handcuffs. (Tr. p. 83, lines 15-21). Sergeant Kennington testified that the metal pen piece found in Appellant's pocket could be used as a key or as a weapon. (Tr. p. 99, lines 2-6).

Sergeant Plyler with the Lancaster County Detention Center testified that he provided Appellant with a copy of the Detention Center rules and Appellant signed a form acknowledging that he received a copy of the rules. (Tr. pp. 70-73). The rules and the acknowledgement were introduced in evidence as State's Exhibits #5 and #6. (Tr. p. 67, lines 11-16; p. 72, lines 1-10; R. pp. **). Regulation 33-1 defining contraband articles was admitted in evidence as State's Exhibit #7. (Tr. p. 65, lines 13-18, R. p. **). There was no testimony, however, that Appellant was provided with a copy of Regulation 33-1.

At the close of the State's case Appellant moved for a directed verdict of acquittal. (Tr. p. 107, lines 14 – 23). Appellant argued:

> Okay. Well, Your Honor, please consider that the statutes 24-7-155 says that matters considered contraband within the meaning of this section are those which are designated published by the department of corrections 33-1, this regulations must be displayed in a conspicuous place available and –must be displayed in a conspicuous place available and visible to visitors and inmates at the facility. Must be displayed. There's no evidence that has been presented that there was any display of the contraband list.

(Tr. p. 107, lines 14-23). The State argued that the conspicuous display requirement was met by providing each inmate with a copy of the rules of the detention center. (Tr. p. 108, lines 1-3). The rules of the Lancaster County Detention Center, however, are different from Regulation 33-1. The State noted that there was a photograph of a sign printed for visitors but admitted that the photograph was not introduced in evidence. (Tr. p. 108, lines 4-12). None of the witnesses

testified about a sign that conspicuously displayed Regulation 33-1. The judge denied the motion stating, "But you still – you had witnesses, or a witness or two testify that each individual inmate is handed the piece of paper and they take it with them and it has all of the rules and regulations printed. I think that's enough to get past directed verdict, Mr. Grier." (Tr. p. 108, lines 13-18). When Appellant noted that the regulation must be displayed in a conspicuous place the judge stated, "I find that was conspicuous." (Tr. p. 108, line 20). The judge went on to note, "Yes, sir. But you've got a good issue on appeal." (Tr. p. 108, lines 22-23). The judge erred. Providing the inmate with a copy of the Lancaster County Detention Center Rules is not the equivalent of conspicuously displaying Regulation 33-1.

The next day Appellant renewed his directed verdict motion arguing that the State failed to prove that the regulation was conspicuously displayed. (Tr. p. 111, line 23 – p. 112, lines 1-14). The judge again denied the motion but clarified his ruling stating, "So in interpreting this statute I have to ascertain the intent of the legislature. In my opinion the intent of the legislature is for the inmates at a facility to have notice, actual notice of what is considered contraband. And as the State has argued, what better notice is there than actually handing them a document setting forth what is considered to be contraband, what you can and cannot have." (Tr. p. 113, line 20 –p . 114, 115, lines 1-15). The judge acknowledged that the statute required that the regulations be displayed in a conspicuous place but found the legislature intended to only require notice. Appellant renewed his objections after the jury returned the verdict. (Tr. p. 152, line 18 – p. 153, lines 1-3). The trial judge denied the motions. (Tr. p. 153, lines 4-5). The trial judge erred in refusing to direct a verdict of acquittal when the State failed to prove that the Department of Corrections Regulation 33-1 designating contraband was displayed in a

conspicuous place available and visible to visitors and inmates at the facility, as required by the statute.

While there is evidence that Appellant was provided with a copy of the Rules of the Lancaster County Detention Center, there is no evidence that Appellant was provided with a copy of Regulation 33-1. The trial judge erred in finding that the legislature intended to only require notice. S.C. Code §24-7-155 requires that the Regulation 33-1 designating contraband "must be displayed in a conspicuous place available and visible to visitors and inmates at the facility." In State v. Morgan, 352 S.C. 359, 366–67, 574 S.E.2d 203, 206–07 (Ct. App. 2002) the South Carolina Court of Appeals wrote:

> If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no need to employ rules of statutory interpretation and the court has no right to look for or impose another meaning Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995); Brassell, 326 S.C. at 560, 486 S.E.2d at 494. When the terms of a statute are clear, the court must apply those terms according to their literal meaning. Holley v. Mount Vernon Mills, Inc., 312 S.C. 320, 440 S.E.2d 373 (1994).

The language of §24-7-155 is plain and unambiguous, and conveys a clear and definite meaning. The judge did not need to employ rules of statutory interpretation. The judge did not need to ascertain the intent of the legislature because the statute is clear. The statute clearly and unambiguously requires that Regulation 33-1 must be displayed in a conspicuous place available and visible to visitors and inmates at the facility. The judge had no right to impose another meaning and find that the legislature intended only to require notice.

The judge erred in refusing to direct a verdict of acquittal. In State v. Brown, 360 S.C. 581, 586–87, 602 S.E.2d 392, 395 (2004), the South Carolina Supreme Court wrote:

> When a motion for a directed verdict of acquittal is made in a criminal case, the trial court is concerned with the existence or non-existence of evidence, not its weight. State v. Morgan, 282 S.C. 409, 319 S.E.2d 335 (1984). The accused is entitled to a directed verdict when the evidence merely raises a suspicion of guilt.

> State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984); State v. Brownlee, 318 S.C. 34, 455 S.E.2d 704 (Ct.App.1995). The accused also is entitled to a directed verdict when the State fails to present evidence on a material element of the offense charged. State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001); State v. Brown, 103 S.C. 437, 88 S.E. 21 (1916); State v. Gore, 318 S.C. 157, 456 S.E.2d 419 (Ct.App.1995). However, if the State presents any evidence which reasonably tends to prove the defendant's guilt, or from which the defendant's guilt can be fairly and logically deduced, the case must go to the jury. On appeal from the denial of a motion for directed verdict, this Court must view the evidence in a light most favorable to the State. State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989); Schrock, 283 S.C. at 132, 322 S.E.2d at 452.

S.C. Code §24-7-155 requires that Regulation 33-1 designating contraband "must be displayed in a conspicuous place available and visible to visitors and inmates at the facility." In Cole v. Manning, 240 S.C. 260, 263, 125 S.E.2d 621, 622 (1962) the parties stipulated that the notice required by the contraband statute found in Section 55-14 of the 1952 Code had been published by the director in a conspicuous place available to visitors at the penitentiary. The 1952 law provided:

> It shall be unlawful for any person to furnish any prisoner under the jurisdiction of the Department of Corrections with any matter declared by the Director of the prison system to be contraband. Matters considered contraband within the meaning of this section shall be those matters determined to be such by the Director and published by him in a conspicuous place available to visitors at each correctional institution. The violation of the provisions of this section shall constitute a felony and anyone convicted thereof shall be punished by a fine of not less than one thousand dollars nor more than ten thousand dollars, or imprisonment for not less than one year nor more than ten years, or both.

Like the notice requirement of the statute addressed in Cole v. Manning, the notice requirement of S.C. Code §24-7-155 requires that Regulation 33-1 designating contraband must be displayed in a conspicuous place. Unlike the parties in Cole v. Manning, the parties in the present case did not stipulate to the notice requirement. Pursuant to the statute, the conspicuous display notice is a material element of the offense. The State failed to prove the conspicuous display notice element of the offense. While providing the individual inmates with a copy of the

detention center rules is wise, it does not satisfy the conspicuous display of Regulation 33-1 notice requirement of the statute. The trial judge erred in refusing to direct a verdict of acquittal.

2. The trial judge erred in refusing to instruct the jury with S.C. Code §24-3-965, and allowing the jury to determine if the item in question was a weapon in order to allow enhanced sentencing.

Prior to trial Appellant moved to quash the indictment pursuant to S.C. Code §24-3-965 because the metal pen piece found in Appellant's pocket was not a weapon or illegal drug. (Tr. p. 26, line 3 – p. 27, 28, lines 1-20). S.C. Code §24-3-965 provides:

> Notwithstanding the provisions of Sections 22-3-540, 22-3-545, 22-3-550, 24-3-950, and **24-7-155**, the offenses of furnishing contraband, **other than weapons or illegal drugs**, to an inmate under the jurisdiction of the Department of Corrections or to an inmate in a county jail, municipal jail, regional detention facility, prison camp, work camp, or overnight lockup facility, and the possession of contraband, other than weapons or illegal drugs, by an inmate under the jurisdiction of the Department of Corrections or by an inmate in a county jail, municipal jail, regional detention facility, prison camp, work camp, or overnight lockup facility **must be tried exclusively in magistrates court**. Matters considered contraband within the meaning of this section are those which are designated as contraband by the Director of the Department of Corrections or by the local facility manager. (emphasis added).

Appellant was indicted pursuant to S.C. Code §24-7-155. Appellant argued that because the metal pen piece was not a weapon or illegal drug, the case must be tried exclusively in magistrate court. The judge correctly denied the motion to quash the indictment finding that the determination of whether the metal pen piece was a weapon was a finding of fact that needed to be made by the jury. The jury, however, was not given the opportunity to determine if the metal pen piece was a weapon.

Prior to jury instruction, Appellant asked the judge to charge the jury with S.C. Code § 24-3-965 as a lesser included offense. (Tr. p. 116, line 23 – p. 117, 118, 119, lines 1-19). Appellant asked the judge to allow the jury to make a determination of whether the metal pen piece was a weapon or not. (Tr. p. 116, line 25 – p. 117, lines 1-19). If the jury determined the

metal pen piece was contraband but not a weapon, pursuant to §24-3-965, the magistrate court would have exclusive jurisdiction. The maximum term of imprisonment imposed for an offense within the exclusive jurisdiction of the magistrate court is one year imprisonment. S.C.Code § 22–3–540 (1989) (stating magistrates have exclusive jurisdiction of all criminal cases where the punishment does not exceed a $100 fine or thirty days imprisonment); S.C.Code Ann. § 22–3–550 (1989) (stating magistrates have jurisdiction over offenses subject to fines or forfeitures of no more than $200 or thirty days imprisonment); S.C.Code Ann. § 22–3–545 (Supp.2000) (stating cases involving crimes punishable by no more than $5,000, one year imprisonment, or both may be transferred from general sessions to magistrate's court).

The judge declined to charge §24-3-965 stating, "I'm not going to charge it, you're protected in the record. I don't believe it's a lesser included offense." (Tr. p. 119, lines 19-21). While not a lesser included offense, the trial judge erred in not submitting a special verdict form to the jury to determine if the contraband was a weapon. The judge had earlier indicated, when he denied the motion to quash the indictment, that the determination of whether the metal pen piece was a weapon was a finding of fact that needed to be made by the jury. The jury should have been asked to first decide if the metal pen piece was contraband and if so, if the contraband was a weapon. The sentencing provision of §24-7-155 would only be applicable if the jury found the item was a weapon.

The legislature, in drafting §24-7-155 and §24-3-965, created two categories of contraband. Pursuant to §24-3-965, possession of contraband, **other than weapons or illegal drugs,** must be tired exclusively in magistrate court. Possession of contraband in the form of weapons or illegal drugs is governed by §24-7-155 and the penalty provision of that statute would apply, a fine of not less than one thousand dollars nor more than ten thousand dollars or

imprisonment for not less than one year nor more than ten years, or both. If the contraband is a weapon or illegal drug, the sentence is enhanced beyond the jurisdiction of the magistrate court. In order to apply the enhancement, however, the jury must find that the contraband was a weapon or illegal drug.

In Apprendi v. New Jersey, 530 U.S. 466, 147 L.E.2d 435, 120 S.Ct. 2348 (2000) the Court held, in pertinent part, that the judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment *and found by the jury.* Other than a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be *submitted to the jury*, and proved beyond a reasonable doubt. The "statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant, not the maximum sentence a judge may impose after finding additional facts. Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004). The statutory maximum sentence authorized by the jury's verdict in Appellant's case was one year pursuant to S.C. Code §24-3-965 because the jury did not specifically find that the contraband was a weapon. The eight year sentence imposed violates Appellant's Sixth Amendment right to a jury trial.

The indictment in the present case states, "That Jermaine Demarcus Grier a prisoner of a county or municipal jail, prison, work camp or overnight lockup facility, did in Lancaster County, South Carolina, on or about November 16, 2015, unlawfully possess a quantity of matter, declared by the superintendent of the facility to be contraband, to wit: a sharpened metal piece derived from a writing pen, an illegal weapon, in violation of §24-7-155, Code of Laws of South Carolina, (1976), as amended." The judge's charge to the jury, however, simply cited the language of §24-7-155. The judge told the jury, "It is unlawful for an inmate of a county, municipal, or multijurisdictional jail, prison camp, work camp, or overnight lockup facility to possess a matter declared to be

contraband. Matters considered contraband within the meaning of this section are those which are designated as contraband and published by the department of corrections as regulation 33-1 of the department of corrections. The regulation must be displayed in a conspicuous place available and visible to visitors and inmates at the facility." (Tr. p. 146, lines 5-14). Regulation 33-1 contains seven categories of contraband. (R. p. **). Only two of the categories listed in Regulation 33-1 involve weapons or illegal drugs. (R. p. **). The jury could have found that the metal pen piece was contraband, pursuant to Regulation 33-1, without finding that it was a weapon or an illegal drug.

The determination of whether the metal pen piece was a weapon is a fact that increases the penalty for the crime beyond the statutory maximum found in the exclusive jurisdiction of the magistrate court pursuant to §24-3-965. Pursuant to Apprendi, this fact must be submitted to the jury and proved beyond a reasonable doubt. Without a finding by the jury, beyond a reasonable doubt, that the metal pen piece was a weapon, the maximum sentence authorized by the verdict is one year. See Dervin v. State, 386 S.C. 164, 168, 687 S.E.2d 712, 714 (2009). The Apprendi error is not harmless. Appellant was sentenced to eight years when the jury's verdict only authorized a sentence of one year.

CONCLUSION

Based on the argument in issue one, Appellant's conviction and sentence should be reversed. Alternatively, based on the argument presented is issue two, Appellant's sentence should be reversed and the case remanded for re-sentencing not to exceed one year.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of December, 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Jermaine D. Grier, #300718, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 16th day of December, 2016.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 16th day of December, 2016.

Christian Ford (L.S)
Notary Public for South Carolina
My Commission Expires: March 1, 2026