

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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MAR 13 2014

Appeal from Horry County

SC Court of Appeals

Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LYNEL WITHERSPOON,

APPELLANT

APPELLATE CASE NO. 2013-001650

ANDERS BRIEF OF APPELLANT

BENJAMIN JOHN TRIPP
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 judge erred in failing to enter a directed verdict of acquittal against a charge of trafficking cocaine where the State conducted a confidential-informant buy; where none of the testifying law enforcement officers witnessed the alleged transaction; where the informant wore a hidden video that did not capture Appellant providing the cocaine; and where although the informant testified that Appellant got in the backseat of the car behind her to make the transaction, the informant also admitted that she had three prior convictions for forgery?

STATEMENT OF THE CASE

On February 28, 2013, the Horry County Grand Jury indicted Appellant Lynel Witherspoon on one count of distribution of cocaine as a third offense. R. 178-179; R. 171, ln. 20—Tr. 173, ln. 4. On July 24, 2013, Appellant proceeded to trial before the Honorable Larry B. Hyman and a jury. Kia Wilson represented Appellant and Scott Graustein represented the State. Tr. 1.

At the conclusion of the trial on July 25, 2013, jury found Appellant guilty. R. 167, ln. 22—R. 168, ln. 3. The court sentenced him to seventeen years imprisonment. R. 174, ln. 19—R. 175, ln. 1.

ARGUMENT

THE TRIAL JUDGE ERRED IN FAILING TO ENTER A DIRECTED VERDICT BECAUSE THE STATE FAILED TO PRESENT SUBSTANTIAL CIRCUMSTANTIAL EVIDENCE THAT APPELLANT WAS THE PERSON IN THE CAR WHO SOLD THE INFORMANT CRACK COCAINE.

STATEMENT OF FACTS

At trial the State offered testimony suggesting that in Myrtle Beach on August 31, 2011, the Fifteenth Circuit Drug Enforcement Unit used a confidential informant to purchase crack cocaine from Appellant. R. 40, ln. 17—R. 57, ln. 25; R. 97, ln. 14—R. 107, ln. 11. The State played a video that the informant allegedly recorded during the buy using a camera disguised as a shirt button. R. 100, ln. 21—R. 106, ln. 10. Based on the inflexibility of the camera, it did not record anyone's face during the alleged buy or a drug buy at all. R. 109, ln. 17—R. 110, ln. 6; R. 114, ll. 14-22. None of the law enforcement officers involved in the operation actually witnessed the buy, though they claimed to be "in the vicinity." R. 78, ln. 16—R. 79, ln. 11. Additionally, the officers never tracked or located the marked money used in the buy. R. 63, ll. 3-17.

The confidential informant, Jessica Stone, testified that she rode in the front passenger seat of a vehicle to the buy location. Appellant allegedly arrived and sat in the backseat, and they swapped the marked forty dollars in cash for crack cocaine. Stone then drove to a rendezvous spot to meet the officers. R. 101, ln. 25—R. 104, ln. 15. On cross-examination, Stone admitted that while she was the only alleged eyewitness, she had also been convicted three times prior for forgery. R. 107, ln. 18—R. 115, ln. 4.

After the State presented its case, Appellant moved for a directed verdict, but the trial judge denied the motion. R. 118, ln. 12—R. 119, ln. 21.

DISCUSSION

The trial judge erred in failing to enter a directed verdict because the State did not present substantial circumstantial evidence that Appellant was the person in the car who sold the informant crack cocaine. South Carolina Code Section 44-53-375 prohibits distribution of cocaine base. The accused is entitled to a directed verdict when the State fails to present evidence to support every element of the charged offense. *See State v. Brown*, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004); *In re Jeremiah W.*, 353 S.C. 90, 93-94, 576 S.E.2d 185, 187 (Ct. App. 2003) (*rev'd on other grounds*, 361 S.C. 620, 606 S.E.2d 766 (2004)); *see also In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

Our Supreme Court "has repeatedly affirmed the principle that when the State fails to produce *substantial circumstantial evidence* that the defendant committed a particular crime, the defendant is entitled to a directed verdict." *State v. Odems*, 395 S.C. 582, 720 S.E.2d 48 (2011) (emphasis added). In *Odems*, the Court cited *State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011) and *State v. Lollis*, 343 S.C. 580, 541 S.E.2d 254 (2001) as "jurisprudence . . . instructive in explaining the proof required in cases built wholly on circumstantial evidence." *Id.* Specifically, the trial court "should grant a directed verdict motion when the evidence *merely raises a suspicion* that the accused is guilty." *Odems*, 395 S.C. at 586, 720 S.E.2d at 50 (emphasis added) (citation omitted).

“Suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof.” *See State v. Buckmon*, 347 S.C. 316, 322, 555 S.E.2d 402, 404-05 (2001) (citing *Lollis*, 343 S.C. 580, 541 S.E.2d 254). Therefore, a case based solely upon circumstantial evidence should be submitted to the jury only “if there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced.” *Bostick*, 392 S.C. at 139, 708 S.E.2d at 776-777 (citing *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)).

In this case, the State did not present substantial circumstantial evidence that Appellant was the person in the car who sold the informant crack cocaine. None of the testifying law enforcement officers involved in the operation actually witnessed the alleged buy. The state’s hidden-video recording did not record anyone’s face during the alleged buy. Finally, the law enforcement officers never tracked or located the marked money used in the buy. The only evidence tending to show that Appellant was the person who provided Stone the crack cocaine was her testimony that that she rode in the front passenger seat of a vehicle to the buy location and that Appellant sat in the backseat. She never testified that she turned around and saw Appellant hand her the cocaine and take the money. Indeed, all of her testimony, including that Appellant entered the car, should be disregarded. She has been convicted three times for forgery, which is a crime of dishonesty. The sum of the State’s evidence at most merely raises a suspicion that Appellant provided Stone with the cocaine, and therefore the trial judge erred in failing to direct a verdict of acquittal.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the trial judge's denial of a directed verdict and dismiss the charge against him.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of March, 2014.

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IN THE COURT OF APPEALS

Appeal from Horry County

Larry B. Hyman, Jr., Circuit Court Judge

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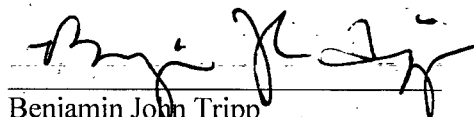
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Lynel Witherspoon 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 Larry B. Hyman, Jr., which was held on July 25, 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 Lynel Witherspoon.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of March, 2014.

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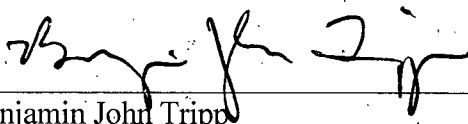
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s);
- (2) Entire Trial Transcript (July 24 – 25, 2013)

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

March 13th, 2014


Benjamin John Tripp
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."

March 13, 2014


Benjamin John Tipp
Appellate Defender

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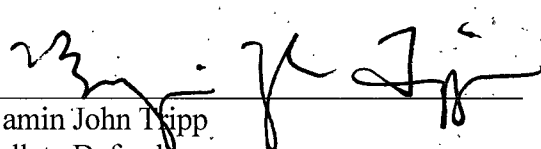
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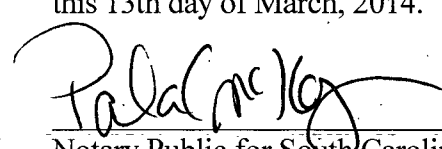
CERTIFICATE OF SERVICE

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 Lynel Witherspoon, #254076 at Macdougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472 this 13th day of March, 2014.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 13th day of March, 2014.

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