

PETITION FOR WRIT OF CERTIORARI

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**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

S.C. SUPREME COURT

Appeal from Anderson County

Alexander S. Macaulay, Circuit Court Judge

Case No. 2015-000325
Opinion No. 2017-UP-080

THE STATE OF SOUTH CAROLINA.....RESPONDENT

v.

TIMOTHY CROSBY.....PETITIONER

PETITION FOR WRIT OF CERTIORARI

Timothy Crosby
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Certificate of Counsel

Counselor for petitioner certified that the petition for rehearing was made and finally ruled on by the court of appeals on April 24th 2017.

Questions Presented

Did the trial court err in charging conspiracy to traffic cocaine in the amount of at least 28 grams, but less than 100 grams as directed verdict, that he was sentenced in the lack of subject matter jurisdiction and that he was sentenced to an illegal sentence.

Also did the trial court err in denying Crosby directed verdict motion on the conspiracy to traffic cocaine one hundred grams but less than two hundred grams when the state did not establish that one hundred or more grams was an agreement to be sold.

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 Macauly 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

R.82,11.24 – R.85,11.7

Agent Cody Collier of the State Law Enforcement Division (SLED) told the trial court that she was with the SLED narcotics unit which was conducting a State Grand Jury narcotics investigation. They were focused on the “Toys R Us” investigation that covered several counties. Toys R Us was an auto repair and paint shop in Piedmont, SC. They had information that drugs were being used and sold out of the Toys R Us auto shop.

R.85,11.8 – R.88,11.25

On February 5, 2013 SLED used a confidential informant (CI), whom they wired with an audio recording device, to go to Toys R Us and purchase an ounce of crack cocaine for one thousand dollars. The CI was Anthony Murray and SLED provided the one thousand dollars to him. Their target person they hoped to catch was a man named Bernard.

R.108,11.19 – R.109,11.25

Agent Casey Collier was asked by Scott McElhannon, who represented Crosby, did she see any other vehicles in the parking lot that day. She answered at least one other than the truck but didn't know who it was and she also stated that she saw a white Dodge truck pull up but couldn't see who got out, she didn't know if it was Timothy or not.

R.128,11.1 – R.141,11.25

The CI, Anthony Murray, was fitted with an audio device and took the money to Toys R Us, but Bernard did not show, another man whom they did not know sold the drugs to the CI. CI Anthony testified that he paid a thousand dollars, in marked money, that day for an ounce of crack from an individual whom he did not know. CI Anthony was asked what did you do after you got the drugs. He responded that he left and called out a tag number of a white pickup not knowing if the person who sold him drugs was driving a white pickup because he left Toys R Us before the dealer left. CI Anthony testified he did 8 to 10 transactions at Toys R Us with no mention of Crosby ever being a part of any of them.

R.142,11.1 – R.154,11.12

CI Anthony admits he was on probation at the time and also has a history of being dishonest and lying. The day of the deal CI Anthony said in his statement Crosby had another bag of crack in his front pocket and identified Crosby the next day, 02/06/13 as the guy he had bought an ounce of crack from on 02/05/13 in a in-camera. In trial CI Anthony said he had never seen Crosby before or identified him in a line up. He was asked by Mr. McElhannon, attorney for Crosby, to identify the people on the audio recording he named Angelo Johnson, Jeff Parker, Man Ferguson, and Larry Walker with no mention of Timothy Crosby.

Timothy Crosby testified that he did take wrecked cars to Johnson's shop, Toys R Us, to be worked on and would then sale them. R.301,11.14 – R.304,11.24 On February 05, 2013 he went to the shop Toys R Us driving a white pickup truck to check on a part or a vehicle. R.304,11.25 – 23. He did not see the CI Anthony, therefore he did not sell any drugs to the CI nor did he take any money from him. Crosby had never met nor seen the CI before the trial. R.304,11.25 – R.307,11.10 When the deputies stopped Crosby after leaving Toys R Us they did not find anything on him or in the car. They let him go with a warning ticket for following too close and faulty equipment.

Jeffrey Parker worked at Toys R Us painting cars. He was also charged of conspiracy to traffic cocaine one hundred grams or more but less than two hundred grams. R.224,11.12 – R.225,11.4. Parker was asked if he was involved in any drug deals and his was that he knew nothing.

R.233,11.24 – R234,11.4 Parker testified at trial that he never actually witnessed any drug deals at Toys R Us, didn't know who he even got the drugs from and didn't know the reason of the phone calls that Angelo had him to make. R.234.11,11 – R.238,11.2

R.257, 11.14 – R.259, 11.1 SLED's chemist, Jill Clark, testified that the drugs that was taken on February 5, 2013 wit CI Anthony Murray was submitted February 6, 2013 who allegedly was in possession of these drugs didn't know who they came from. Her test results of the crack submitted was concluded to be 22.5 grams of crack cocaine, nothing more. R.255, 11.1 – 18.

R. 280, 11.16 – R.283, 11.23 William Angelo Johnson was charged in the conspiracy and testified at trial that he was on drugs and alcohol at the time and did not remember any dates or who sold him what. In conclusion, there's no argument between his conspiracy, his testimony is hearsay.

R. 294, 11.14 – R.300, 11.25 Phillip Wall testified that he was at Toys R Us on February 5th and said his voice was on the audio that was played during trial. He also said that there were other people there at the time and told the courts he did not see Mr. Crosby sell anything to anyone.

R.285, 11.21 – R.291, 11.22 Mr. McElhannon moved for a directed verdict on both indictments, trafficking ten to twenty-eight and conspiracy to traffic one hundred to two hundred grams. The judge denied his motion and stated that he will do it in reverse.

R.347, 11.22 – R.377 The judge gave the two charges that was on the indictments (count one - conspiracy to trafficking 100 grams or more but less than 200 grams of cocaine; count two - trafficking cocaine base 10 grams or more but less than 28 grams. He gave the meaning of each charge and told the jury if they had reasonable doubt they could consider the lesser included offense of trafficking cocaine conspiracy 28 grams or more but less than 100 grams, a charge that was never in the indictment.

R.377, 11.1 – 19 The jury found Crosby guilty of the lesser included, conspiracy to traffic cocaine twenty-eight grams or more but less than one hundred grams. The jury also found him guilty of the second offense of trafficking cocaine base ten grams or more but less than twenty-eight grams, a lesser conspiracy offense in which Appellant (1) Never received notice of, (2) nor was contained within his indictment.

The indictment charged Crosby with violating section 44-53-370(e)(2)(c) by conspiring to traffic in 100 or more grams but less than 200 grams of cocaine. The indictment alleged that the defendants, including Crosby:

... did ... knowingly, willingly, unlawfully, and willfully conspire, for the purpose of selling, delivering, purchasing, or bringing into this State, or providing financial assistance or otherwise aiding and abetting the sale, delivery, purchase, or bringing into this State, or the knowing actual or constructive possession, or the knowing attempt to become in actual or constructive possession of one hundred (100) grams or more but less than two hundred (200) grams of cocaine....

There is essentially a two-part test for determining whether to charge a lesser included offense. First, the court must determine if the proposed charge is legally a lesser included offense. In this regard, an indictment will sustain a conviction for a lesser offense if the lesser offense is included within the greater charged offense. *State v. Fennell*, 263 S.C. 216, 209 S.E.2d 433 (1974). The test for determining when a crime is a lesser included offense of the crime charged is whether the greater offense includes all the elements of the lesser offense. *State v. Suttles*, 279 S.C. 87, 302 S.E.2d 338 (1983). If the lesser offense includes an element not included in the greater offense, then the lesser offense is not included in the greater. *Id.*

Section 44-53-370(e) defines the offense of trafficking in cocaine as follows:

Any person who knowingly sells, manufactures, cultivates, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, cultivate, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of:
(2) ten grams or more of cocaine or any mixtures containing cocaine, as provided in Section 44-53-210(b)(4), is guilty of a felony which is known as "trafficking in cocaine"....

S.C.Code Ann. § 44-53-370(e)(2) (Supp.1999); State v. Raffaltdt, 318 S.C. 110, 456 S.E.2d 390 (1995).

There is no South Carolina case which directly answers the question of whether the graduated sentencing categories based upon quantity of cocaine are lesser included offenses. Although the statute provides a graduated structure of increasing penalties for trafficking in larger amounts of cocaine or any mixture containing cocaine, the statute is triggered by committing one of the prescribed acts with regard to ten grams or more. *Raffaldt*, 318 S.C. at 117, 456 S.E.2d at 394. Thus, our supreme court has ruled that an indictment charging trafficking in cocaine, without specifying the amount, or specifying only that the amount was in excess of ten grams, is sufficient to confer subject matter jurisdiction for trafficking in any amount. *Granger v. State*, 333 S.C. 2, 507 S.E.2d 322 (1998); see also *State v. Towery*, 300 S.C. 86, 386 S.E.2d 462 (1989).

In *Granger v. State*, 333 S.C. 2, 507 S.E.2d 322 (1998) the supreme court ruled that an indictment which alleged that the defendant trafficked in cocaine in an amount in excess of ten grams did not limit jurisdiction to the lowest sentencing category of ten grams or more of cocaine, but less than 28 grams. Therefore, the court concluded the trial court had subject matter jurisdiction to convict the defendant of trafficking in cocaine in the next higher sentencing level of 28 grams or more, but less than one hundred grams, where the facts at trial substantiated the higher amount. In support of this ruling, the court cited with approval the Alabama case of *Darby v. State*, 516 So. 2d 775 (Ala.Crim.App.1986), rev'd on other grounds, 516 So. 2d 786 (1987) for the proposition that an "indictment alleging defendant trafficked '28 grams or more' of cocaine, without specifying the exact amount of cocaine [was] sufficient; [the] provisions of trafficking relating to minimum sentencing requirements did not involve 'elements of the offense' of trafficking." *Granger*, 333 S.C. at 4-5, 507 S.E.2d at 324.

Conversely, our supreme court has also ruled that an indictment which does charge a specific sentencing parameter by designating an amount within a particular sentencing level cannot be amended before trial pursuant to S.C.Code Ann. § 17-19-100 (1985) to charge an amount within an increased sentencing level because to do so changes the nature of the offense by increasing the penalty involved. *Clair v. State*, 324 S.C. 144, 478 S.E.2d 54 (1996). In reaching this decision, the court interpreted its holding in *Hopkins v. State*, 317 S.C. 7, 451 S.E.2d 389 (1994) to declare that an amendment to an indictment is improper if it increases the penalty. If, however, the provisions relating to minimum sentencing requirements do not involve elements of the offense, then this reasoning is difficult to reconcile with *State v. Evans*, 322 S.C. 78, 470 S.E.2d 97 (1996) wherein our supreme court stated that: "A material variance between the charge and the proof entitles the defendant to a directed verdict. A variance is not material if it is not an element of the offense." *Evans*, 322 S.C. at 81, 470 S.E.2d at 99; see also *State v. Gunn*, 313 S.C. 124, 437 S.E.2d 75 (1993), cert. denied, 510 U.S. 1115, 114 S. Ct. 1061, 127 L. Ed. 2d 383 (1994).[2]

In *State v. Raffaldt*, 318 S.C. 110, 456 S.E.2d 390 (1995) the court noted without comment that the trial court had charged the lower sentencing category amounts as included within the charged offense, but the court did not rule on the propriety of that portion of the lower court's charge. In *Matthews v. State*, 300 S.C. 238, 241, 387 S.E.2d 258, 260 (1990) the supreme court concluded that the legislature intended possession with intent to distribute to be a lesser-included offense of trafficking based upon possession. Under this same reasoning, we conclude that "Conspiracy to traffic in cocaine in the amount of 100 grams or more but less than 200 grams" can include conspiracy to traffic in lesser amounts.

The second issue to be resolved in determining whether to charge a lesser included offense, is whether or not the lesser included offense is factually sustainable under any view of the evidence. A trial judge must charge a lesser included offense if there is evidence from which it can be inferred that the defendant committed the lesser rather than the greater offense. *State v. Drafts*, 288 S.C. 30, 340 S.E.2d 784 (1986). On the other hand, "[t]he trial court may and should refuse to charge on a lesser-included offense where there is no evidence that the defendant committed the lesser rather than the greater offense." *State v. Smith*, 315 S.C. 547, 549, 446 S.E.2d 411, 412-13 (1994) (citing *Casey v. State*, 305 S.C. 445, 409 S.E.2d 391 (1991)).[3]

To determine whether the facts support a charge on the lesser amounts, we first analyze the charged offense. A conspiracy is "a combination or agreement between two or more persons for the purpose of accomplishing a criminal or unlawful object..." *State v. Gunn*, 313 S.C. 124, 133-34, 437 S.E.2d 75, 80 (1993), cert. denied, 510 U.S. 1115, 114 S. Ct. 1063, 127 L. Ed. 2d 383 (citing *State v. Ameker*, 73 S.C. 330, 53 S.E. 484 (1906)); see also S.C.Code Ann. § 16-17-410 (Supp. 1999); *State v. Wilson*, 315 S.C. 289, 433 S.E.2d 864 (1993). The gravamen of conspiracy is the agreement or mutual understanding. *Gunn*, 313 S.C. at 134, 437 S.E.2d at 80; *Wilson*, 315 S.C. at 294, 433 S.E.2d at 868.

"The overt acts committed in furtherance of the conspiracy are not elements of the crime. Under South Carolina law, a conspiracy does not require overt acts." *State v. Wilson*, 315 S.C. 289, 294, 433 S.E.2d 864, 867-868 (1993). "The substantive crimes committed in furtherance of the conspiracy constitute circumstantial evidence of the existence of the conspiracy, its object, and scope." *Id.* (citing *State v. Amerson*, 311 S.C. 316, 428 S.E.2d 871 (1993)).

In this case, the conspiracy charged in the indictment was an agreement to traffic in 100 or more grams but less than 200 grams of cocaine. The evidence at trial clearly established that the amount of cocaine or a mixture containing cocaine involved in the alleged conspiracy far exceeded 100 grams or more but less than 200 grams. It is firmly rooted in our law that "[o]nce a conspiracy has been established, evidence establishing beyond a reasonable doubt the connection of a defendant to the conspiracy, even though the connection is slight, is sufficient to convict him with knowing participation in the conspiracy." *State v. Horne*, 324 S.C. 372, 382, 478 S.E.2d 289, 294 (Ct.App.1996) (citing *State v. Sullivan*, 277 S.C. 35, 282 S.E.2d 838 (1981)). Further, "the acts and declarations of any conspirator made during the conspiracy and in furtherance thereof are deemed to be the acts and declarations of every other conspirator and are admissible against all." *Id.* (quoting *Sullivan*, 277 S.C. at 42, 282 S.E.2d at 842). Therefore, if the defendant's actions, however slight, are sufficient to establish his participation in the conspiracy, then he is guilty of the charged conspiracy. Conversely, a variance between a single drug trafficking conspiracy charged in an indictment and several conspiracies proved at trial is a "material variance" and cannot support the convictions of defendants not involved in the charged conspiracy, but only those who are so involved. *State v. Gunn*, 313 S.C. 124, 437 S.E.2d 75 (1993).

CONCLUSION

For the reasons stated petitioner asks the court to grant the petition for a writ of certiorari. In view of these legal principles it is concluded that by charging the lesser amount as a lesser included offense, the court committed reversible error because it allowed the jury to convict Crosby of a different uncharged conspiracy. Conspiracy to traffic in an amount of cocaine contained within a lesser sentencing level than that alleged in the indictment may be proper where the amount involved in the object of the conspiracy is in controversy. In such circumstances, the lesser charge would be an appropriate consideration in defining the scope or object of the conspiracy and it would apply to each alleged conspirator. Factually, that was not the case here. Though the individual amount which Crosby allegedly handled was 22 grams, the evidence clearly established that the amount trafficked by the conspiracy far exceeded 100 grams or more but less than 200 grams. Consequently Crosby was convicted of an offense not contained within the indictment and his conviction cannot stand and should be reversed.

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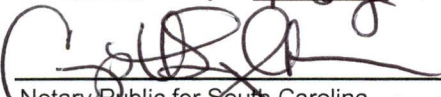
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I certify that I have served a Petition for a Writ of Certiorari by depositing a copy in the United States Mail, postage paid on 5/22/17 addressed to the following: Alan Wilson, Esquire, Attorney General and Joshua R. Underwood, Esquire, Assistant Attorney General at Rembert Dennis Building 1000 Assembly Street Room 519, Columbia SC 29201; Jenny Abbott, Kitchening Clerk, Court of Appeals Post Office Box 11629 Columbia, SC 29211; The Supreme Court of South Carolina – Daniel Shearouse, Clerk of Court, Post Office Box 11330, Columbia SC 29211



Timothy Crosby #247353

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this 22 day of May, 2017



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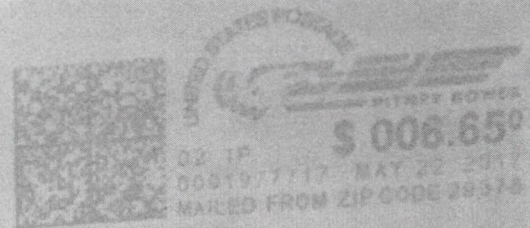
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
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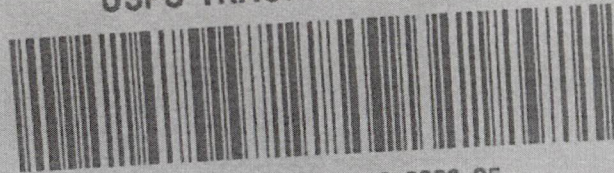
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The South Carolina Court of Appeals S.C. SUPREME COURT

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February 15, 2017

Mr. Joshua Richard Underwood, Esquire
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Columbia SC 29211-1549

Ms. LaNelle Cantey DuRant, Esquire
1330 Lady St., Suite 401
PO Box 11589
Columbia SC 29211

Re: The State v. Timothy Crosby
Appellate Case No. 2015-000325

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

Jenny A. Kitchings
CLERK

cc: Timothy Crosby, 247353
Alan McCrory Wilson, Esquire
The Honorable Alexander S. Macaulay

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

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Appeal From Anderson County
Alexander S. Macaulay, Circuit Court Judge

Unpublished Opinion No. 2017-UP-080
Submitted January 1, 2017 – Filed February 15, 2017

APPEAL DISMISSED

Appellate Defender LaNelle Cantey DuRant, of
Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Senior
Assistant Deputy Attorney General John Benjamin Aplin,
and Assistant Attorney General Joshua Richard
Underwood, all of Columbia, for Respondent.

PER CURIAM: Dismissed after consideration of Appellant's pro se brief and review pursuant to *Anders v. California*, 386 U.S. 738 (1967). Counsel's motion to be relieved is granted.

APPEAL DISMISSED.¹

HUFF and SHORT, JJ., and MOORE, A.J., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

The South Carolina Court of Appeals

The State, Respondent,

v.

Timothy Crosby, Appellant.

Appellate Case No. 2015-000325

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas E. Huff J.

Paul G. Short, Jr. J.

James E. Moore A.J.

Columbia, South Carolina

cc:

Timothy Crosby, 247353

Alan McCrory Wilson, Esquire

Joshua Richard Underwood, Esquire

FILED

April 24, 2017



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
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