

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Union County
John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DOUGLAS HALL,

APPELLANT

Appellate Case No. 2011-190672

ANDERS BRIEF OF APPELLANT

DAYNE C. PHILLIPS
Appellate Defender

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in admitting evidence of a prior and unrelated drug transaction between an informant and Appellant in violation of the rule excluding propensity evidence where the probative value of the evidence was substantially outweighed by its prejudicial effect?

STATEMENT OF THE CASE

On August 5, 2010, Appellant Douglas Hall was indicted by the Union County Grand Jury for (1) possession with the intent to distribute (PWID) crack cocaine and (2) PWID crack cocaine within the proximity of a park. R. 313 – 316. Appellant was also indicted by the Union County Grand Jury for (3) attempted PWID crack cocaine and (4) attempted PWID crack cocaine within the proximity of a park. R. 7, ll. 12-16.

On April 5, 2010, Appellant proceeded to trial before the Honorable John C. Hayes, III, and a jury. R. 1. Appellant was represented by Melinda Butler, and the State was represented by Assistant Solicitor John Anthony. Based on defense counsel's objection and the trial court's subsequent ruling, the State only brought the PWID crack cocaine and PWID within the proximity of a park charges before the jury. R. 40, l. 7 – 41, l. 23; R. 88, l. 8 – 101, l. 5.

On April 6, 2010, the jury found Appellant guilty of the lesser-included offense of simple possession of crack cocaine. R. 301, ll. 5-16; R. 317. The trial court then sentenced Appellant to ten years imprisonment. R. 310, ll. 3-4; R. 318.

This appeal follows.

STATEMENT OF FACTS

Relevant Facts

Pre-trial, the State indicated that it sought to introduce a videotape of an alleged drug transaction between an informant and Appellant in a vehicle. R. 30, l. 21 – 31, l. 10. The State also revealed that “there is [a] reference to *prior* [drug] sales” between the informant and Appellant on the videotape. R. 30, ll. 24-25 (emphasis added). The State further noted that, although law enforcement found the crack cocaine on the ground, the informant would “testify that [Appellant] had [the] crack [cocaine] on his person while they were in the vehicle together.” R. 31, ll. 13-15.

The State argued that “any references on the tape to prior sales should be admitted in this case under Lyle to show the intent because [Appellant] is charged with intent to distribute[.]” R. 32, ll. 3-6. The State cited *State v. Gore*, 299 S.C. 368, 384 S.E.2d 750 (1989) and *State v. Wilson*, 345 S.C. 1, 545 S.E.2d 827 (2001), and maintained that “prior distributions can be relevant and are relevant under Lyle to show intent to distribute when intent to distribute is the charge.” R. 32, ll. 8-10.

In response, defense counsel argued, “As to Lyle, . . . it’s very obvious that Rule 404(b)[, SCRE,] prohibits evidence of a person’s prior bad acts to be admissible to prove action and conformity with their action on a particular occasion” R. 34, ll. 21-25. Defense counsel also argued that “[Appellant] was not arrested for any drugs earlier that day, and there’s no clear and convincing evidence that [Appellant] sold any drugs to the informant earlier that day.” R. 21-24. Defense counsel emphasized, “[T]he Court has to still consider . . . the substantial prejudice that [Appellant] will suffer if this comes before the jury because the jury is bound to connect the two and say well, if he did it then

[previously sold drugs], then he was [going to] do it then [subsequently sell drugs].” R. 36, ll. 6-12.

The following testimony was proffered to determine the admissibility of the propensity evidence. John Sherfield, of the Union County Sheriff’s Office, maintained that on May 18, 2010, he followed Melvin Dubois because he knew Dubois was addicted crack cocaine. R. 62, l. 7 – 63, l. 17. Officer Sherfield later observed that Dubois spoke to Appellant and then walked away. R. 63, ll. 18-21. Officer Sherfield recalled,

I pulled up beside [Dubois] . . . [and] I told him I needed to speak with him . . . I asked him [if] he purchased any illegal drugs and he said no. I asked if he mind if I searched him and he said no, go ahead, and then I began to search him and I found a quantity of crack cocaine in his pocket.

64, ll. 2-11.

Officer Sherfield stated that after he found the crack cocaine on Sherfield, Dubois “asked [him] if there was anything he could do to keep from going to jail” and that “he had, in fact, got the crack cocaine from [Appellant] . . . and it was agreed that [Dubois] would try to assist [law enforcement] in the arrest of [Appellant] as well as two other defendants.” R. 65, ll. 6-10. Officer Sherfield admitted that Dubois’ possession of crack cocaine charge would be dropped in exchange for Dubois’s assistance as an informant. R. 65, ll. 11-13. Officer Sherfield also revealed that the informant was given seventy dollars to purchase fifty dollars of crack cocaine because informant allegedly owed Appellant twenty dollars “*from a previous buy.*” R. 66, l. 24 – 67, l. 6.

Mevlin Dubois, the informant, identified Appellant as the person who sold him crack cocaine and admitted that he was caught by Officer Sherfield with crack cocaine on his person. R. 70, l. 7 – 71, l. 21. The informant then stated that he “wore an audio/video”

wire and was given money to buy crack cocaine from Appellant. R. 72, l. 22 – 73, l. 22. As to the drug transaction, the informant noted, “I tried to give [Appellant] the 70 bucks for drugs he had in his hand. I told him 20 of it was for what I owed [from a previous drug transaction].” R. 74, ll. 20-23; R. 75, ll. 7-20. The informant further claimed, “I saw the bag of crack in [Appellant’s] hand, in a bag with the rocks of crack in it in his right hand.” R. 76, ll. 2-5. The DVD of the drug transaction was then admitted for purposes of the pre-trial hearing on admissibility of the prior bad act evidence and the informant reiterated his prior testimony as the video was played. R. 78, l. 6 – 79, l. 15.

The trial court ultimately found “by clear and convincing evidence, that [Appellant] was involved with Mr. Dubois [the informant] in a drug transaction on the morning of May 18th, 2010” and that “the evidence is – the [testimony regarding the prior drug] transaction is admissible as 404(b) evidence under South Carolina Rules of Evidence as it constitutes a crime of illegal activity[.]” R. 99, ll. 4-12. In explaining his ruling, the trial court stated, “As the events in the morning show the *existence of a common scheme or plan*, that is distribution of crack cocaine and intent. . . . I find that the probative value outweighs any prejudicial value.” R. 99, ll. 14-18 (emphasis added). The trial court further noted, “I find that the proximity in time is minimal especially in light of the decision in State versus Gore where there were several days between the transactions. . . . So, I will allow the morning transaction in under [Rule] 404(b)[, SCRE].” R. 99, ll. 18-23.

ARGUMENT

The trial court erred in admitting evidence of a prior and unrelated drug transaction between an informant and Appellant in violation of the rule excluding propensity evidence because the probative value of the evidence was substantially outweighed by its prejudicial effect.

“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith on a particular occasion . . . It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.” Rule 404(a) and (b), SCRE; *See State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). To be admissible, alleged prior bad acts that are not the subject of conviction must be proved by clear and convincing evidence. *State v. Cutro*, 332 S.C. 100, 504 S.E.2d 324 (1998).

“Further, even though the evidence falls within a *Lyle* exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. The determination of the prejudicial effect of prior bad act evidence must be based on the entire record and the result will generally turn on the facts of each case.” *State v. Brooks*, 341 S.C. 57, 533 S.E.2d 325 (2000); *See* Rule 403, SCRE. When the prior bad acts are similar to the one for which the appellant is being tried, the danger of prejudice is enhanced. *State v. Gore*, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984).

In this case, the State sought to introduce testimony and a videotape which referenced a prior and unrelated drug transaction between Dubois, the informant, and Appellant. R. 66, l. 24 – 67, l. 6; R. 74, l. 20 – 75, l. 20; R. 78, l. 6 – 79, l. 15. *See State v. Hough*, 325 S.C. 88, 480 S.E.2d 77 (1997) (by introducing prior bad act evidence, state was attempting to demonstrate that because defendant had committed crimes in past, he

was doing so on this occasion, precisely type of inference *Lyle* prohibits). Notably, this case is factually distinct from *Gore*, 283 S.C. 118, 121, 322 S.E.2d 12, because the propensity evidence in the instant case was initially presented during the State's case in chief, instead of on cross-examination of the defendant. Therefore, the admission of the prior bad act evidence was erroneous because the probative value of the evidence was substantially outweighed by its prejudicial effect. *See* Rule 403, SCRE; *see also Brooks*, 341 S.C. 57, 533 S.E.2d 325.

Whether the improper introduction of this evidence is harmless requires us to look at the other evidence admitted at trial to determine whether the defendant's "guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached." *State v. Parker*, 315 S.C. 230, 234, 433 S.E.2d 831, 833 (1993) (evidence of unrelated prior bad act is not reversible error where its admission was harmless beyond reasonable doubt). Here, Appellant's guilt was not conclusively proven by competent evidence because the crack cocaine was not found on Appellant's person when he was arrested.

CONCLUSION

For the foregoing reasons, Appellant Douglas Hall respectfully requests that this Court reverse his conviction and remand this case to the Union County Court of General Sessions for a new trial.

Respectfully submitted,



Dayne C. Phillips
Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of November, 2012.

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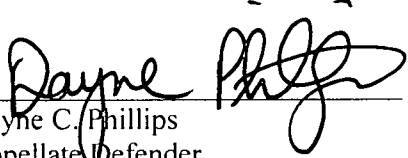
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Douglas Hall states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge John C. Hayes, III, which was held on April 6, 2011, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He 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, he asks the Court to relieve him as counsel for Douglas Hall.

Respectfully submitted,


Dayne C. Phillips
Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of November, 2012.

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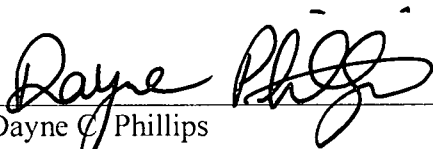
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Pursuant to the new Anders procedure, Appellant included the following in the Record on Appeal:

- (1) True-billed indictments;
- (2) Sentencing sheets;
- (3) Entire transcript of proceedings dated April 5-6, 2010;
- (4) Court's Exhibits #1 and 2.

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

November 15th, 2012



Dayne C. Phillips
Appellate Defender

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Attorney for Appellant

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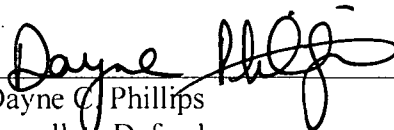
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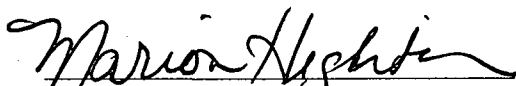
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Columbia, SC 29201; and on Douglas Hall, #144917 at Allendale Correctional Institution, this 15th day of November, 2012.


Dayne C. Phillips
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 15th day of November, 2012.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.