STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Oconee County

Honorable Alexander S. Macaulay, Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

GREGORY LEE MURPHY,

APPELLANT

APPELLATE CASE NO. 2016-002445

ANDERS BRIEF OF APPELLANT PURSUANT TO WHITE V. STATE

LARA M. CAUDY
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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err by refusing to charge the jury with the lesser included offense of possession of methamphetamine when there was evidence from which the jury could have found Appellant committed the lesser offense rather than the greater offense of distribution of methamphetamine for which he was indicted?

STATEMENT OF THE CASE

An Oconee County Grand Jury indicted Appellant on March 11, 2013 for distribution of methamphetamine. App. 328-329. His case was called to trial on June 24, 2013 before the Honorable Alexander S. Macaulay, and a jury. App. 1. Deputy Solicitor Blair Stoudemire represented the state, and Daniel Day represented Appellant. App. 1.

On June 26, 2013, the jury found Appellant guilty as indicted. App. 250, ll. 15-24. He was sentenced by Judge Macaulay to twenty five years suspended upon the service of ninety months imprisonment and five years probation. App. 264, l. 22 – 265, l. 10. He did not appeal.

On November 8, 2013, Appellant filed an application for post-conviction relief (PCR) seeking, *inter alia*, a belated direct appeal because his trial counsel failed to file a notice of appeal. App. 267-273. The state filed a return to this application dated July 8, 2014. App. 276-282. An evidentiary hearing was convened on July 28, 2014 before the Honorable Edgar W. Dickson. Assistant Attorney General J. Walt Whitmire represented the state, and Hugh Welborn represented Appellant. App. 283. By order filed November 28, 2014, Judge Dickson granted Appellant a belated direct appeal. 319-327.

This brief of appellant follows.

STATEMENT OF THE FACTS

The state alleged at trial that Appellant distributed a small quantity of methamphetamine to Marlee Crowe, a confidential informant who was working with the Oconee County Sheriff's Office, on August 8, 2012. Appellant suffered from a severe drug addiction for many years and admitted to being a user of methamphetamine and to possessing methamphetamine on August 8, 2012. However, he vehemently denied distributing the drug to Crowe on that day. Appellant and Crowe knew each other for over a decade and had smoked methamphetamine together on numerous occasions. App. 136, ll. 17-24; App. 182, l. 20 – 183, l. 1. Appellant testified that he called Crowe on the morning of August 8, 2012 because he did not have any money and "wanted to get high." In the past, if Appellant did not have money to purchase methamphetamine, Crowe often did and they would use methamphetamine together. App. 183, ll. 2-15. They had smoked together about two weeks before this incident. App. 183, ll. 16-19.

In August 2012, Appellant was staying with a friend named Carrie. App. 184, ll. 11-17. There was methamphetamine in this home, but Appellant did not have any money to purchase the drug. App. 184, ll. 18-24. On August 8, 2012, he invited Crowe over to smoke with him. Crowe drove to the house where Appellant was staying and Appellant walked outside to greet her. He was holding a glass pipe in his hand, which he used to smoke methamphetamine, and a cigarette lighter. App. 184, l. 25 – 186, l. 10. Crowe gave Appellant twenty five dollars and he went inside the house. When he returned, he had a small quantity of methamphetamine that he expected to smoke with Crowe in the car. However, when he got into the car, Crowe told Appellant she did not want to smoke. App. 186, l. 21 – 188, l. 19. Consequently, Appellant took a small amount of the drug and left the remainder with Crowe. App. 189, ll. 15-18. After Crowe left, Appellant smoked alone on the front porch. App. 190, ll. 6-15.

Before meeting Appellant that day, Crowe contacted Sergeant Brandon Long with the Oconee County Sheriff's Office and told Long that she could purchase methamphetamine from Appellant. App. 89, ll. 13-19. Sergeant Long and Investigator Tim Hunnicutt with the Seneca Police Department worked with Crowe to set up a controlled buy. App. 117, ll. 9-12. When Crowe ultimately met Appellant, she was wired with audio and video recording equipment. App. 54, ll. 6-16; App. 80, l. 16 – 81, l. 24. The recording of her interaction with Appellant was admitted into evidence during Appellant's trial without objection and published to the jury. App. 122, l. 24 – 123, l. 12. After meeting with Appellant, Crowe turned over a substance to Sergeant Long that was later confirmed to be .13 grams of methamphetamine. App. 156, l. 19 – 158, l. 2. Crowe was paid sixty dollars for her assistance. App. 51, ll. 20-24; App. 85, ll. 3-4.

At the conclusion of the presentation of evidence, Appellant requested the judge charge the jury with the lesser included offense of possession of methamphetamine. Counsel argued there was evidence from which the jury could find Appellant was merely in possession of methamphetamine and thus committed only the lesser offense. App. 216, ll. 2-17. The deputy solicitor did not object. The solicitor stated, "Judge, quite honestly if he [Appellant] hadn't testified I was probably gonna argue there was no evidence to show possession. However, based on his testimony I think Mr. Murphy [Appellant] did say that he was keeping part of the drugs for his personal use. I really don't have a whole lot of argument against that if he's keeping part of that for his personal use. I don't know that I can argue against it." App. 217, ll. 3-10.

Despite the state's lack of objection, the judge refused to charge the lesser offense. Reading from State v. Franks, 376 S.C. 621, 658 S.E.2d 104 (Ct. App. 2008), the judge stated, "Mere contention that a jury might accept [the] State's evidence in part and reject it in part is insufficient to satisfy a requirement for an instruction of [a] lesser-included offense that, there

must be some evidence tending to show [the] Defendant was guilty of only the lesser offense." App. 217, ll. 12-21. The judge found the only testimony presented was that Appellant "possessed it [methamphetamine] to distribute it, and therefore, there [wa]s no evidence of mere possession." App. 219, ll. 12-21. Consequently, the judge denied Appellant's request to charge. At the conclusion of the charge to the jury, Appellant renewed his objection. App. 248, ll. 6-16.

The jury ultimately found Appellant guilty as indicted. App. 250, ll. 15-24.

ARGUMENT

The trial judge erred by refusing to charge the jury with the lesser included offense of possession of methamphetamine when there was evidence from which the jury could have found Appellant committed the lesser offense rather than the greater offense of distribution of methamphetamine for which he was indicted.

The trial judge erred by denying Appellant's request to instruct the jury that it could find him guilty of the lesser included offense of possession of methamphetamine. There was evidence from which the jury could have inferred Appellant committed the lesser offense rather than the greater offense of distribution of methamphetamine. Respectfully, this Court should reverse the ruling of the trial judge and grant Appellant a new trial.

"A trial judge is required to charge a jury on a lesser included offense if there is evidence from which it could be inferred that a defendant committed the lesser offense rather than the greater." State v. Franks, 376 S.C. 621, 624, 658 S.E.2d 104, 106 (Ct. App. 2008) (quoting State v. Drafts, 288 S.C. 30, 32, 340 S.E.2d 784, 785 (1986)) (internal quotation marks omitted). "[D]ue process requires that a lesser included offense instruction be given only where the evidence warrants such an instruction." Id. (quoting Hopper v. Evans, 456 U.S. 605, 611 (1982)) (internal quotation marks omitted). "The mere contention that the jury might accept the State's evidence in part and reject it in part is insufficient to satisfy the requirement that some evidence tend to show the defendant was guilty of only the lesser offense." Id. (quoting State v. Geiger, 370 S.C. 600, 608, 635 S.E.2d 669, 674 (Ct. App. 2006)).

Appellant was indicted for distribution of methamphetamine pursuant to S.C. Code Ann. § 44-53-375(B), which states in relevant part: "A person who manufactures, distributes, dispenses, delivers, purchases, or otherwise aids, abets, attempts, or conspires to manufacture,

distribute, dispense, deliver, or purchase, or possesses with intent to distribute, dispense, or deliver methamphetamine . . . is guilty of a felony." Appellant, on the other hand, requested the trial judge charge the jury with the lesser included offense of possession of methamphetamine pursuant to S.C. Code Ann. § 44-53-375(A), which states in pertinent part: "A person possessing less than one gram of methamphetamine . . . is guilty of a misdemeanor."

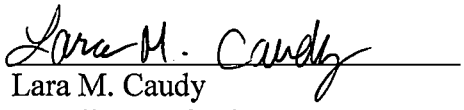
Because there was evidence from which the jury could have found Appellant was guilty of only possessing methamphetamine, the judge erred by refusing to charge the lesser offense. The state alleged at trial that Appellant distributed or sold methamphetamine to Marlee Crowe. However, there was ample evidence presented from which the jury could have concluded Appellant only committed the lesser offense of possession of methamphetamine. Appellant testified that he invited Crowe over to the home where he was staying to smoke methamphetamine. When he approached Crowe's car, Appellant had a glass pipe used to smoke methamphetamine in his hand along with a cigarette lighter. After he reentered the house, Appellant returned to the car with a very small quantity of methamphetamine that he intended to and expected to smoke with Crowe. However, for the first time ever, Crowe stated she did not want to smoke with Appellant. Consequently, Crowe left and Appellant admitted to smoking the methamphetamine alone on the front porch.

This evidence, if believed, established that Appellant was guilty of merely possessing methamphetamine, not distributing it. Therefore, the trial judge erred by refusing to charge the lesser offense. Respectfully, this Court should reverse the ruling of the trial judge and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of September, 2017.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Gregory Lee Murphy states:

1. She is an appellate defender for the South Carolina Office of Appellate Defense, and was appointed to represent Appellant.

2. She has reviewed the record of Appellant's trial before the Honorable Alexander S. Macaulay, which was held on June 24-26, 2013, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Gregory Lee Murphy.

Respectfully Submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of September, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

September 8, 2017.

Lara M. Caudy

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant in the above referenced case has been served upon Lindsey McCallister, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant has been served upon Gregory Lee Murphy, at 225 Skyline Drive, Walhalla, SC 29691, this 8th day of September, 2017.

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 8th day of September, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.