

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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AUG 19 2013

SC Court of Appeals

Appeal from Oconee County

Alexander S. Macaulay, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENNETH W. WHITWORTH,

APPELLANT

APPELLATE CASE NO. 2013-000497

ANDERS BRIEF OF APPELLANT

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court gave a jury instruction on circumstantial evidence that lessened the State's burden of proof?

STATEMENT OF THE CASE

Appellant was convicted of trafficking in methamphetamine after a jury trial held in his absence before the Honorable Alexander S. Macaulay on February 26 – 27, 2013, in Oconee County. On February 28, 2013, appellant was brought before the court and his sealed sentence was opened. The sentence was for thirty (30) years suspended upon service of twenty-five (25) years with five (5) years probation, thereafter. R. David Day, Esquire, was the trial attorney. Lindsey S. Simmons, Esquire, was the assistant solicitor.

This appeal follows.

ARGUMENT

The trial court gave a jury instruction on circumstantial evidence that lessened the State's burden of proof.

Appellant was tried for selling methamphetamine to an informant, Jamie Clark. Clark and appellant had known each other for years. Appellant's defense was that they were both friends and both users of methamphetamine. They just got together to use the drugs and there was no distribution. (Tr. p. 132, line 8 – p. 133, line 2).

During its charge to the jury, the trial court gave the following jury instruction on circumstantial evidence:

Now, there are two types of evidence which are generally presented during a trial, direct evidence and circumstantial evidence.

Direct evidence is the testimony of a person who claims to have actual knowledge of a fact, such as an eyewitness. It is evidence which immediately establishes the main fact to be proved.

Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. It is evidence which immediately establishes collateral facts from which the main fact may be inferred.

Circumstantial evidence is based on inference and not on personal knowledge or observation. It is proof that does not actually establish the fact in question but asserts or

ascribes something else from which you may reasonably infer the truth of the fact or at least reasonably infer an increase in the probability the fact is true.

For the circumstantial evidence to be sufficient to warrant the finding of a fact, the circumstances must lead to that fact with reasonable certainty.

Facts and circumstances should be considered in light of ordinary experience and common sense. The existence of a fact cannot be based on speculation, surmise, or conjecture.

The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence nor is a greater degree of certainty required of – required of circumstantial evidence than of direct evidence.

You should weigh all of the evidence in the case. After weighing all of the evidence, if you're not satisfied of the guilt of the defendant beyond a reasonable doubt you must find the defendant not guilty.

(Tr. p. 143, line 10 – p. 144, line 20).

Recently, the South Carolina Supreme Court gave a model charge on circumstantial evidence in State v. Logan, Opinion No. 27296 (filed August 14, 2013). That charge reads as follows:

There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence

is proof of a chain of facts and circumstances indicating the existence of a fact.

Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, however, to the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed.

The State has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination of the two.

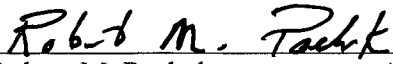
(emphasis supplied).

As can be seen, the emphasized portion of the model charge places a higher burden of proof on the State. The trial court in appellant's case erred in failing to give a similar charge.

CONCLUSION

Appellant's conviction should be reversed.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of August, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Oconee County
Alexander S. Macaulay, Circuit Court Judge.

THE STATE,

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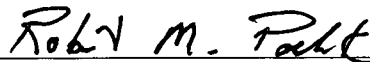
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kenneth W. Whitworth 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 Alexander S. Macaulay, which was held on February 28, 2013, 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 Kenneth W. Whitworth.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of August, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Oconee County

Alexander S. Macaulay, Circuit Court Judge

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APPELLATE CASE NO. 2013-000497

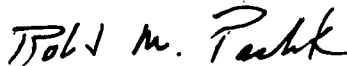
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s);
- (2) Entire Trial Transcript (February 26 – 28, 2013)

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

August 19th, 2013



Robert M. Pachak
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

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 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."

August 19, 2013

Robert M. Pachak

Robert M. Pachak
Appellate Defender

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Division of Appellate Defense
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Columbia, South Carolina 29211-1589

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Appeal from Oconee County
Alexander S. Macaulay, Circuit Court Judge

THE STATE,

RESPONDENT,

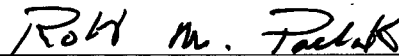
V.

KENNETH W. WHITWORTH,

APPELLANT

CERTIFICATE OF SERVICE

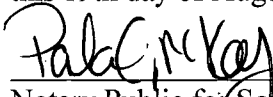
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Kenneth W. Whitworth, #255970 at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 19th day of August, 2013.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 19th day of August, 2013.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.