

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Pickens County

Honorable Robert E. Hood, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JIMMY LARRY GILSTRAP,

APPELLANT

APPELLATE CASE NO 2017-001467

RECEIVED

ANDERS BRIEF OF APPELLANT

MAY 30 2018

SC Court of Appeals

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in admitting the NPLeX report which indicated the dates and amount of Sudafed purchased by Appellant Gilstrap, his wife, and the two co-defendants, Jerry Murphy and Sherry Bowie which was not needed as the two co-defendants testified as to the number of times they purchased Sudafed allegedly at the direction of Appellant, and which report was prejudicial to Appellant as it was cumulative to the testimony?

STATEMENT OF THE CASE

On July 22, 2014, the Pickens County Grand Jury indicted Appellant Jimmy Gilstrap on the charge of manufacturing methamphetamine. On June 21-22, 2017, Gilstrap proceeded to trial before the Honorable Robert Hood and a jury. Appellant Gilstrap was represented by Dorothy Manigault, and the state was represented by Graham Buckner. R. 1. The jury found Gilstrap guilty as indicted. R. 310, ll. 4 – 23. The judge sentenced Gilstrap to ten years. R. 312, ll. 14 – 18. Gilstrap's attorney filed a notice of appeal. This appeal follows.

STANDARD OF REVIEW

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006) citing State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. Pagan, *supra*, citing State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

ARGUMENT

The trial court erred in admitting the NPLEx report which indicated the dates and amount of Sudafed purchased by Appellant Gilstrap, his wife, and the two co-defendants, Jerry Murphy and Sherry Bowie which was not needed as the two co-defendants testified as to the number of times they purchased Sudafed allegedly at the direction of Appellant, and which report was prejudicial to Appellant as it was cumulative to the testimony.

Facts

On November 4, 2013, the Pickens County Sheriff's Office along with SLED, went to the home of Perry Murphy and Sherry Bowie to discuss with them the excessive amount of the drug, Sudafed, that they had been purchasing. R. 90, ll. 12 – 20; R. 72, ll. 8 – R.74, ll. 24. Law enforcement monitored a database, NPLEx, where purchases of Sudafed were reported. This was due to the “epidemic of the use of methamphetamine” in Pickens County. R. 73, ll. 1 – R. 75, ll. 25.

According to Deputy Kevin Dunham, Murphy gave consent for the officers to search the residence. The deputy took pictures of the home and the interior. The photographs were of items known to be used to manufacture methamphetamine. These items included lithium battery strips, coffee filter with white powdery substance, Drano, rubber tubing, Sudafed blister pack, coffee grinder for grinding pills, salt, pipe cutter, and others. R. 76, ll. 7 - R. 84, ll. 12.

According to Deputy Durham, Murphy admitted that these items found in his residence were the ingredients of a “meth lab.” R. 84, ll. 16 -R. 85, ll. 1. The items were destroyed due to the danger of preserving them. R. 85, ll. 2 – R. 86, ll. 6. No identifiable fingerprints were found. R. 87, ll. 12 – 20.

Captain Chad Brooks took statements from Murphy and Bowie that same day. R. 88, ll. 9 – 19. A narcotics team then went to the home of Appellant Gilstrap because of his being involved with Murphy and Bowie. R. 86, ll. 12 – R. 87, ll. 11.

Both Murphy and Bowie entered guilty pleas to manufacturing methamphetamine and exposing a child to the manufacture of methamphetamine in 2014 or about one year following their arrest. The child was Bowie's sixteen-year-old son who lived with them. R. 135, ll. 1 – R. 136, ll. 23; R. 162, ll. 15 – 25.

Appellant Gilstrap was arrested about six months after this incident on May 12, 2014. R. 237, ll. 21 – R. 238, ll. 1. The Pickens County Grand Jury indicted Gilstrap on July 22, 2014 on the charge of manufacturing methamphetamine. See Indictment 2014-GS-39-1578.

On June 21-22, 2017, Gilstrap proceeded to trial before the Honorable Robert Hood. In a pretrial motion, the state told the court that they planned to introduce the NPLeX records which did show pseudoephedrine purchases. R. 44, ll. 12 – 25. The state argued that both co-defendants—Murphy and Bowie—were going to testify that they “operated under the direction” of Appellant Gilstrap who convinced them to purchase the pseudoephedrine (Sudafed). Gilstrap then used the co-defendants' home to make the “meth” and Gilstrap would give them some. R. 45, ll. 1 – 20.

Defense counsel objected to the NPLeX records being admitted. Counsel argued that the testimony of the two co-defendants would be sufficient. R. 49, ll. 1 – 6. The judge decided to postpone his ruling until he had more information. R. 49, ll. 7 – 20; R. 51, ll. 12 – 17.

Co-defendant Murphy testified during an in-camera proffer that during about a ten month period just before their arrest, he and his girlfriend, Bowie, bought Sudafed at the suggestion of Gilstrap. Gilstrap and his wife, Loretta, would come to Murphy's residence and

make the “meth.” In exchange for buying the Sudafed, Gilstrap would give Murphy and Bowie a quarter gram of “meth.” Murphy and Bowie bought the Sudafed about every ten or twelve days. R. 92, ll. 18 – R. 93, ll. 25.

Bowie testified during a proffer to the same story. She admitted that she did not know how to make “meth.” R. 100, ll. 16 – R. 103, ll. 7.

Following the proffers of the two co-defendants, the judge ruled that the NPLeX records would be admissible through Krista McCormick who was the custodian of the records. The judge found that one of the elements of manufacturing methamphetamine was that the defendant could be involved in a conspiracy. The judge ruled that this was evidence of a conspiracy and was relevant and not so “prejudicial as to outweigh the probative effect.” R. 106, ll. 21 – R. 108, ll. 19.

During the trial, Krista McCormick testified that she was with Apprise, Inc. which provided the NPLeX program. She was the manager of the NPLeX subpoena compliance. She explained that NPLeX meant the “National Precursor Log Exchange” which was a database for tracking pseudoephedrine as a result of the Federal Combat Methamphetamine Epidemic Act that passed in 2006. R. 113, ll. 1- R. 114, ll. 17. She presented to the court Appellant Gilstrap’s record of pseudoephedrine and ephedrine transactions between January 1, 2013 through December 31, 2013. Defense counsel objected “subject to her previous objection” when Gilstrap’s record was admitted into evidence. The judge admitted the record “over Defense’ objection.” R. 117, ll. 1 – R. 118, ll. 2.

Murphy then testified before the jury that he had pled guilty to manufacturing “meth.” He testified that he bought Sudafed or pseudoephedrine because Gilstrap asked him to do it. Gilstrap made the methamphetamine at Murphy’s trailer residence and the four of them—

Murphy, Bowie, Loretta, and Gilstrap- used the “meth” by snorting it. R. 134, ll. 4 – R. 140, ll. 24; R. 147, ll. 15 – 25. Bowie testified also that she and Murphy bought Sudafed at Gilstrap’s direction. R. 162, ll. 20 – R. 170, ll. 20.

Investigator Tommy Blankenship, who worked with the Pickens County Sheriff’s Office, was qualified by the court as an expert to testify within the field of methamphetamine production. R. 184, ll. 1 – R. 190, ll. 25. He testified that in his expert opinion, after reviewing the photos, that Murphy’s residence was an active methamphetamine lab that had just been used. He said it was still usable at that point in time. R. 211, ll. 11 – 16.

Appellant Gilstrap testified in his own defense that he did not manufacture methamphetamine at the residence of Murphy and Bowie. He denied socializing with them and said that Murphy gave him rides to the “jockey lot and stuff.” Gilstrap testified that he never made “meth” at his home nor Murphy’s home. He denied selling the drug. R. 222, ll. 1 – 25; R. 225, ll. 1 – R. 227, ll. 24. Gilstrap admitted that he had purchased pseudoephedrine because “everybody in his family took it.” He explained that they lived in a home with mold and building problems. His wife and daughter even used an inhaler at times. R. 236, ll. 1 – R. 237, ll. 23.

The jury found Gilstrap guilty as indicted. R. 310, ll. 1 – 23. The judge sentenced Gilstrap to ten years incarceration. R. 312, ll. 7 – 22.

Discussion

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. 403, SCRE.

In State v. Lee, 399 S.C. 521, 732 S.E.2d 225 (2012), the Court of Appeals held that photographs taken seven to eight months after the last charged incident of criminal sexual conduct (CSC) with a minor under the age of eleven were unduly prejudicial and inadmissible and were not harmless beyond a reasonable doubt. Lee was convicted of criminal sexual conduct with a minor under the age of eleven; committing or attempting to commit a lewd act on a child under the age of sixteen; and unlawful conduct towards a child.

The Court found that the photographs “were the subject of detailed testimony at trial and were cumulative of such testimony.” The Court also ruled that photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they were not necessary to substantiate material facts or conditions. Lee’s case was reversed and remanded.

Gilstrap’s case is similar in that the extensive NPLeX report was not necessary to substantiate a material fact or condition. Two co-defendants, Murphy and Bowie, testified about buying the Sudafed or methamphetamine. The NPLeX report was only cumulative to their testimony. The admission of the NPLeX report was extremely prejudicial to Gilstrap.

CONCLUSION

Based on the above, Appellant's convictions and sentences should be reversed, and the case remanded for a new trial.

A handwritten signature in black ink, appearing to read "LaNelle Cantey DuRant". The signature is written in a cursive style with a large initial "L" and a long, sweeping underline.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of May, 2018.

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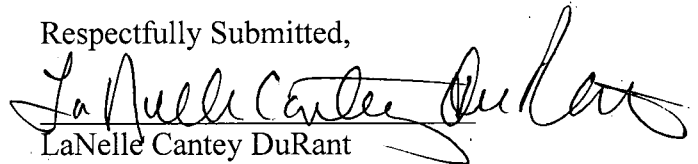
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jimmy L. Gilstrap 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 Robert E. Hood, which was held on June 19 - 23, 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 Jimmy L. Gilstrap.

Respectfully Submitted,



LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR APPELLANT

This 30th day of May, 2018.

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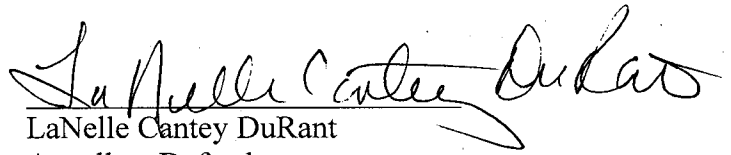
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s):
- (2) Sentencing sheet
- (3) Trial Transcript June 21-22, 2017

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

May 30, 2018



LaNelle Cantey DuRant
Appellate Defender

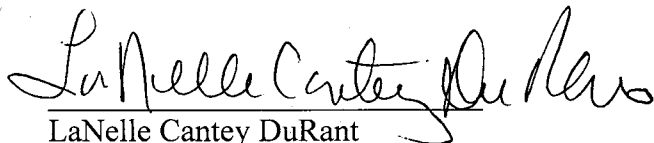
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ATTORNEY FOR APPELLANT

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."

May 30, 2018.



LaNelle Cantey DuRant
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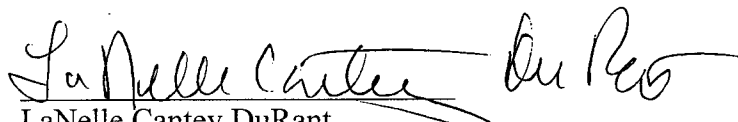
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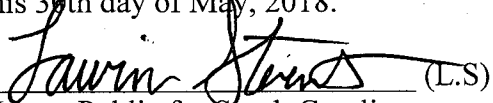
APPELLANT

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 Jimmy L. Gilstrap, #372971, at Livesay Pre-Release Center, Post Office Box 580, Una, SC 29378, this 30th day of May, 2018.


LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 30th day of May, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.