STATE OF SOUTH CAROLINA

ORIGINAL

IN THE COURT OF APPEALS

Appeal from Lexington County

George C. James, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JEFFREY DODD THOMAS,

APPELLANT

Appellate Case No. 2012-212428

FINAL BRIEF OF APPELLANT

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

RECEIVED
OCT 01 2013
SC Court of Appeals

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUE ON APPEAL

The trial judge erred in failing to direct a verdict of acquittal in Appellant's favor on the charge of manufacture of methamphetamine where the prosecution failed to present any direct or substantial circumstantial evidence that Appellant engaged in production, preparation, propagation, compounding, conversion or processing of any substance containing amphetamine or methamphetamine.

STATEMENT OF THE CASE

On September 6, 2011, a Lexington County Grand Jury indicted Appellant for possession of methamphetamine, first offense, (2011-GS-32-2535), possession of a schedule IV controlled substance – Xanax (2011-GS-32-2536), and manufacture methamphetamine, first offense (2011-GS-32-2537). R. 244(Indictments). The prosecutor, Michael Ross, called the case for trial before the Honorable George C. James, Jr. and a jury on May 22, 2012. Robert T. Williams represented Appellant. R. 1. The jury found Appellant guilty of all charges. R. 230, lines 11-24. Judge James sentenced Appellant to three years' imprisonment for possession of methamphetamine, six months' imprisonment for possession of a scheduled IV controlled substance, and seven years' imprisonment suspended upon the service of three years' imprisonment and three years' probation for manufacturing methamphetamine. R, 242, line 19 – R. 243, line 9; R. 250 (Sentence sheets).

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

ARGUMENT

The trial judge erred in failing to direct a verdict of acquittal in Appellant's favor on the charge of manufacture of methamphetamine where the prosecution failed to present any direct evidence or substantial circumstantial evidence that Appellant engaged in production, preparation, propagation, compounding, conversion or processing of any substance containing amphetamine or methamphetamine.

Relevant facts

Officer Jessie Laintz testified that he responded to a trailer in Lexington County in reference to a purported trespassing on May 29, 2011. R. 3, line 24 – R. 4, line 5. Upon arrival, Laintz observed Appellant standing to the left of the residence. Appellant appeared to be talking to someone inside the trailer through a window. R. 4, lines 19-25. Appellant admitted to Laintz that he was aware of the trespass notice, but claimed he had been invited to the residence via text message. R. 5, lines 7-11. Appellant consented to Laintz retrieving his cell phone and identification from a nearby truck. Appellant purportedly told Laintz that the truck belonged to him, and Laintz discovered the tag on the vehicle was registered to Appellant. R. 5, lines 14-21; R. 6, lines 2-7. Laintz could find no text message in the phone inviting Appellant to the residence. R. 5, line 23 – R. 6, line 1. Thereafter, Laintz placed Appellant under arrest for trespassing. R. 6, lines 15-17.

Prior to towing Appellant's vehicle from the property, Laintz conducted an inventory search of the vehicle. R. 7, lines 3-5. Laintz found an Altoids container approximately five inches away from Appellant's wallet. Inside the container, Laintz found four clear baggies, two of which had a white crystal-like substance in them, and two of which had a residue of white crystal-like substance. R. 7, lines 7 – 19. On the floor on the

passenger side, Laintz found a large container of salt and a three-foot piece of clear tubing. In the center console of the truck, Laintz found lithium batteries. Under the driver's seat, Laintz found a box of Sudogest containing ten pills. In the truck bed, Laintz found a starter fluid spray can with a hole in the bottom. In the back seating area of the truck, Laintz found a blue backpack. In the backpack, Laintz found coffee filters, a digital scale, and some papers. R. 7, line 25 – R. 8, line 11.

On cross-examination, Laintz admitted that he did not request fingerprint analysis on the Altoids container or the box of Sudogest. R. 31, lines 2 – 5; R. 33, lines 16-18. Additionally, Laintz testified that no pills were missing from the box of Sudogest.[1] R. 32, lines 18-25. Laintz admitted that all of the items recovered, except for the white crystal like substance, were the legal and available for purchase. R. 33, lines 13-15; R. 34, line 15 – R. 35, line 2. Regarding the plastic tubing, Laintz testified that no tests were performed on the tubing to determine whether it had been used for any foreign substance. Laintz testified that based upon his observation the tubing had not been used for any foreign substance. R. 36, lines 4-13. Laintz testified that he did not smell any strong odors in the vehicle during his inventory search. He admitted that in his experience, the most distinguishing thing about a working methamphetamine lab is this smell of ether. R. 36, line 24 – R. 37, line 9. On redirect examination, Laintz testified that Sudogest, ether, tubing, coffee filters, and lithium batteries were not illegal to possess, but were used to make methamphetamine. R. 37, line 16 – R. 38, line 10. Laintz testified that the vehicle was "[a]n absolute mess" in terms of cleanliness. He described the truck as containing "[c]lothes everywhere, trash everywhere."

[1] During the trial, the terms Sudogest and Sudafed are used interchangeably to refer to the box of pills found in the truck. For the sake of clarity, Appellant will use the term Sudogest throughout his brief to refer to the box of pills recovered.

Clothes were piled high in the driver's seat and trash almost completely filled the passenger seat. R. 13, lines 12-22; R. 14, lines 4-6.

Officer. Richard Hazewinkel responded to the incident location as well. R. 56, lines 10 – 24.[2] Hazewinkel recovered the following items within the large backpack: H&R Block tax paperwork with appellant's name listed on it, a twenty-six ounce container of iodized salt, one clear plastic tube, one small green cylinder, one bottle of alcohol, one box of aluminum foil, white coffee filters, one AA lithium battery, one AAA lithium battery, one box of Sudogest containing a pack of ten tablets, and a digital scale. R. 57, line 16 – R. 58, line 9. Hazewinkel also observed one starter fluid can that had been punched and two others fluid cans in the bed of the vehicle. R. 58, lines 10 – 14. Hazewinkel testified that none of the pills had been removed from the Sudogest pack. R. 63, lines 19 – 21. On cross-examination, Hazewinkel admitted that he was not on the scene when the items were initially seized by Laintz; therefore, he was unable to testify to the location of the items prior to his arrival. R. 67, line 2 – R. 68, line 19.

Emily Homer, a chemist at the sheriff's department, tested the two items found in the plastic bags inside of the Altoids container. She found 0.02 grams of methamphetamine in one bag and 0.08 grams of methamphetamine in the other bag. R. 98, lines 6 – 10. Homer testified she did not test the bags containing possible residue. R. 98, lines 11 – 14.

---

[2] Appellant objected to Hazewinkel's testimony and his use of a PowerPoint presentation to support his testimony. Appellant objected on the bases that in "normal mobile meth cases," the prosecution presents evidence of "some substance or some liquid," but no such evidence existed in this case. R. 86, lines 14-20. The judge noted he was looking for "evidence about a judge or a bottle." R. 87, lines 2-8. The court characterized Appellant's objection as including the facts that the police did not find residue or smell anything. Appellant further explained there was no liquid of any kind – only finished product. R. 88, lines 9-17.

Thomas Hamilton, the chief of the narcotics unit in Lexington County, testified as an expert in the production and distribution of methamphetamine, and disposal of the meth products. R. 119, lines 12-14; R. 120, line 24 – R. 121, line 11. Hamilton testified that the starting drug in the production of methamphetamine is pseudoephedrine hydrochloride, which can be purchased without a prescription. R. 123, lines 15-19.[3] The base ingredient must be crushed, usually with a coffee grinder or blender. R. 124, lines 13-15. Next, a person must acquire ether. According to Hamilton, starter fluid cans contain a large amount of ether, which is removed from the cans by punching a hole in the bottom of the can to pour it out R. 125, lines 1-18. Coleman camping fuel also contains ether and may be used instead of starter fluid. R. 125, line 24 – R. 126, line 6. The next ingredient is ammonium nitrate, which is found in cold packs and fertilizer. R. 126, lines 7-20. According to Hamilton, sodium hydroxide, which is commonly called lye and found in drain openers, is a necessary ingredient in the manufacturing of methamphetamine. R. 126, line 22 – R. 127, line 2. Drain openers may be purchased at Wal-Mart or any hardware store. R. 127, lines 3-6. The final ingredient in the first step of the process is lithium metal, which is commonly found in camera batteries. In order to obtain the lithium, a person would have to open the batteries using wire cutters or pipe cutters, then remove the wadding to recover a gray thin sheet of metal. R. 127, lines 7-23.

After acquiring all five of the necessary ingredients for the first step, one must combine the sodium hydroxide and ammonium nitrate in a bottle to create anhydrous ammonia. A second chemical reaction occurs in the bottle at the same time – the ammonia

[3] Hamilton testified that "[t]he normal recipe that we see uses one to two boxes" of pseudoephedrine. R. 129, lines 7-11.

reacts with the lithium. Per Hamilton, "the ammonia with the lithium converts pseudoephedrine methamphetamine." R. 124, lines 1-3; R. 128, lines 4-16. After these reactions, "the actual meth is inside that liquid." R. 128, lines 17-21. The normal "cook time" for the first step is forty-five minutes to an hour. R. 129, lines 1-6. During this process, pressure builds and someone must continue to shake it to keep it reacting and vent it to release the pressure. R. 129, lines 12-20. Next, the mixture is strained using common household items, such as clothing or paper towels, to produce only a cloudy liquid. R. 130, lines 6-21.

The second step requires combining sulfuric acid, such as the type found in drain openers, with salt in a small bottle to produce hydrochloric acid. The second bottle must have a tube connected to it to allow the gas to exit. R. 131, lines 1-8. The acid gas then "bubble[s]" across the container containing the ether and methamphetamine solution. The hydrochloric acid bonds with the methamphetamine making methamphetamine hydrochloride, which is salt. This salt is not soluble in ether, and as a result, falls to the bottom. R. 131, lines 13-19. A coffee filter is then used to strain the fine salt from the liquid. The salt in the coffee filter is left to dry and the finished product is methamphetamine. R. 131, line 23 – R. 132, line 7.

Concerning the items recovered from Appellant's truck, Hamilton testified that each item had a "legitimate legal lawful use." R. 136, lines 1-2. Nevertheless, Hamilton testified that if the items were found in the same automobile, then the items would be "for the product of methamphetamine." He based this opinion primarily on the "punched out ether can." R. 136, line 22 – R. 137, line 5; R. 144, line 16 – R. 145, line 3. He admitted, however, that all of the items necessary to create methamphetamine were not present.

Importantly, ammonium nitrate, sodium hydroxide, and sulfuric acid were not present. R. 145, lines 4-11; R. 151, lines 12-15.[4]

At the conclusion of the state's case, Appellant moved for a directed verdict on the charge of manufacturing methamphetamine.[5] Appellant noted that the state's expert testified that making methamphetamine would require materials not recovered from Appellant's vehicle. Additionally, Appellant noted that "there was no solution ... that contained any one of the steps where it had been dissolved or any type of chemical process had been going on." R. 152, line 14 – R. 153, line 1. Appellant explained that it was not enough to have some of the ingredients; there must be some "indicia of the process." R. 153, lines 2-16.

The prosecutor argued "the problem with his argument is that methamphetamine was found in the car." He attempted to analogize the crime of manufacturing methamphetamine to murder. R. 153, lines 18-25. The judge inquired if the prosecutor had to prove that Appellant "manufactured either what was found or manufactured something else." The prosecutor responded that the methamphetamine's "existence is proof that it was made, and the evidence that links him to making the manufacturing, to making the drug is the trail he left behind." R. 154, lines 15-20. Additionally, the prosecutor relied upon "[t]he hole in the can, the tubing, the salt, the coffee filters, and that fact that he was in possession of pseudoephedrine itself." R. 154, lines 23-25. Later, the prosecutor made clear that "if

---

[4] No one testified regarding finding bottles in the truck. A bottle, or container of some sort, would have been necessary for the manufacture of methamphetamine.

[5] Appellant renewed this motion after informing the Court he would present no evidence. R. 160, lines 13-17. Appellant moved for a new trial after the jury returned its verdict as well. R. 232, lines 1-15.

that meth had not been in the car," then he would not have proceeded with the charge of manufacturing methamphetamine. R. 155, lines 15-21.

Judge James noted that he possessed starter fluid, pseudoephedrine, and salt in his house. He explained that he was waiting for testimony to indicate "some residue or some odor or some indicia of something that he had either been riding around doing it as he was moving." R. 155, lines 1-7. Judge James determined the directed verdict motion on the manufacturing meth charge was "an intriguing one" and took the matter under advisement. R. 158, line 25 – R. 159, line 11; R. 160, lines 8-10.

While discussing jury charges, the prosecutor informed the court of a statute providing that "possession of equipment or paraphernalia used in the manufacture of cocaine, cocaine base, or methamphetamine is prima facie evidence of intent to manufacture." R. 162, lines 7-12 (citing S.C. Code Ann. § 44-53-375 (D)).

The following day, Judge James denied Appellant's motion for directed verdict on the manufacturing charge. He stated "it's extremely close." He explained that "[s]omeone can have the intent to commit a crime, but the crime is not committed until the crime is actually committed." He elaborated that a person "could have all of these materials" in his possession and "have the intent to commit that crime at some point" but the person could not be "charged with it, convicted of it" until the person actually committed the crime. R. 169, lines 9-24. Nevertheless, he held there was enough evidence to send the case to the jury. R. 170, lines 2-3.

During jury deliberations, the jury asked the following question: "[I]s the state charging that [Appellant] was manufacturing in his vehicle or just that he manufactured meth?" R. 226, lines 12-15; R. 253 (Court's Exhibit #2). The prosecutor responded "[t]hat

he manufactured meth in his, in your vehicle." R. 226, lines 18-19. The prosecutor then stated "[t]hat the State must prove that on or about this day he manufactured methamphetamine." R. 227, lines 13-14. The judge informed the jury that "the state must prove, beyond a reasonable doubt, that the defendant, on or about May 29, 2011, manufactured meth." R. 228, lines 1-10. Shortly thereafter, the jury returned with its verdicts of guilt. R. 230, lines 11-24.

Discussion

South Carolina's statutory scheme provides as follows concerning manufacturing of methamphetamine:

> 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 or cocaine base, in violation of the provisions of Section 44-53-370, is guilty of a felony.

S.C. Code Ann. § 44-53-375(B). Manufacture is defined as

> Production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container.

S.C. Code Ann. § 44-53-110 (defining "manufacture"). "'Methamphetamine' includes any salt, isomer, or salt of an isomer, or any mixture or compound containing amphetamine or methamphetamine." S.C. Code Ann. § 44-53-110 (defining "methamphetamine").

Additionally, the statutory scheme provides "[p]ossession of equipment or paraphernalia used in the manufacture of cocaine, cocaine base, or methamphetamine is prima facie evidence of intent to manufacture." S.C. Code Ann. § 44-53-375(D). "'Paraphernalia' means any instrument, device, article, or contrivance used, designed for

use, or intended for use in ingesting, smoking, administering, manufacturing, or preparing a controlled substance and does not include cigarette papers and tobacco pipes." The non-exhaustive list of paraphernalia includes items such as carburetion tubes and devices, cocaine spoons and vials, bongs, and ice pipes or chillers. S.C. Code Ann. § 44-53-110 (defining "paraphernalia").

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. State v. Brown, 103S.C. 437, 88 S.E.21 (1916); State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. McHoney, 344 S.C. 85, 97 544 S.E.2d 30, 36 (2001). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused," the trial judge may deny the motion for directed verdict. State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001); State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000); State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000). When the prosecution relies exclusively on circumstantial evidence, the trial judge must direct a verdict in the defendant's favor unless there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the defendant or from which his guilt may be fairly and logically deduced. State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011); State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000). Likewise, a directed verdict is appropriate when the evidence produced "merely raises a suspicion the accused is guilty." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Arnold, 361 S.C. 386, 389-390, 605 S.E.2d 529, 531 (2004); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984); State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999). Our courts define suspicion as "a belief or opinion as to guilt based upon

facts or circumstances which do not amount to proof." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963).

In Mitchell, 341 S.C. at 409, 535 S.E.2d at 127, the South Carolina Supreme Court held the lower court erred in failing to direct a verdict where the only evidence presented against the defendant was his fingerprint at the scene of the burglary. Likewise, the Lollis Court directed a verdict of acquittal in the defendant's favor where the state presented no direct evidence that Lollis was involved in setting fire to his home. The only circumstantial evidence against Lollis was that his wife admitted to the arson, he had placed valuables in storage prior to the fire, he possessed a key to the storage unit, and he allegedly had financial troubles. Our state supreme court found this evidence insufficient. Lollis, 343 S.C. at 584-585, 541 S.E.2d at 256-257.

In State v. Odems, 395 S.C 582, 720 S.E.2d 48 (2012), the Court held the defendant was entitled to a directed verdict based upon a lack of substantial circumstantial evidence that the defendant was involved in the burglary. Although Odems was in a car with other individuals who admittedly burglarized a home, the state failed to provide substantial circumstantial evidence that Odems was present during the home invasion. The witness who saw individuals at the home claimed she saw two persons, not three as were found in the car. Fingerprints collected from the stolen goods did not match Odems, but matched the other individuals in the car. One of the individuals who admitted his involvement claimed Odems was picked up after the burglary at a gas station. Id. at 588, 720 S.E.2d at 51. As explained by the Odems Court, although our courts have abandoned the traditional circumstantial evidence jury charge, the language of the charge is instructive in making a directed verdict determination. The traditional charge provided:

> Every circumstance relied upon by the State be proven beyond a reasonable doubt; and ... all of the circumstances proven be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis.

Id. at 590, 720 S.E.2d at 52 (quoting State v. Hernandez, 382 S.C. 620, 626 n.2, 677 S.E.2d 603, 606 n.2 (2009).

In one of the Supreme Court's most recent circumstantial evidence case, State v. Bostick, 392 S.C. 134, 141, 708 S.E.2d 774, 778 (2011), the Court held the prosecution failed to present substantial circumstantial evidence of Bostick's guilt. Rather, the state's evidence was capable of producing only a suspicion of Bostick's guilt. Id. Although the police found items belonging to the victim in a burn pile behind the home of Bostick's mother, the Court held no evidence linked Bostick to the evidence in the burn pile and the prosecution presented no testimony that Bostick had control over the burn pile. Id. at 137-141, 708 S.E.2d at 775-778. The only other evidence presented against Bostick was that he had a chemical pattern that matched gasoline on his shoes and gasoline was used to start the fire at the victim's home, and DNA from blood on Bostick's jeans excluded ninety-nine percent of the population, but the expert could not testify the DNA matched the victim. Id. at 142, 708 S.E.2d at 778.

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).

Appellant is unaware of any case in South Carolina interpreting our manufacturing methamphetamine statute. Nevertheless, South Carolina courts have confronted the issue of manufacturing in other areas. Primarily, our appellate courts have considered what constitutes manufacturing in the context of "moonshining."

In State v. Evans, 216 SC 328, 57 S.E.2d 756 (1950), the South Carolina Supreme Court overturned a conviction for manufacturing whiskey where the "evidence strongly tend[ed] to show an intention on the part of [Evans] to engage in the manufacture of liquor" but the prosecution failed to present any evidence of an overt act toward putting the intent into effect. "The law does not concern itself with the mere guilty intention, unconnected with any overt act." Id. at 332, 57 S.E.2d at 758. The only evidence against Evans was the testimony of three officers who saw Evans sitting around a little fire near the still. When Evans saw the police, he ran. In the area, officers found a 100-gallon copper still, two barrels of mash, tin tub buckets, shovels, and several other items. Additionally, officers found some whiskey in a small container on the site. The still showed evidence of usage approximately one week prior. In fact, the officers testified that everything was ready for meal and sugar to be added to the beer from the first batch to make a second one; however, neither meal nor sugar was found at the site. The state of the fermentation of the mash found at the site was favorable to be used for making whiskey. Nevertheless, the Court held "there is not a scintilla of evidence of any overt act on the part of [Evans], or anyone else in

his presence, which would constitute the offense of manufacturing whiskey without a license." Id. at 331-332, 57 S.E.2d at 757.

Similarly, in State v. Quick, 199 S.C. 256, 19 S.E.2d 101 (1942), the South Carolina Supreme Court held Quick was entitled to a directed verdict on the charge of unlawful manufacture of intoxicating liquor where officers found two stills on Quick's property, and found Quick approaching the property by automobile, which contained five hundred pounds of sugar, a stack of mill feed, and three cases of yeast cakes. Id. at 256, 19 S.E.2d at 102. Neither of the stills was in operation at the time the officers found them. One contained mash, and the other appeared to have been recently operated. The officers testified they did not know to whom the stills belonged. Id. The Court found the evidence "overwhelmingly tend[ed] to show an intention on the part of [Quick] to manufacture of liquor." However, the Court determined that the state had failed to prove that Quick engaged in any overt act. Id.

Although the Court provided no definite rule as to what constituted an overt act, the Court explained that each case would depend upon the particular facts and inferences drawn therefrom "with a view to working substantial justice." Id. The Court explained "the act must always amount to more than mere preparation, and move directly toward the commission of the crime." Id.

> There is a wide difference between the preparation for the commission of an offense and the commission of the offense itself, or even the attempt to commit. The preparation consists in devising or arranging the means or measures necessary for the commission of the crime; the attempt or overt act is the direct movement toward the commission, after the preparations are made.

Id. at 256, 19 S.E.2d at 103. The Court held that the testimony showed nothing more than an act by Quick in preparation to the commission of the crime and not an act proximately

leading to its consummation. Id. The Court further found the jury instruction telling the jury that if it found Quick intended to manufacture intoxicating liquors illegally then Quick had violated the statute was an incorrect statement of the law. As provided by the Court, the statute made it unlawful for a person to manufacture liquor; however, the statute did not make it an offense to intend to manufacture liquor. Id. Therefore, Quick was entitled to a directed verdict.

On the other hand, our Supreme Court addressed the manufacture of liquor and found sufficient evidence to warrant denial of the directed verdict motion in State v. Jackson, 210 S.C. 214, 42 S.E.2d 230 (1947).

> Ordinarily, the manufacture of alcoholic liquors would contemplate the finished product, but the rule has been established in this state that an overt act in the process of manufacturing, is sufficient to show unlawful manufacture, and that each case must be decided dependent upon its particular facts, especially as to the issue whether a verdict of acquittal should be directed.

Id. at 218, 42 S.E.2d at 232. The South Carolina Supreme Court found the testimony of police officers tending to show that the initial steps involved in the manufacture of alcoholic liquors had been taken in that the mash in the still had nearly reached the stage of fermentation and all that remained to be done was to build a fire thereunder was sufficient for the case to go to the jury on the charge of the unlawful manufacture of alcoholic liquors. Id. at 221, 42 S.E.2d at 234.

In State v. Cunningham, 239 S.C. 212, 122, S.E.2d 289 (1961), Cunningham was charged with manufacturing alcoholic liquors and with unlawfully having in his possession one case of fruit jars being an apparatus, appliance, or device to be used for the purpose of manufacturing alcoholic liquors. The jury acquitted Cunningham of manufacturing liquor, but found him guilty of possession of one case of fruit jars to be used for the purpose of

manufacturing alcoholic liquors. At the time, a statute declared that the unexplained possession of any apparatus, appliance, or any device commonly or generally used for the manufacture of prohibited alcoholic liquors was prima facia evidence of a violation of the possession statute. Id. at 213-214, 122 S.E.2d at 289.

One night, officers observed three unidentified men start working at a still. Shortly thereafter, two of the men, one of whom was later identified as Cunningham, walked away from the still. The two men saw the officers and ran. Cunningham was carrying two cases of new empty half-gallon fruit jars, which he dropped when he ran. Id. at 214-215, 122 S.E.2d at 290. The prosecution contended the fruit jars were to be used as receptacles for the liquor, and as such, would be an apparatus, appliance, or device used for the purpose of manufacturing liquor. However, no one testified as to what type of receptacle was being used to receive the liquor at this particular still. "In fact, there [was] no evidence that fruit jars [were] suitable for use in manufacturing liquor." The Court noted that the jars were "in common use in many if not most homes for other purposes." Id. at 215, 122 S.E.2d at 290. In light of the jury's acquittal of Cunningham of manufacturing, the most that could be said against him was that he was transporting the jars to the still for the purpose of transporting liquor already manufactured. However, such use would not be for the purpose of manufacturing liquor, which was what the statute required. Id.

Applying the plain meaning of the statute coupled with the case law concerning the manufacture of liquor to the facts presented in Appellant's case requires reversal of the lower court's decision and a directed verdict in Appellant's favor. The plain language of the manufacture statute required the state provide evidence that Appellant engaged in the "production, preparation, propagation, compounding, conversion, or processing" of "any

salt, isomer, or salt of an isomer, or any mixture or compound containing amphetamine or methamphetamine." See S.C. Code Ann. § 44-53-110 (defining "manufacture") (defining "methamphetamine"). The prosecutor provided no evidence that Appellant had engaged in any of these acts.

Located in various places within Appellant's truck were items that could be used for manufacturing methamphetamine, but may be legally and innocently purchased and used. According to the officer's testimony, the tubing did not appear to have been used for the manufacture of methamphetamine. The batteries were whole and intact, indicating they had not been opened to remove the lithium, which would have been necessary to manufacture methamphetamine. The coffee filters were unused – they showed no signs of having been used to strain or dry methamphetamine. The officer who searched Appellant's vehicle testified he did not smell anything unusual, and that based upon his experience, working meth labs smell strongly of ether. The box of pseudoephedrine contained all of the pills with which it was sold – no pills were missing to indicate the product had been used in any way. Importantly, officers found no plastic or glass bottle in Appellant's vehicle. Obviously, if officers found no bottle in the vehicle, then officers found no bottle containing residue or any appearance of being used in the manufacture of methamphetamine. Additionally, officers found no ammonium nitrate, sodium hydroxide, or sulfuric acid, all of which are required for the manufacture of methamphetamine.

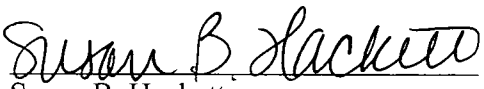
Although Appellant possessed items that may be used to manufacture methamphetamine, the items are not illegal to possess and serve legitimate purposes outside the manufacture of methamphetamine. As explained by Judge James, the prosecutor presented no evidence, such as residue or odor, to show indicia of manufacturing. Just as

the manufacturing intoxicating liquors statutes required an overt act toward putting the intent into effect, the manufacturing methamphetamine statute requires the prosecution to prove an overt act. It is not enough for the prosecution to prove a guilty intention on the part of Appellant; rather, the prosecution must prove Appellant engaged in an overt act connected to a guilty intention.

CONCLUSION

Appellant respectfully requests this Court reverse the decision of the trial court and direct a verdict in his favor on the charge of manufacturing methamphetamine.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of October, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

October 1, 2013

Susan B. Hackett

Susan B. Hackett
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

George C. James, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JEFFREY DODD THOMAS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Christina J. Catoe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 1st day of October, 2013.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 1st day of October, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.