ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Anderson County

R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOSE ROMERO,

APPELLANT

Appellate Case No. 2011-198668

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in failing to direct a verdict in Appellant's favor due to the prosecutor's failure to present evidence that Appellant had knowledge of the quantity of marijuana, which triggered the trafficking offense?

STATEMENT OF THE CASE

During its September 2009 term, an Anderson County Grand Jury indicted Appellant for trafficking in marijuana, more than ten pounds, but less than one hundred pounds. R. 7, ll. 10-14; R. 440-441. The prosecution, represented by Rame Campbell, called the case to trial before the Honorable Lawton McIntosh and a jury on August 22, 2011. Sarah Drawdy represented Appellant. R. 1. After two days of testimony, the jury found Appellant guilty as charged. R. 433, ll. 8-16. Judge McIntosh sentenced Appellant to ten years and a fine of $10,000 suspended upon the service of thirty-six months and payment of $10,000. The balance of the sentence was suspended upon probation for thirty-six months. R. 437, l. 22 – R. 438, l. 8; R. 442.

Appellant filed a timely notice of appeal. This brief follows.

ARGUMENT

The trial court erred in failing to direct a verdict in Appellant's favor due to the prosecutor's failure to present evidence that Appellant had knowledge of the quantity of marijuana, which triggered the trafficking offense.

The prosecution presented evidence from multiple police officers concerning an undercover operation on June 5, 2009 covering Anderson, Greenville, and Spartanburg counties. South Carolina Law Enforcement Division (SLED) agent Michael Sloan explained that his agency received information concerning a suspicious package at the United Parcel Service (UPS) hub in Spartanburg. R. 141, ll. 12-15. After a drug detection dog alerted on the package, Sloan seized the packaged and obtained a search warrant to open the package. R. 142, l. 10 – R. 143, l. 5. Upon opening the package, Sloan found three bundles wrapped in Saran wrap and surrounded by Styrofoam peanuts. R. 149, l. 21 – R. 150, l. 3. Sloan unwrapped one of the bundles and determined it was marijuana based upon his training and experience. R. 151, l. 18 – R. 154, l. 14. Sloan then prepared for a controlled delivery of the package. R. 155, ll. 1-3.

Sloan donned a UPS uniform and attempted to deliver the package to the address listed, which was at an apartment complex. R. 157, l. 10 – R. 158, l. 9. However, he was unable to deliver the package. R. 158, ll. 8-9. Sloan repeated this ruse a second time, and again, he was unsuccessful. R. 159, ll. 17-23. Later in the day, Sloan learned that two Hispanic males in a red pick-up truck had approached a UPS driver near the apartment complex inquiring about the package. R. 160, ll. 7-12. Sloan decided to make a third effort at delivering the package. He obtained a van and used empty boxes to make fake

deliveries to nearby stores prior to delivering the package to the apartment. R. 161, 12-20. While making the fake deliveries, Sloan observed two Hispanic males in a red pick-up truck watching and following him. R. 162, l. 14 – R. 164, l. 24.

Sloan went to the apartment complex and observed the red pick-up truck park nearby and a Hispanic male exit the truck and walk towards him. R. 166, ll. 5-23. Sloan knocked on the door of the designated apartment, obtained a signature from the person answering the door, handed over the package, and left. R. 168, ll. 3-10. While Sloan was walking back to his van, he observed the red pick-up truck leaving the area. R. 172, ll. 16-20. On Sloan's order, the surveillance teams and security teams approached and arrested individuals involved. R. 170, ll. 14-18. Law enforcement recovered the package.[1] R. 173, ll. 5-9.

Officer Neal McGuire testified that he assisted Sloan as part of the surveillance team. R. 228, l. 8-20. McGuire received directions to secure the person in the red truck who had left the apartment complex. R. 232, l. 23 – R. 233, l. 2. McGuire and two other officers approached Appellant and placed him in detention. R. 233, l. 2-17. Ultimately, McGuire placed Appellant under arrest. R. 237, ll. 4-5.

Sloan spoke to Appellant, who agreed to cooperate and attempt to deliver the package to an address in Greenville. R. 183, ll. 4-10. Sloan claimed Appellant informed him that he was paid $500 for transporting the package, and he paid $100 to the man in the apartment for accepting the package and $100 to his passenger for picking up the

[1] The parties stipulated the substance in the package was marijuana weighing 30.34 pounds. R. 138, l. 1 – R. 139, l. 11.

package. R. 184, ll. 9-14.[2] Appellant also gave Sloan the address and name of the person to whom he was supposed to deliver the package. R. 184, ll. 14-25. Sloan testified that Appellant was wired with an audio recording device and attempted to deliver the package, but no one answered the door. Sloan called off the operation. R. 186, ll. 1-17.[3] Importantly, Sloan testified Appellant was never in possession of the package. R. 207, ll. 6-9.

Roger K. Scogins with the Anderson County Sheriff's Office testified as an expert in drug trafficking and the drug trade. R. 321, ll. 8-21. Scogins testified that in most of the cases he has encountered, "the actual person that would be receiving the package ultimately to open the package and start to distribute it out is never the person that actually receives the package up front." R. 331, ll. 18-25. On cross-examination, Scogins testified that the ultimate recipients of the drugs don't tell the couriers what the packages contain. R. 342, ll. 20-23.

At the close of the state's case, Appellant moved for a directed verdict of acquittal arguing the prosecution failed to offer evidence that Appellant knew about the drugs. Appellant stressed that although the state offered alleged inculpatory statements made by Appellant, the statements came through officers who failed to obtain written waivers of Appellant's rights and failed to obtain written statements from Appellant. Additionally,

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[2] On cross-examination, Sloan testified that Appellant was to receive $500 after delivering the package to Greenville. R. 211, l. 22 – R. 212, l. 1. McGuire testified he did not find $500 on Appellant's person or in his truck. R. 264, l. 9 – R. 265, l. 1.

[3] Sloan admitted he did not obtain Appellant's statement in writing or by other recording. He also admitted that he did not save the audio recording of Appellant attempting to deliver the package. R. 195, l. 7 – R. 196, l. 2; App. 209, ll. 5-10; R. 209, ll. 22-23; App. 211, ll. 11-16.

Appellant stressed that he never had actual or constructive possession of the package. R. 354, l. 2 – R. 355, l. 3. The judge denied Appellant's motion for mistrial stating the prosecution presented evidence that Appellant "aided, abetted, or attempted or conspired, etcetera, etcetera, or attempted to become in actual or constructive possession." R. 357, ll. 5-14.

After Appellant decided he did not want to testify, Appellant turned to the issue of a directed verdict again. R. 363, ll. 12-14. Appellant argued he was entitled to a directed verdict because the prosecution presented no evidence that he had knowledge of the weight of the drugs in the package. R. 363, l. 15 – R. 364, l. 4. Appellant relied upon State v. Hernandez, 382 S.C. 620, 677 S.E.2d 603 (2009) to support his position. R. 364, l. 7 –R. 365, l. 20. Additionally, Appellant relied upon the plain meaning of the statutory language. R. 364, ll. 14-24; R. 370, ll. 12-23. Appellant made clear his position that the prosecution was required to prove his knowledge of the weight of the marijuana, and that all of the evidence presented during the state's case was suspicious activity. R. 368, ll. 4-23.

The prosecution conceded that it was unable to prove that Appellant knew he was picking up more than ten pounds or less than one hundred pounds. According to the prosecutor, the only way to prove such would be through testimony of Appellant because the officers could not testify accordingly. R. 367, ll. 2-12. Additionally, the prosecution countered that proving knowledge of the weight was not element of the offense. Rather, the weight triggered particular statutory provisions. R. 369, l. 18 – R. 370, l. 7. Eventually, the prosecutor cited State v. Taylor, 323 S.C. 162, 473 S.E.2d 817 (Ct. App.

1996) for the proposition that a defendant need not know the amounts involved to be found guilty of trafficking. R. 382, ll. 3-24. The judge took the matter under advisement. R. 383, ll. 4-12.

During his closing argument, the prosecutor explained the state was "really concentrating on" the portion of the trafficking in marijuana statute dealing with whether Appellant knowingly attempted to become in actual or constructive possession of marijuana weighing between ten pounds and one hundred pounds. R. 387, l. 19 – R. 388, l. 2. After explaining to the jury that the amount of the marijuana had been stipulated by both sides, the prosecutor argued "we don't have to prove he knew he was to get [thirty] pounds but just that the weight of this package is more than [ten] pounds." R. 388, ll. 8-12; R. 388, ll. 19-21.

At the conclusion of the case, the judge charged the jury concerning trafficking in marijuana. Specifically, the judge charged the jurors:

> [T]he defendant is charged with trafficking in marijuana between more than [ten] pounds but less than [one hundred] pounds. The state must prove beyond a reasonable doubt that the defendant knowingly sold, manufactured, cultivated, delivered, purchased, brought into this State, provided financial assistance or otherwise aided, abetted, attempted or conspired to sell, manufacture, cultivate, deliver, purchase, or bring into this State, was normally in actual or constructive possession normally or attempted to become in actual constructive possession of marijuana.
>
> The State must also prove beyond a reasonable doubt that the amount of marijuana was [ten] pounds or more but less than [one hundred] pounds. As I told you earlier, that has been stipulated to.

R. 423, ll. 9-24. Appellant objected to the instruction because it failed to include that the state must prove Appellant "knowingly" engaged in the conduct, including that the weight of the drugs exceeded ten pounds. R. 429, l. 22 – R. 430, l. 10.

The judge then addressed Appellant's directed verdict motion as the two were intertwined. The judge found Taylor, supra, "to still be good law." Thus, the judge denied the motion. Additionally, the judge overruled Appellant's objection to the jury charge because he "read it right from the book." R. 430, ll. 13-24.

The prosecution charged Appellant with trafficking in marijuana, more than ten pounds, but less than one hundred pounds in violation of S.C. Code § 44-53-370(e)(1)(a)(1). Specifically, the statute provides that a person is guilty of trafficking in marijuana if the person "knowingly ... provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, cultivate, 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 pounds or more of marijuana." The plain language of the statute makes clear that in order to convict a person for violating this provision of the statute, the jury must find the person had knowledge of the weight of the marijuana.

When presented with a motion for a directed verdict, a trial court looks to whether the prosecution presented any evidence of the crimes charged. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). When the prosecution fails to produce evidence of the charged offenses, the trial judge must direct a verdict in favor of the defendant. Id. A reviewing court examines the evidence and all reasonable inferences in the light most favorable to the prosecution following the denial of a directed verdict. Id. If the prosecution failed to present any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilty of the accused, then the case must not be submitted

to the jury and the motion for directed verdict must be granted. Id. at 292-293, 625 S.E.2d at 648.

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). Under the plain meaning rule, the court should not alter the meaning of a clear and unambiguous statute. In re Vincent J., 333 S.C. 233, 235, 509 S.E.2d 261, 262 (1998) (citations omitted). Where the statute's language is plain and unambiguous, conveying a clear and definite meaning, the rules of statutory interpretation are not needed and the court should not impose another meaning. Id. (citing Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Reading the plain and unambiguous language of the statute makes it clear that the legislature intended to require the prosecutor prove a person had knowledge of the quantity of marijuana.

The lower court relied upon Taylor, supra to support its decision that the prosecution need not prove knowledge as to the weight. This Court held a trial judge correctly refused to charge a jury that the defendant could be found guilty of trafficking in crank only if the defendant knew there were ten grams or more. This court relied upon the following proposition of the Supreme Court to support its holding:

> It is the amount of cocaine, rather than the criminal act, which triggers the trafficking statute, and distinguishes trafficking from distribution and

> simple possession. If the amount of cocaine, or any mixture containing cocaine, is ten grams or more the trafficking statute is applied.

Taylor, 323 S.C. at 167, 473 S.E.2d at 819 (citing State v. Raffaldt, 318 S.C. 110, 117, 456 S.E.2d 390, 394 (1995)).

On the other hand, the Supreme Court directed a verdict in favor of three suspects who occupied a rental truck, which was following a tractor trailer loaded with marijuana, where the only evidence presented against them was that they traveled to Trenton for the night, rented the moving truck, and conversed with the driver of the Thunderbird before caravanning down a rural direct road. Hernandez, 382 S.C. at 624-626, 677 S.E.2d at 605-606. The driver of the tractor trailer was an undercover agent who drove the truck to a store in Trenton. Id. at 622, 677 S.E.2d at 604. Upon the agent's arrival in Trenton, he met with three men in a Thunderbird at the store. The men unloaded several pieces of furniture from the tractor trailer and told the agent to transport the rest to a second location. Id., at 622-623, 677 S.E.2d at 604. Upon arrival at the second location, the agent observed the Thunderbird drive past along with a moving truck driven by three suspects. Id. at 623, 677 S.E.2d at 604. The Thunderbird and moving truck stopped. Two men exited the Thunderbird, one told the agent to follow the Thunderbird, while a second man spoke to the occupants of the moving truck. The three vehicles then formed a caravan with the Thunderbird leading down rural dirt roads. Eventually, the tractor trailer and moving truck became stuck in mud. The undercover agents decided to call off the operation and arrest the individuals. The occupants of the moving truck were arrested, while the Thunderbird drove away and were never apprehended. Id. at 622, 677 S.E.2d at 604. The Supreme Court held the evidence presented by the prosecution was

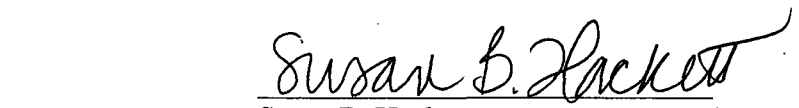
insufficient to prove the occupants of the moving truck had knowledge of the contents of the tractor-trailer. Acknowledging that while the prosecution may have presented evidence to support an inference that the suspects had knowledge of the drugs, the evidence alone did not constitute substantial circumstantial evidence that the suspects had knowledge. Id. at 625, 677 S.E.2d at 605.

Appellant's case is easily distinguished from Taylor and Raffaldt. The defendants in Taylor and Raffaldt were in actual possession of the drugs; therefore, they had knowledge of the weights in question. The evidence was undisputed that Appellant never had actual or constructive possession of the package of marijuana. In fact, Appellant never even saw the package prior to his arrest. According to the prosecutor's closing argument, the prosecutor was proceeding against Appellant under the prong of the trafficking statute that Appellant attempted to possess the marijuana. Therefore, knowledge of the weight of the marijuana could not be imputed to Appellant. In light of this significant distinction, the trial court erred in failing to direct a verdict of acquittal in Appellant's favor where the prosecutor could not present evidence of Appellant's knowledge of the weight of the marijuana to satisfy the trafficking statute.

CONCLUSION

Appellant respectfully requests this Court reverse the decision of the lower court and direct a verdict of acquittal in Appellant's favor.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of October, 2012.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Anderson County

R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOSE ROMERO,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jose Romero states:

1. She is an Appellate Defender for the S.C. Office of Appellate Defense, and was appointed to represent Appellant.

2. She has reviewed the record of Appellant's trial before Judge R. Lawton McIntosh, held on August 22-24, 2011, 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 (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 Jose Romero.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of October, 2012.

STATE OF SOUTH CAROLINA

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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;
(2) Sentence sheet; and
(3) Entire trial transcript.

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

October 24th, 2012

Susan B. Hackett

Susan B. Hackett
Appellate Defender

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Attorney for Appellant

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APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney 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 Salley W. Elliott, Esquire, at P.O. Box 50666, Columbia, SC; and on Jose Romero, #347499 at Kershaw Correctional Institution, this 24th day of October, 2012.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 24th day of October, 2012.

_____(L.S.)
Notary Public for South Carolina

My Commission Expires: October 2, 2013.