

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Georgetown County

Honorable Michael G. Nettles, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARVIN LUTHER MYERS, JR.

APPELLANT

APPELLATE CASE NO 2017-001044

ANDERS BRIEF OF APPELLANT

RECEIVED
MAR 02 2018
SC Court of Appeals

LANELLE CANTEY DURANT
Appellate Defender

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in denying Appellant Myers' motion for a directed verdict on the trafficking cocaine, trafficking cocaine base and PWID marijuana when the state did not present substantial circumstantial evidence that the cocaine, cocaine base, and marijuana belonged to Myers as the evidence only raised mere suspicion of Myers' guilt based on his mere presence when there were no eyewitnesses and no forensic evidence connecting Myers to these drugs?

STATEMENT OF THE CASE

On May 25, 2016, the Georgetown County Grand Jury indicted Marvin Luther Myers, Jr. on the charges of possession with intent to distribute (PWID) heroin; PWID marijuana; trafficking in cocaine base more than ten grams but less than twenty-eight grams; and trafficking in cocaine twenty-eight to one hundred grams. On April 17-19, 2017, Appellant Myers proceeded to trial before the Honorable Michael G. Nettles and a jury. Myers was represented by C. Rauch Wise, and the state was represented by Richard D. Todd, Jr. R. 1. The jury found Myers guilty of the lesser charges of PWID cocaine; PWID cocaine base; possession of heroin; possession of marijuana. (R. 361, ll. 19 – R. 362, ll. 12). The judge sentenced Myers to one year on the possession of marijuana; to two years for the possession of heroin; to seven years for the PWID cocaine base; to seven years for the PWID cocaine with all sentences to run concurrent. (R. 375, ll. 11 – R. 376, ll. 4). Myers' attorney filed a notice of appeal. This appeal follows.

ARGUMENT

The trial court erred in denying Appellant Myers' motion for a directed verdict on the trafficking cocaine, trafficking cocaine base and PWID marijuana when the state did not present substantial circumstantial evidence that the cocaine, cocaine base, and marijuana belonged to Myers as the evidence only raised mere suspicion of Myers' guilt based on his mere presence when there were no eyewitnesses and no forensic evidence connecting Myers to these drugs.

Relevant Facts

Joshua Bliss and his wife, Nicole, lived with Scotty Roach at his home in Georgetown. R. 81, ll. 1 – 5; R. 86 ll. 17 – 24. Joshua Bliss had charges pending and chose to cooperate with law enforcement in order to have some charges dismissed. As a result, he wore a camera and acted as a confidential informant (CI) and purchased drugs from Scotty Roach. R. 124, ll. 9 – R. 126, ll. 23; R. 90, ll. 1 – 25.

As a result of Joshua Bliss' drug buy, the police obtained a search warrant and an arrest warrant for Scotty Roach. R. 91, ll. 1 – 16. On December 11, 2015, the police executed the search warrant on Roach's residence. Five adults and one child were found in the house, and drugs were found throughout the house, R. 130, ll. 22 – 25. R. 91, ll. 8 – 19; R. 95, ll. 1 – 22. Marvin Myers was found in one of the back bedrooms. An envelope addressed to Myers was found under the TV stand in the bedroom. Myers' driver's license was found in his wallet found in a pair of pants on the bed in the same bedroom. R. 100, ll. 1 – 15; R. 108, ll. 1 – 21.

When the officers entered the bedroom where Myers' items were, they smelled the odor of raw and burnt marijuana. In excess of 300 grams of marijuana was found in the laundry room outside Myers' alleged bedroom. R. 101, ll. 1 – 17. Inside the bedroom containing Myers' things was found a Walmart bag containing two plastic bags. Inside one of the plastic bags was 19.6

grams of crack cocaine, and inside the other plastic bag was 57 grams of powder cocaine. R. 105, ll. 2 – 23.

Inside the pocket of the pants found in the alleged bedroom of Myers was found a car key in addition to Myers' identification. The key fit the rental Infiniti SUV parked in the driveway of the house. When the vehicle was searched, a jacket was found. Inside the pocket of the jacket was found a bag with 1.4 grams of heroin. R. 116, ll. 1- R. 118, ll. 9. Myers claimed the jacket as his. R. 224, ll. 11 – 13.

Myers was arrested and charged with trafficking cocaine; trafficking crack cocaine; PWID marijuana; and PWID heroin. R. 185, ll. 1 – 25; R. 81, ll. 18 – R. 82, ll. 24.

At trial, the SLED drug analyst testified that the amount of drugs found were 11.38 grams of marijuana; 56.40 grams of cocaine; 17.45 grams of crack cocaine; and 1.02 grams of heroin. R. 168, ll. 6 – R. 171, ll. 21.

At trial, Agent Donald Tempalsky testified that no DNA analysis was done on any of the items taken from the home. No items were checked for fingerprints. R. 131, ll. 1 – R. 132, ll. 19. Agent Tempalsky admitted also that Myers' driver's license had an address of Alex Alford Drive. R. 129, ll. 1 – 23. Scotty Roach's home where the search warrant was executed was located on Park Street. R. 91, ll. 8 – 19.

At the close of the state's case, defense counsel made a motion for a directed verdict (DV) on all of the charges except the possession of the heroin found in the jacket that the state said Myers acknowledged as his. Defense counsel argued that the only evidence the state had of the other charges was Myers' mere presence. Counsel pointed out that the house was not Myers' and there was no evidence that that house was Myers' residence. Counsel argued that the letters

showed that Myers received his mail at another address. There was no DNA analysis performed on any of the items. R. 241, ll. 10 –R. 242, ll. 17.

Counsel argued to the court that he had a “pet peeve” about circumstantial evidence cases. He said that the Supreme Court had not defined the term “substantial circumstantial evidence.” Counsel explained that although some of Myers’ items were found in the bedroom, there was no evidence that he ever touched any of them. R. 242, ll. 18 – R. 243, ll. 22.

The trial judge said that it was a factual question for the jury. The judge thought there was substantial circumstantial evidence. R. 247, ll. 1 – 25.

The defense called witnesses who verified that Myers did not live at Scotty Roach’s house. Danielle Gibson testified that she and Myers were dating and he helped her with her business. She confirmed that Myers lived with his grandmother. R. 258, ll. 1 – 25; R. 252, ll. 1 – R. 257, ll. 23.

Ernest Mattison testified that Myers was his nephew. He confirmed that Myers lived with Mattison and Myers’ grandmother. However, if Myers came in too late, the door would be locked and he would have to find somewhere else. R. 288, ll. 21 – R. 292, ll. 25.

The judge denied the motion but assured counsel he was “protected on the record.” At the close of the evidence, defense counsel renewed his motion for a directed verdict. Based on the same issues as before. R. 308, ll. 23 – R. 309, ll. 25.

The jury returned verdicts of guilty on lesser included charges. The verdicts were: guilty of PWID cocaine instead of trafficking; guilty of PWID crack cocaine instead of trafficking; possession of heroin instead of PWID heroin; possession of marijuana instead of PWID marijuana. R. 361, ll. 22 – R. 362, ll. 12. The judge sentenced Myers to seven years incarceration total. All sentences ran concurrent. R. 375, ll. 1 – R. 376, ll. 3.

Discussion

On appeal of a denial of a directed verdict of acquittal, the Supreme Court must look at the evidence in the light most favorable to the state. State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004). A trial judge should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty. Id.; State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004). Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error. State v. Arnold, *supra*. A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged. State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

In State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011), the Supreme Court held that the state presented insufficient evidence to submit Bostick's murder charge to the jury and the trial court should have granted a directed verdict where direct evidence linked the defendant to the crime scene or to items from the victim's house found in a burn pile on the defendant's mother's property. There was no testimony tending to establish that the defendant had control over the burn pile and blood found on the defendant's pants could not be matched to the victim's DNA, and no evidence was presented concerning the defendant's knowledge that the victim may have had money in a briefcase in her house.

In State v. Butler, 407 S.C. 376, 755 S.E.2d 457 (2014), the Supreme Court held that if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury. Citing State v. Cherry, *supra*.

In Myers' case, there was only a mere suspicion of Myers' guilt. There were no witnesses nor any forensic evidence. The state did not present any witnesses who had bought drugs from

Myers or who had seen him sell drugs. There were no witnesses who told of heavy traffic to the incident location. There was not substantial circumstantial evidence of Myers' guilt.

CONCLUSION

Based on the above, the conviction and sentence should be reversed and the case remanded for a directed verdict.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of March, 2018.

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Honorable Michael G. Nettles, Circuit Court Judge

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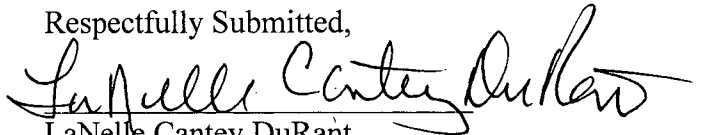
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Marvin Luther Myers states:

1. She is 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 Judge Michael G. Nettles, which was held on April 18-19, 2017, 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 Marvin Luther Myers.

Respectfully Submitted,



LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR APPELLANT

This 2nd day of March, 2018.

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IN THE COURT OF APPEALS

Appeal from Georgetown County
Honorable Michael G. Nettles, Circuit Court Judge

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MARVIN LUTHER MYERS, JR.

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**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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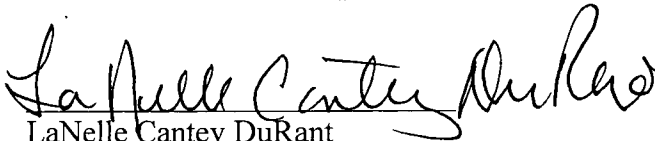
SC Court of Appeals

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s):
- (2) Sentencing sheets
- (3) Trial Transcript April 17, 2017
- (4) Trial Transcript April 18-19, 2017

I certify that this designation contains no matter which is irrelevant to this appeal.

March 2, 2018


LaNelle Cantey DuRant
Appellate Defender

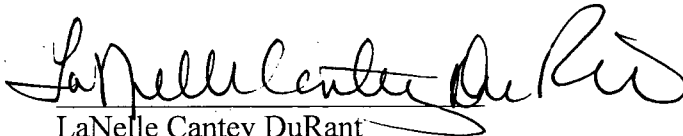
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ATTORNEY FOR APPELLANT

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."

March 2, 2018.



LaNelle Cantey DuRant
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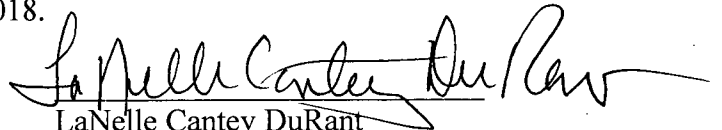
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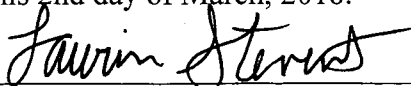
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Marvin Luther Myers, 301535, at Kershaw Correctional Institution, 4848 Gold Mine Hwy, Kershaw, SC 29067, this 2nd day of March, 2018.



LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 2nd day of March, 2018.

 (L.S)

Notary Public for South Carolina
My Commission Expires: July 5, 2027.