

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)
)
STATE)
)
VS.)
)
JAWAN RAYEL WHITE)
_____)

COURT OF GENERAL SESSIONS

2012-GS-26-01319

MOTION FOR A NEW TRIAL

RECEIVED

FEB 16 2017

SC Court of Appeals

Facts

In 2011, the United States Drug Enforcement Agency, the DEA, was building a case against the Defendant, Jawan Rayel White (hereinafter Defendant), through the use of a federal confidential informants (hereinafter Federal CI) whom was acquainted with Defendant. The DEA informed the Fifth Circuit Drug Enforcement Unit (hereinafter DEU) of their interest in the Defendant in order for the DEU to continue the investigation. The DEA advised the DEU that the Defendant intended to purchase a large quantity of heroin. The Federal CI negotiated a deal with the Defendant to purchase four (4) ounces of heroin for a price of Ten Thousand 00/100 (\$10,000.00) dollars.

In August, 2011, the DEA arranged a meeting between the Defendant and a DEU informant (State CI). The plan was for the Federal CI to introduce the State CI to the Defendant as a heroin supplier for the large drug sale. On August 16, 2011 the Federal CI, the State CI and the Defendant met at Broadway at the Beach, in order to make introductions, become acquainted, and arrange the later drug sale. Prior to the meeting the State and Federal CIs met with Agent Randy Miller of the DEU in order to fit State CI with an audio and video recording devise to record the meeting.

Once the introductions took place, the Defendant informed the State CI that he did not have the Ten Thousand 00/100 (\$10,000.00) dollars needed for the sale. The State CI refused to do the sale of heroin for less than four (4) ounces. After some deliberation, the Defendant agreed to call the State CI once he was able to acquire the funds necessary to by the drugs in the drug sale. Three (3) days later, on August 19, 2011, the Defendant called the State CI to inform him that he, the Defendant, was ready to make the purchase. Further, they agreed to meet the next day at the Coastal Grande Mall to execute the drug sale.

Ex. C

Before the State CI met with the Defendant, he once again met with Agent Miller to be fitted with an audio and video recording device to record the events of the sale and to pick up four (4) ounces of imitation heroin (113.4 grams). Once the State CI had the imitation heroin he went to the Costal Grande Mall to meet the Defendant. DEU agents were positioned in various spots around the meeting point, where they could converge on the Defendant as soon as the signal was given that the sale was complete.

Once the signal was given and the sale was complete, the Defendant was arrested for trafficking heroin twenty-eight (28) grams or more, in violation of South Carolina Code Ann. 44-53-370(e)(3)(c). The Defendant was arraigned and assigned representation by the Public Defender's Office. The Defendant was represented by John Hilliard at trial.

The State called the Defendant's case to trial on June 13, 2013. The Defendant was not present on the day of the trial. The State moved to proceed with the trial in the Defendants absence, which was granted. During the "trial in absentia" hearing, the State called three witness: Heather Lewis, Assistant Clerk of Court for Horry County Circuit Court; Annie Ayers, an employee of the Fifteenth Circuit Solicitor's Office; and Roy Hemingway, Deputy Sheriff with the Horry County Sheriff Department.

Lewis testified to the authenticity of a certified copy of the Surety Bond Order that had been executed before the Defendant's release on bail for the trafficking charges. The Security Bond Order was entered into evidence without objection. The acknowledgement section of the Surety Bond Order was read into the record as follows:

"I understand that if I violate any provision of this order a warrant will be issued for my arrest. I understand and have been informed that I have a right and obligation to be present at trial, and should I fail to attend that trial the Court ... the trial will proceed in my presence."

Next, the State called Ayers. Ayers testified that she obtained a valid subpoena and mailed it to the Defendant at the address identified on the certified Security Bond Order. A copy of the subpoena was admitted into evidence without objection. Finally, the State called to Officer Hemingway. Officer Hemingway testified that he called out the Defendant's name on the courthouse steps three times, and that there was no response. Attorney Hilliard declined to cross-examine any of the witnesses the State called in support of its motion to try the Defendant in absentia.

The Court found the Defendant was notified he would be tried in his absent should he fail to appear for trial when summon, and that the Defendant was sent notice of the actual trial date as a result of the subpoena that was mail to him at the address identified on his Surety Bond Order. Therefore, the trial proceeded in the absence of the Defendant.

At the conclusion of the evidence and closing arguments, the Court charged the jury on trafficking in heroin, twenty-eight grams or more pursuant to South Carolina Code Ann. 44-53-370, as follows:

Now the Defendant is charged with trafficking in heroin. The State must prove, beyond a reasonable doubt, that the Defendant knowingly sold, manufacture, cultivate, delivered, purchased, brought into this State, provided financial assistance or otherwise aided, abetted, **attempted or conspired to sell, manufacture, cultivate, deliver, purchase or bring into this State**, and was knowingly in actual or constructive possession, knowingly attempted to become in actual or constructive possession of heroin.

In order to find the Defendant guilty the State must also prove, beyond a reasonable doubt, that the amount of the heroin, or any mixture containing heroin, was twenty-eight grams or more. Under trafficking in heroin, twenty-eight grams or more, **the presence of only imitation heroin at the transaction is irrelevant if the State proves, beyond a reasonable doubt that the Defendant conspired or attempted to purchase more than twenty-eight grams of real heroin.** (*emphasis added*).

The jury returned a verdict of guilty at the conclusion of deliberation.

Analysis

The Defendant argued three (3) issues to the Court in a Hearing held on September 14, 2016:

1. A new trial should be granted on the ground that the jury charge for trafficking in heroin, twenty-eight grams or more, was erroneous and had the potential to confuse the jury on the underlying factual bases of the state's case;
2. A new trial should be granted on the ground that defendant was denied the right to confront his accusers under the confrontation clause of the Constitution of the United States.

3. A new trial should be granted on the ground that defendant was tried in absentia in violation of his right to be present under the sixth amendment of the Constitution of the United States; and

After hearing from both the Defendant and the State, the Court denies the Defendant's motion for a New Trial.

The Defendant's first argument was that a new trial should be granted on the ground that the jury charge for trafficking in heroin, twenty-eight (28) grams or more, was erroneous and had the potential to confuse the jury on the underlying factual bases of the state's case. The Court instructed the jury:

"Under trafficking in heroin, twenty-eight grams or more, the presence of only imitation heroin at the transaction is irrelevant if the State proves, beyond a reasonable doubt that the Defendant conspired or attempted to purchase more than twenty-eight grams or real heroin." (Emphasis added)

Defendant argues that he could not be charged with trafficking four (4) ounces (113 grams) of heroin as a result of purchasing four (4) ounces of imitation heroin from an undercover agent because no evidence was presented to support a charge of conspiracy. Additionally, Defendant argues, correctly, conspiracy between an undercover informant and the Defendant cannot constitute as a conspiracy.

The heroin trafficking statute makes it illegal to conspire or attempt to sell, manufacture, cultivate, deliver, purchase, or bring heroin into South Carolina. The intent of the Defendant is a factor in determining whether the Defendant attempted to traffic heroin.

In State v. McCluney, 361 S.C. 607, 606 S.E.2d 485 (2004), McCluney and two other people attempted to purchase cocaine from a police informant. The cocaine provided to McCluney was an imitation cocaine substance. The Supreme Court of South Carolina, reversing the Court of Appeals, held:

"Trafficking is not limited to the substantive offenses of purchasing, possessing, and selling large amounts of controlled substances. Conspiring and attempting to do those acts also constitute trafficking. The part of the trafficking statute pertinent to this case is as follows: "Any person who knowingly... *attempts[] or conspires* to ... purchase ... ten grams or more of cocaine ... is guilty of a felony which is known as trafficking in cocaine. (emphasis added).

The Court of Appeals errantly focused on the facts that only imitation cocaine was present at the transaction and that purchasing imitation cocaine does not constitute trafficking. In doing so, the court relied heavily on *Murdock v. State of South Carolina*, 311 S.C. 16, 426 S.E.2d 740 (1992), which is irrelevant to Respondent's case.

The court should have focused on the State's evidence that Respondent conspired and attempted to purchase real cocaine. Section 44-53-370(e) (2) plainly states that conspiring and attempting to purchase ten grams or more of real cocaine constitute trafficking. The presence of only imitation cocaine [361 S.C. 610] at the transaction is irrelevant to Respondent's intent and thus irrelevant to the State's conspiracy and attempt arguments..." 361 S.C. 607, 609-610.

In the present case the Defendant attempted to purchase four (4) ounces of heroin. The Court charged the jury, to paraphrase, the presence of imitation heroin is irrelevant if the state proves the Defendant conspired or attempted to purchase more than twenty-eight (28) grams of real heroin. It is clear the Defendant attempted to purchase well over twenty-eight (28) grams of heroin, by the fact that the Defendant first met with the State CI, did not have adequate funds to purchase the drugs, however called the State CI later after raising Ten-Thousand 00/100 (\$10,000) dollars to complete the transaction. The fact that there was not a conspiracy is moot.

Additionally, in determining the Court's decisions regarding jury instructions, the standard of review is an abuse of discretion standard. "An appellate court will not reverse the trial court's decision regarding jury instruction unless the trial court committed an abuse of discretion. Cole v. Raut, 378 S.C. 398, 404, 663 S.E.2d 30,33 (2008). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence." *Id.* "A trial court must charge the current and correct law." Wells v. Halyard, 341 S.C. 234, 237, 533 S.E.2d 341,343 (Ct. App. 2000). Here the Court instructed the jury on the law as it was written by the legislature. The instructions were supported by the evidence presented by both the Defendant and the State.

For the foregoing reasons, I find that charging the jury, pursuant to South Carolina Code Ann. 44-53-370(e)(3)(c), was not erroneous, nor had the potential to confuse the jury.

The Defendant's second argument is that a new trial should be granted on the ground that Defendant was denied the right to confront his accusers under the confrontation clause of the Constitution of the United States. Defendant argues that the State CI was allowed to

testify to conversations that he had with the Federal CI, and that the introduction and publication of the video tape of the August 16, 2011 meeting at Broadway at the Beach constitutes testimony by the Federal CI, which the Defendant was not able to cross. Defendant argues that the introduction of the evidence was not permissible hearsay, with no exception to the rule or otherwise.

The Court would state that objection to this evidence on this ground was made initially by the Defendant in his motion for a new trial. No such objection was raised at trial. It is a well settled matter of Criminal Procedure that a motion for a new trial may not raise a new evidentiary issue for the first time. State v. Holmes, 320 S.C. 259, 266, 464 S.E.2d 334, 338 (1995). Therefore, Defendant's objection to this evidence is unreserved and not properly before this Court.

Defendant's third argument is that a new trial should be granted on the ground that defendant was tried in absentia in violation of his right to be present under the Sixth Amendment to the United States Constitution. Defendant argues Rule 16 of the South Carolina Rules of Criminal Procedure states that:

Except in cases wherein capital punishment is a permissible sentence, a person indicted for misdemeanors and/or felonies may voluntarily waive his right to be present and may be tried in his absence upon a finding by the court that **such person has received notice of his right to be present** and that a warning was given that the trial would proceed in his absence upon a failure to attend the court.

Defendant argues that there was no testimony given regarding whether the Defendant received notice of his trial date, only that a subpoena had been mailed to Defendant. However, Defendant argues that there were no questions asked concerning whether Defendant "received" the subpoena, or even if the subpoena was returned to sender.

Defendant's argument fails. As stated above, on the day of the trial the State produced three witnesses: Mrs. Lewis, Mrs. Ayers, and Officer Hemingway. Mrs. Lewis testified to the authenticity of a certified copy of the Surety Bond Order. The Security Bond Order was entered into evidence and the acknowledgement section of the Surety Bond Order was read into the record as follows:

"I understand that if I violate any provision of this order a warrant will be issued for my arrest. I understand and have been informed that I have a right and obligation to be present

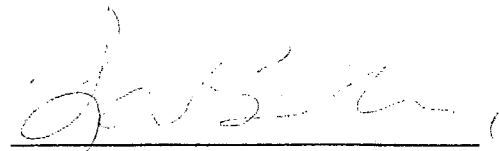
at trial, and should I fail to attend that trial the Court ... the trial will proceed in my presence."

Mrs. Ayers testified that she obtained a valid subpoena and mailed it to the Defendant at the address identified on the certified Security Bond Order. A copy of the subpoena was admitted into evidence. Additionally, Officer Hemingway testified that he called out the Defendant's name on the courthouse steps three times, and that there was no response.

The Court, by the rules of South Carolina and in its discretion, may order a trial to be held in the defendant's absence upon the finding that the defendant was noticed that if the defendant failed to come to trial that he or she could be tried in their absence and that the defendant was noticed of the trial. In the present matter there was ample evidence showing Defendant had notice that if he failed to show up to his trial that he would be tried in absentia. Additionally there was evidence presented that Defendant had been subpoenaed to appear at the trial and did not come to court on the day specified. It was in the discretion and power of the court to grant the State's motion to try the Defendant in absentia.

For the Foregoing reasons the Court Denied the Defendants Motion for a New Trial.

DATED: 11-9-16
Conway, South Carolina



Larry B. Hyman, Jr.
Circuit Court Judge
Fifteenth Judicial Circuit