STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

LANCE L. MILES,

APPELLANT

APPELLATE CASE NO 2015-000308

Appeal from Lexington County

Honorable Thomas A. Russo, Circuit Court Judge

Opinion No. 5511

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Appellant Lance Miles respectfully petitions this Court for a rehearing in the above-captioned matter after a published opinion, dated August 23, 2017, affirmed his conviction for first degree burglary. In support of his petition, Appellant respectfully alleges that this Court overlooked or misapprehended the following arguments:

Issues I & II

Respectfully, this Court's opinion misconstrued the cannons of statutory interpretation when concluding that a defendant only needs to know that he is possessing a controlled substance to be guilty of trafficking in heroin under § 44-53-370(e). In so doing, this Court effectively rewrote S.C,

Code Ann. § 44-53-370(e), instead of interpreting the plain language of the subsection in a straightforward manner consistent with the other sections of the Narcotics and Controlled Substances Act.

Rules of Statutory Construction

The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. *State v. Morgan*, 352 S.C. 359, 574 S.E.2d 203 (Ct.App.2002) (*citing State v. Baucom*, 340 S.C. 339, 531 S.E.2d 922 (2000)). All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. *State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577 (Ct.App.1999) *cert. denied as improvidently granted, State v. Hudson*, 346 S.C. 139, 551 S.E.2d 253 (2001).

The legislature's intent should be ascertained primarily from the plain language of the statute. *Morgan* at 366, 574 S.E.2d 203, 547 S.E.2d at 206. Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation. *Id.* Courts should consider, not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997). The terms must be construed in context and their meaning determined by looking at the other terms used in the statute. *Hudson*, 336 S.C. 237, 519 S.E.2d 577.

Finally, penal statutes must be strictly construed against the State and in favor of the defendant. *Hair v. State*, 305 S.C. 77, 406 S.E.2d 332 (1991). Any doubt as to the proper construction should be resolved in favor of the citizen against the state. *State v. Cutler*, 374 S.C.

376, 264 S.E.2d 420 (1980); *see also Yates v. United States*, 135 S.Ct. 1074 (2015) (ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity).

The South Carolina Narcotics and Controlled Substances Act

The Narcotics and Controlled Substances Act ("The Act") is a comprehensive statutory scheme regulating the all aspects of the use and prohibition of controlled substances. In § 44-53-110, the Act defines number of relevant terms. For instance, the Act defines "controlled substance" as a drug, substance, or immediate precursor in Schedules I through V in Sections 44-53-190, 44-53-210, 44-53-230, 44-53-250, and 44-53-270." § 44-53-110(6). The Act also defines specific drugs and narcotics such as marijuana, cocaine base, methamphetamine, and opium. § 44-53-110 (9), (27)-(30).

The Act criminalizes the possession of "a controlled substance." Possession encompasses a broad range of conduct:

> Except as authorized by this article it shall be unlawful for any person:
>
> (1) to manufacture, distribute, dispense, deliver, purchase, aid, abet, attempt, or conspire to manufacture, distribute, dispense, deliver, or purchase, or possess with the intent to manufacture, distribute, dispense, deliver, or purchase **a controlled substance** or a controlled substance analogue;
>
> (2) to create, distribute, dispense, deliver, or purchase, or aid, abet, attempt, or conspire to create, distribute, dispense, deliver, or purchase, or possess with intent to distribute, dispense, deliver, or purchase a counterfeit substance.

§ 44-53-370(a) (*emphasis added*). Notably, possession of a controlled substance does not require the State to prove a defendant "knowingly" possessed a "controlled substance." *State v. Ferguson*, 302 S.C. 269, 395 S.E.2d 182 (1990) (holding that defendant must be at least criminally negligent when he or she manufactured, distributed, or dispensed a controlled substance under § 44-53-

370(a)). The punishment for unauthorized possession of a "controlled substance," "counterfeit substance," or "controlled substance analogue" varies depending on the which schedule the "controlled substance" falls into. § 44-53-370(b).

The Act also "prohibits any person knowingly or intentionally to possess a **controlled substance** unless the substance was obtained directly from, or pursuant to a valid prescription or order of, a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this article." § 44-53-370(c) (*emphasis added*). A person who violates § 44-53-370(c) is sentenced based on the schedule of drug they possessed and the number of prior convictions. § 44-53-370(d).

Turning to § 44-53-370(e)(3), the structure of this subsection different from that of § 44-53-370(a) and § 44-53-370(c). The trafficking statute does not use the word "**controlled substance.**" Rather, South Carolina's trafficking offenses are divided by drug type and then further divided by the amount of the specific drug with sentencing ranges also determined based, in part, on the number of the defendant's prior offenses. § 44-53-370(e)(1)-(8). This structure, when read in a straightforward manner, makes clear that the legislature intended to punish individuals who are "knowingly in actual or constructive possession" of four grams or more of "any morphine, opium, salt, isomer, or salt of an isomer thereof."

Our Supreme Court has held that "knowledge" can to be equated with a defendant having a "**firm belief" or awareness of a particular element or fact.**" *State v. White*, 311 S.C. 276, 44 S.E.2d 741 (1947) (former receipt of stolen goods statute required that State to prove that defendant knew he was receiving stolen goods). It will often be proved by circumstantial evidence. *Id.* Our courts have rejected a definition of "knowledge" that encompasses "willful blindness" as it would improperly "broaden the meaning of knowledge.'" *Ducworth v. Neely*, 319 S.C. 158, 456 S.E.2d

896 (Ct. App. 1995). Requiring knowledge of the specific drug being trafficked makes sense given the harsh penalties for trafficking and the lesser penalties for the two possession offenses.

In issuing its opinion, this Court failed to consider that § 44-53-370(e) is not the only trafficking statute. Additional standalone trafficking offenses are found in § 44-53-375(c) covering trafficking in methamphetamine and crack cocaine. This statute is worded identically to the trafficking offenses found in § 44-53-370(e):

> A person who knowingly sells, manufactures, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, 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 ten grams or more of methamphetamine or cocaine base, as defined and otherwise limited in Section 44-53-110, 44-53-210(d)(1), or 44-53-210(d)(2), is guilty of a felony which is known as "trafficking in methamphetamine or cocaine base" and, upon conviction, must be punished as follows if the quantity involved is:

§ 44-53-375(c).

A plain reading of the § 44-53-370(e)(3) requires the State to prove that Appellant knew he was possessing oxycodone. This Court's opinion inserted the term "controlled substance" into § 44-53-370(e). Injecting the word "controlled substance" into § 44-53-370(e)(3) would create two arbitrary classes of trafficking offenses. Under § 44-53-370(e), a defendant could be guilty of trafficking in one of the enumerated drugs, by virtue of there being evidence that he knew he was dealing with a controlled substance. By contrast, to be guilty of trafficking under § 44-53-375(c), the State would have to prove that a defendant specifically knew he was trafficking in methamphetamine or crack cocaine. This inconsistent outcome among similarly situated defendants could not have been the intent of the legislature.

Likewise, adopting this Court's construction of § 44-53-370(e), requiring only knowledge of a "controlled substance," to § 44-53-375(c) would cause a serious due process problem if because trafficking in methamphetamine and crack cocaine are punished more severely than other kinds of trafficking. *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000) (holding a hate crime statute unconstitutional because it allowed the trial court to increase a criminal sentence beyond a statutory maximum based on his own finding of an aggravating factor).

Trafficking Statutes in Other States

This Court's opinion also misapprehended the practical effect of requiring the State to prove knowledge of the specific drug being trafficked. Other jurisdictions, with similarly written trafficking statutes require the prosecution prove that a defendant knew what drug he was trafficking. *See Way v. State*, 475 So.2d 239 (Fl. 1987) (trafficking statute requires "knowing" possession of cocaine); *Young v. Commonwealth*, 659 S.E.2d 308 (Va. 2008) (defendant must have knowledge of the nature and character of the substance in his possession); *Calhoun v. State*, 460 So.2d 268 (Al. Ct. Crim. App. 1984) (prosecutors must prove that "the accused knew he was in possession of more than one kilogram of marijuana"); *Wilson v. State*, 718 S.E.2d 31 (Ga. Ct. App. 2011) (cocaine trafficking statute explicitly requires that defendant know substance possessed and know it is cocaine); *State v. Zetina-Torres*, 400 S.W.2d 343 (Mo. Ct. App. WD 2013) (must prove defendant knew methamphetamine was in vehicle and that defendant exercised control over it); *Martin v. Commonwealth*, 409 S.W.2d (Ky. 2013) (defendant must know that substance he possessed was cocaine); *State v. Coleman*, 742 S.E.2d 346 (N.C. Ct. App. 2013) (court erred in failing to give instruction that the State must prove defendant's knowledge of the type of contraband he was carrying); *State v. Dudick*, 213 S.E.2d 458 (W.V. 1975) (must prove beyond a reasonable doubt defendant knew there was marijuana where police found it and that defendant exercised

control over it); *State v. Henry*, 63 P.3 490 (Id. Ct. App. 2003) (trafficking requires defendant to have knowledge that the substance was methamphetamine).

Accordingly, this Court erred in affirming the trial court's instruction to jurors that the State did not need to prove beyond a reasonable that Appellant knowingly possessed oxycodone, rather the State needed only to prove that the Appellant knowingly possessed a controlled substance. This response was a misstatement of the applicable law and based on an improper construction of § 44-53-370(e) and § 44-53-370(e)(3).

As to Issue II, the trial court erred in refusing to grant a directed verdict on Appellant's indictment for trafficking in oxycodone as the State failed to present any evidence that Appellant was "knowingly and intentionally in actual or constructive possession" of oxycodone, as required under § 44-53-370(e)(3); *State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011).

Issue III

Respectfully, this Court erred in concluding that the State did not violate Appellant's right against self-incrimination by introducing Appellant's statements to police when the first statement was the product of an interrogation by officers who failed to advise Appellant of his *Miranda*[1] rights and Appellant's subsequent statements were tainted by the initial violation and the product of an involuntary waiver.

The police engaged in an improper interrogation technique. They questioned Appellant without providing *Miranda* warnings. After extracting an incriminating admission, the police then *Mirandized* Appellant and asked him the same questions again. R. 10, l. 4 – 15, l. 12. This issue is preserved for appellate review. Defense counsel objected to the admission of both Appellant's pre-*Miranda* and post-*Miranda* statements. *State ex rel. Wilson v. Ortho-McNeil-Janssen*

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Pharmaceuticals, Inc., 414 S.C. 33, 777 S.E.2d 176 (2015) (holding counsel is not required to harass the trial judge by making continued objections after an issue has been ruled upon to preserve an issue for appeal.); *Herron v. Century BMW*, 395 S.C. 461, 719 S.E.2d 640 (2011); *Malloy v. Thompson*, 409 S.C. 557, 762 S.E.2d 690 (2014).

Admitting Appellant's statements could not have been harmless error as his statements were the only evidence that Appellant knew, under this Court's lower *mens rea* requirement for trafficking, the package he intercepted contained a "controlled substance." *State v. Mitchell*, 286 S.C. 572, 336 S.E.2d 150 (1985) (holding that an error can only be harmless when "it could not reasonably have affected the result of trial."). Without his incriminating admissions, jurors would have had to speculate as to whether Appellant was simply stealing the package – contents unknown – from the front porch of the apartment or whether he believed the package likely contained a "controlled substance." *State v. Bailey*, 298 S.C. 1, 377 S.E.2d 581 (1989) (holding an insubstantial error not affecting the result of the trial is harmless where a defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached.).

Appellant's interrogation mirrors those found improper under *Seibert* and *Navy*. *Missouri v. Seibert*, 542 U.S. 600 (2004); *State v. Navy*, 386 S.C. 294, 688 S.E.2d 838 (2010). Officers interrogated Appellant for an extended period of time prior to advising him of his rights. At the onset of the pre-advisement interrogation, Appellant initially denied knowing the contents of the package. R. 10, ll. 4-25. Unsatisfied with this answer, Agent Edmonson continued to probe Appellant, telling him that he believed there were drugs in the package. *Id.*

Appellant eventually conceded that there were very likely drugs in the package. *Id.* In response to continued questioning, Appellant also allegedly admitted that he had previously picked-up other packages in the past year, and that he did so because he could not find other employment to

support his family. R. 149, ll. 20 - 150, ll. 6. As law enforcement was not forthcoming at trial regarding the extent of its pre-*Miranda* interrogation, the exact contours of the pre-*Miranda* interrogation are unclear.

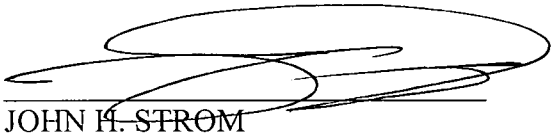
What is clear is that after obtaining a written waiver of Appellant's rights, the same officer, Edmonson, continued to ask Appellant the same questions and Appellant's post-*Miranda* statements were virtually identical to his pre-*Miranda* statements. Moreover, there was no break whatsoever between the unwarned statements and the warned statements as Appellant made his written statement only thirty to forty-five minutes after being tackled and handcuffed by police. R. 176, ll. 8-18; R. 195, ll. 6-15. The setting of the interrogation did not change. The arresting officers did not attempt to cure their error by informing Appellant that his pre-*Miranda* statements could not be used against him.

Accordingly, this Court erred by finding defense counsel failed to preserve his objection to the trial court's admission of Appellant's post-*Miranda* statements. This Court also erred by concluding that the admission of Appellant's statements constituted harmless error.

Conclusion

Based on the foregoing arguments, Appellant Lance L. Miles respectfully requests that this Court this Court issue an order granting a rehearing and, ultimately, reverse his conviction and remand this case to the Lexington County Court of General Sessions (Issues I and III), or in the alternative, issue an Order of acquittal (Issue II).

Respectfully Submitted,



JOHN H. STROM
Appellate Defender

This 7th day of September, 2017.

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Honorable Thomas A. Russo, Circuit Court Judge

THE STATE,

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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 Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Lance L. Miles, #299857, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 7th day of September, 2017.

John H. Strom
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 7th day of September, 2017.

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