

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

ORIGINAL

THE STATE,

RESPONDENT,

V.

JO PRADUBSRI,

APPELLANT

APPELLATE CASE NO 2015-000208

Appeal from Lexington County

Honorable Clifton Newman, Circuit Court Judge

Opinion No. 5499

PETITION FOR REHEARING

RECEIVED  
JUL 25 2017  
SC Court of Appeals

On July 19, 2017, this Court affirmed Appellant's conviction and sentence in a published opinion. *State v. Pradubsri*, 2015-OP-5499 (S.C. Ct. App. filed July 17, 2017). Pursuant to Rule 221(a), SCARC, Appellant asks this Court to rehear this matter in light of the significant points overlooked and/or misapprehended by this Court in rendering its opinion, which will be explained more fully below and addressed in the order of this Court's opinion.

First, this Court held that reasonable suspicion existed for law enforcement to initiate the traffic stop of Appellant's vehicle based solely on the information provided by a confidential informant. Notably, this Court conceded that "the informant here did not give as much

predictive information as” confidential informants had in other cases. However, this Court concluded that the informant’s record of providing accurate information to law enforcement in unrelated past investigations and her correct information regarding the make and model of Appellant’s vehicle, provided reasonable suspicion.

This Court further held that Appellant’s presence in “the small, identified area” where the informant had previously stated Appellant would be gave police additional justification to stop Appellant. Respectfully, this Court’s conclusion that reasonable suspicion existed based solely on the informant’s information was an error of law.

Reasonable suspicion requires “a particularized and objective basis that would lead one to suspect another of criminal activity.” *United States v. Cortez*, 449 U.S. 411, 417 (1981); *State v. Lesley*, 486 S.E.2d 276 (Ct. App. 1997). Reasonable suspicion “entails. . . something more than an inchoate and unparticularized suspicion or ‘hunch,’ but less than the level of suspicion required for probable cause” *State v. Butler*, 343 S.C. 198, 202, 539 S.E.2d 414, 416 (Ct. App. 2000).

In determining that reasonable suspicion existed to support the traffic stop, this Court ignored that the informant had proven she was unreliable. Finch testified that he received between ten and twenty calls about Appellant from the informant over a three month period. R. 47, ll. 8-18. In many of her calls, the informant told Finch where Appellant was and where Appellant was going to be.

Nevertheless, it took law enforcement three months to locate Appellant. In many respects the informant in the present case is a less precise, less reliable version of the informant in *State v. Pope*, 410 S.C. 214, 763 S.E.2d 214 (Ct. App. 2014). Moreover, when law enforcement finally located Appellant, they did not observe any of the illegal activity the informant attributed to Appellant.

This Court also misconstrued “the small, identified area” that the informant predicted Appellant would be located in during the three months she was in contact with law enforcement. The informant told police that Appellant lived and sold drugs in the Irmo – St. Andrews area. This description encompasses one entire municipality, Irmo, and a densely inhabited portion of another, Columbia. The area spans two counties and has a combined population of over thirty thousand people.

The informant’s vague location information coupled with the three months of unsuccessful efforts by law enforcement to corroborate her allegations and the complete lack of incriminating corroborative details when Appellant was finally located meant that it was an error for this Court to conclude that the informant’s information was sufficiently particularized to provide law enforcement with reasonable suspicion to initiate an investigatory stop. *Cf. State v. Pope*, 410 S.C. 214, 763 S.E.2d 214 (Ct. App. 2014) (reasonable suspicion existed where informant provided a specific time, road, travel direction, confirmed the location with the defendant, and his information confirmed by law enforcement); *State v. Roberts*, 368 S.C. 529, 629 S.E.2d 679 (Ct. App. 2006) (reasonable suspicion existed where informant accurately predicted robbery and police located car matching informant’s information after the robbery).

Next, this Court held that, while the trial court erred defining reasonable doubt as “doubt which makes an honest, sincere, conscientious juror in search of the truth hesitate to act,” the error was harmless. This Court concluded that the error was harmless because the trial court “referenced the ‘beyond a reasonable doubt’ standard at least twenty times during its instructions.” Respectfully, this Court’s prejudice analysis makes two significant errors.

Our Supreme Court has specifically held jurors should not be instructed that, “their verdict would represent truth and justice for the parties.” *State v. Daniels*, 401 S.C. 251, 258, 737 S.E.2d

473, 477 (2012); *see also State v. Needs*, 333 S.C. 20, 538 S.E.2d 248 (2000) (instructions on reasonable doubt which charge the jury to “seek the truth” are disfavored because they risk unconstitutionally shifting the burden of proof to defendant).

First, this Court appears to have overlooked the fact that, while the trial court used the words “beyond a reasonable doubt” some twenty times during its instructions; the trial court provided only one definition of what “beyond a reasonable doubt” actually means. Namely, reasonable doubt was a “doubt which makes an honest, sincere, conscientious juror in search of the truth hesitate to act.” Simply repeating that jurors must find Appellant guilty “beyond a reasonable doubt” did not correct the erroneous definition of what constituted “beyond a reasonable doubt.”

Jurors are presumed to follow the law. The trial court repeatedly instructed jurors that they must determine whether the State had proven Appellant’s guilt beyond a reasonable doubt. The trial court defined reasonable doubt in a way that suggested jurors should determine whether they believed the State’s version of events was more likely true or the defendant’s version of events.

Thus, the trial court was instructing jurors to decide Appellant’s guilt using a preponderance of the evidence standard. Instructing jurors, whether done once or one hundred times, that they must find Appellant guilty “beyond a reasonable doubt” cannot render the trial court’s use of an improper definition of “beyond a reasonable doubt” harmless.

Second, this Court overlooked that the trial court not only defined “beyond a reasonable doubt” in terms seeking the truth, but also twice instructed jurors to determine the “truth of the evidence presented” and to “determine that evidence which convinces you of its truth.” R. 325, ll.13-15; R. 326 13-18.

Under these circumstances, it is very likely that the jurors substituted the trial court’s repeated admonition to determine the truth in this case for the State’s constitutional duty to prove

Appellant's guilt beyond a reasonable doubt. *Accord State v. Daniels*, 401 S.C. 251, 737 S.E.2d 737 (2012); *State v. Needs*, 333 S.C. 134, 508 S.E.2d 857 (2000); *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000); *Cf. Todd v. State*, 355 S.C. 396, 585 S.E.2d 305 (2003) (no reasonable likelihood that the jurors applied the judge's instruction in a way that violated Due Process Clause).

In addition, this Court held that the trial court did not err in refusing to reveal the informant's identity. Citing to *State v. Humphries*, 354 S.C. 87, 90, 579 S.E.2d 613, 615 (2003), this Court concluded that the informant was not a material witness or an active participant in a criminal transaction.

This conclusion was an error of law. The informant was material witness. As an initial matter, as the State was not required to identify the informant, Appellant was unable to effectively challenge whether reasonable suspicion existed to justify the investigatory stop. R. 81 - 82. Police conducted virtually no independent investigation to confirm the validity of the informant's information. *State v. Burns*, 294 S.C. 338, 340, 364 S.E.2d 465, 466 (1988) (informant relied upon by law enforcement when seeking warrant was a material witness).

Moreover, the State's theory at trial was that Appellant was the drug dealer and Martin simply worked for him in exchange for drugs. The defense's theory was that Martin was the drug dealer and Appellant was her driver. The defense highlighted that Martin had the drugs on her when they were stopped by police and that she ran her own prostitution ring, which included drug dealing, independent of Appellant. Martin had an obvious motive to lie and to cast blame on Appellant. She had also received a highly favorable plea deal in exchange for her testimony despite repeatedly violating the terms of her probation.

The informant was the only one apart from Martin and Appellant who could testify as to whether Appellant or Martin was the drug dealer. This court also failed to take into consideration

the fact that Appellant was arrested over six years before trial so there was minimal risk that revealing the informant's identity would compromise the flow of information to law enforcement or harm the informant. R. 387.

Law enforcement's investigative decisions made the informant a material witness. The police choose to forgo other investigative techniques such as controlled buys or surveillance, and did not even wait for a pretextual traffic violation. Furthermore, the State relied totally Martin's testimony to establish that Appellant – and not Martin – was the drug dealer. *State v. Blyther*, 287 S.C. 31, 33, 336 S.E.2d 151, 152-53 (Ct. App. 1985) (finding “where . . . the informant is either a *material witness to the crime* or directly participates in it, disclosure may be required, particularly where, in a drug related crime, he is the *only witness to the transaction other than the buyer and the defendant*”) (internal citation omitted) *(emphasis added)*.

Without the identity of the informant, Appellant was unable to effectively attack the existence of reasonable suspicion. Therefore, the trial court erred in refusing to reveal the identity of the informant where the informant acted beyond the scope of a mere tipster and her identity was essential for a fair determination of Appellant's case.

This Court also misconstrued Appellant's argument with respect to the *mens rea* requirement of the former version of the proximity charge. Appellant was indicted for possession with intent to distribute crack cocaine within proximity of a school. R. 387. At the time of Appellant's arrest, this offense was defined as: “[i]t is a separate criminal offense for a person to distribute, sell, purchase, manufacture, or to unlawfully possess with intent to distribute , a controlled substance while in, on, or within one-half mile radius of the grounds of a public or private elementary school . . .” S.C. Code Ann. § 44-53-445 (1995).

This Court was correct in noting that the current version of the statute requires the State to prove a defendant knew he was within a one-half mile radius of one of the enumerated places. This Court was also right to note that the current version of the statute has no relevance to Appellant's case. However, Appellant's argument raises a separate issue and the subsequent revision of the proximity charge statute is irrelevant to the appeal.

This Court erred in rejecting Appellant's argument that the previous version of the statute – at a minimum – required Appellant to act with criminal negligence. Where criminal statutes contain significant penalties, courts are reluctant to conclude that the legislature intended any material element of the crime to be one of strict liability. *Morissette v. United States*, 342 U.S. 246 (1952); *State v. Ferguson*, 302 S.C. 269, 395 S.E.2d 182 (1990) (distribution of cocaine case, controlled substances statute required a mental state of at least criminal negligence).

Our Supreme Court has regularly held that the failure of the legislature to explicitly include a mental state in defining a particular element of a crime does not mean that the legislature intended to make the crime one of strict liability. *State v. Jefferies*, 316 S.C. 13, 446 S.E.2d 427 (1994) (review of the evolution of the kidnapping statute illustrated that it was not intended to be a strict liability offense); *see also: State v. Freeland*, 106 S.C. 220, 91 S.E. 3 (1916) (possible to be guilty of cocaine possession if defendant acted with “willful or negligent want of knowledge. If she was culpably ignorant of the fact, her ignorance would not excuse her”).

The default *mens rea* requirement in South Carolina is criminal negligence. Criminal negligence is defined in our case law as when a defendant “inadvertently creates a substantial and unjustifiable risk of which he ought to be aware.” *State v. Taylor*, 323 S.C. 162, 473 S.E.2d 817 (Ct.App.1996).

In Appellant's case, there was no substantial circumstantial evidence produced by the State tending to show that Appellant knew or was "willfully ignorant" of the fact that Irmo Elementary was within a half-mile of the Kroger. The evidence relied upon by the State does not amount to substantial circumstantial evidence reasonably tending to prove Appellant's guilt, or from which his guilt may be fairly and logically deduced. *See Bostick*, 392 S.C. at 139, 708 S.E.2d at 776-777.

Therefore, this Court erred in refusing to grant a directed verdict on Appellant's indictment for PWID within proximity of a school where the evidence merely raised the suspicion of Appellant's guilt, and the State failed to present substantial circumstantial evidence that Appellant knowingly or with willful ignorance possessed with intent to distribute crack cocaine within proximity of a school. *See Ferguson*, 302 S.C. 269, 395 S.E.2d 182; *see also Freeland*, 106 S.C. 220, 91 S.E. 3.

Finally, this Court erred in affirming the trial court's admission of Martin's testimony regarding alleged prior drug manufacture and sales by Appellant. The trial court erroneously ruled that the prior manufacturing and sales were an element of trafficking. Accordingly, the trial court refused to rule on whether the State had proven these prior bad acts by clear and convincing evidence.

Affirming the trial court's ruling was legal error. Trafficking in crack cocaine is defined as:

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 . . . is guilty of a felony which is known as "trafficking in cocaine"

S.C. Code Ann. § 44-53-370(e) & (e)(2). In short, trafficking "includes practically any activity related to being involved with drugs above *a certain weight*." Willaim S. McAninch, W. Gaston

Fairey & Lesley M. Coggiola, *The Criminal Law of South Carolina* 448 - 449 (5th ed. 2007) (*emphasis added*).

Petitioner's indictment accused him of trafficking by "actual or constructive possession" or attempted actual or constructive possession of 68.88 grams of crack cocaine. Appellant was not charged with conspiracy to traffick in some larger, undetermined amount of crack cocaine. R. 387. Therefore, the prior manufacture and sales of crack cocaine could not have constituted proof of an element of Appellant's trafficking charge. *State v. Amerson*, 311 S.C. 316, 428 S.E.2d 871 (1993).

Had the trial court properly assessed the evidence of prior drug sales and manufacture under Rule 404(b), SCRE, it would have been clear that the State could not prove these prior bad acts by a preponderance of the evidence and that the danger of unfair prejudice substantially outweighed any marginal relevance.

For both purported bad acts, the State was totally reliant on Martin's unreliable, biased testimony. *Cf. State v. Cheeseboro*, 346 S.C. 526, 552 S.E.2d 300 (2001) (testimony that defendant previously murdered cab driver was admissible: there was evidence appellant was in possession of the murder weapon at the time of the cab driver shooting and the cab driver gave a description generally matching appellant).

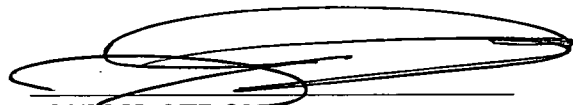
The State could not produce any surveillance footage from the Kroger, nor the gift card that Martin claimed she accepted as a payment for the crack cocaine. With respect to her claims that Appellant manufactured crack cocaine in their residence, Sgt. Birch testified that his observation of the house did not reveal any suspicious activity. R. 62, ll. 22 - 64, ll. 24; *State v. Humphries*, 345 S.C. 87, 579 S.E.2d 613 (2003)(testimony by former employee that defendant had marijuana delivered to employee's residence two days following defendant's arrest was improper bad act evidence).

Turning to prejudice, Martin's prior bad act testimony was damning because it provided the State with a coherent narrative alleging that Appellant was the trafficker; despite Martin possessing the crack cocaine and initially claiming the crack cocaine belonged to her. Further, Martin's unsubstantiated testimony emphasizing that Appellant regularly manufactured crack cocaine enhanced the unfair prejudice. Most importantly, these alleged prior bad acts confused the issues and misled the jury as to the elements of trafficking.

Consequently, this court erred in affirming the trial court's admission of Martin's testimony because it constituted impermissible prior bad act evidence under Rule 404(b), SCRE, having no logical relation to the crimes for which Appellant was standing trial, and, to the extent the testimony had any probative value, its probative value was outweighed by its prejudicial effect.

In light of the factors listed above that were overlooked and/or misapprehended by this Court in reaching its opinion, Appellant respectfully requests this Court rehear the matter and dismiss the charge against him.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "JOHN H. STROM", written over a horizontal line.

JOHN H. STROM  
Appellate Defender

This 25th day of July, 2017.

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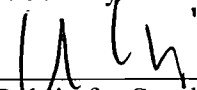
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon William M. Blich, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Jo Pradubsri, #181097, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 25th day of July, 2017.



John H. Strom  
Appellate Defender  
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE  
ME this 25th day of July, 2017.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: 5/12/2025