

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)
STATE,)
Versus)
JOHN ALEXANDER WEBB,)

IN THE COURT OF GENERAL SESSIONS
INDICTMENT NOS. 2017-GS-26-3144
2017-GS-26-3145, 2017-GS-26-3146
2017A2610200648
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ORDER GRANTING MOTION
IN ARREST OF VERDICTS

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HORRY COUNTY, SC

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Defendant. JAN 27 2020

SC Court of Appeals

This matter came before the Court on the motion of the Defendant, John Alexander Webb, for New Trial and/or Judgment in Arrest of Verdict, through his counsel, Francis A. Humphries, Jr., Esquire. At the hearing held June 18, 2019, the State was represented by Assistant Solicitors George Henry Martin and Seth Oskin, and Senior Assistant Solicitor Mary Ellen Walter. The Court heard the argument of the Defendant in support of his motion summarized as follows: Defendant moved for a New Trial and/or Judgment in Arrest of Verdict requesting the Court act as Thirteenth Juror and set aside the verdicts of the jury in this matter and enter verdicts of Not Guilty or Grant a New Trial on all the indictments as the terms of the statute under which the Defendant was indicted and tried, are strictly construed against the State and in favor of the Defendant.

By way of background, on April 23, 2019, Defendant was found guilty by a jury of all charges in the above-captioned indictments. As a result, Defendant was sentenced to one (1) year suspended upon the service of ninety (90) days, which may be served on weekends, and one (1) year probation, the conditions of which are that the Defendant perform 240 hours of Public Service, probation to terminate upon completion of public service, and the Defendant participate in substance abuse counseling as directed by Probation. Defendant was sentenced consistently on each indictment and those sentences were to run concurrently.

The Defendant was charged with violating the drug distribution law, § 44-53-390(a)(4), SC Code Ann. (1976), and the jury was instructed, that:

"The state must prove beyond a reasonable doubt that the defendant knowingly or intentionally furnished false or fraudulent material information in, or omitted any material information from, any application, report, or other document to be kept by this article.

Triazolam and Phentermine are controlled substances under the laws of our State.

Knowingly means with knowledge; that is, consciously done.

Intentionally means willfully; intending the result which actually occurs; not accidentally or involuntary.

Fraud means the intentional and successful employment of any cunning or deception used to cheat another person; it is something said or done or not said or done by a person in order to cheat or deceive another person.

Pursuant to section 44-53-340 of the South Carolina Code of Law, persons registered to manufacture, distribute, or dispense controlled substances under this article shall keep records and maintain inventories in conformance with the record-keeping and inventory requirements of federal law and with any additional rules the Department issues."

The State did offer witness testimony outlining the referenced guidelines and requirements imposed by DHEC, which are additional rules and statutes found outside of Title 44, Chapter 53, Article 3, Narcotics and Controlled Substances, S.C. Code Ann. (1976), amended, the statutes under which the defendant was charged, but the Defendant asserts that the State failed to directly reference, in testimony or other evidence, any statute contained within the mandated article or any rule issued by the Department of Health and Environmental Control setting out record keeping requirements. Having failed to do so, the Defendant asserted the State failed in its burden to establish the existence of any evidence meeting these material elements of the offense, even in the light most favorable to the State. The Defendant moved that he was entitled to a directed verdict of not guilty on all indictments upon which he was tried or, in the alternative, a new trial.

While acknowledging there was no direct reference in testimony or other evidence to any statute contained within the mandated article or any rule issued by the Department of Health and

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Environmental Control setting out record keeping requirements, the State argued that the testimony and evidence submitted by the State was sufficient to establish a violation of law was committed by the Defendant, notwithstanding, the Defendant's statement, included in the audio recording made by the defendant's counsel, introduced into evidence as State's Exhibit 1, that he had documented his findings that met the record keeping requirements of the practice in each incidence alleged in the separate indictments, to wit:

INDICTMENT NO. 2017-GS-26-03144 relating to "Renee J." on July 7, 2016;

INDICTMENT NO. 2017-GS-26-03145 relating to "Kristy S." between April 8, 2016 and October 15, 2016; and

INDICTMENT NO. 2017-GS-26-3146 relating to "Alexandria C." on October 27, 2016.

It was the statement of the Defendant, as recorded in the interview of him by the DHBC Inspector, Derek Strickland, and introduced into evidence as the aforesaid State's Exhibit 1, that he had made and kept documentation each time the medications were prescribed to his wife, "Kristy S.", her daughter, "Alexandria C.", and the wife's co-worker and friend, "Renee J.", — all of whom would have been the "victims" of the alleged offenses, but who were later estranged from the Defendant, when he and his wife were going through a divorce.

Nevertheless, thereafter, the Defendant stated that documentation and "records" were among the papers that were lost in the divorce process when he was removed from the marital home. Although the State was able to locate and present as witnesses each of the three pharmacists who filled the three subject prescriptions, the State did not call any of the "victims" who had received the allegedly unlawfully prescribed control substances.

At the end of the State's case, Defendant moved for Directed Verdict based on the State's failure to offer any evidence of, or direct reference to, any statute within Title 44, Chapter 53, Article 3, of the S.C. Code of Laws Ann. (1976), as amended, or any rule issued by the Department

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of Health and Environmental Control (DHEC) as specifically required by Section 44-53-390 (a)(4) and Section 44-53-340 of the S.C. Code of Laws Ann. (1976), the statutes under which the Defendant was charged. The Court, at that time, denied that motion stating the Court understood "interpretation is required in testimony that they are operating under regulations under this article". (p. 189, ll. 19-21 of Trial Transcript).

After the Defendant rested his case, without offering any evidence, the Defendant renewed his motion for Directed Verdict on the grounds stated above which was also denied. After the verdicts were returned, but before the sentences were given by the Court, Defendant renewed his motion for Directed Verdict. The Court did not rule on Defendant's motion at that time, but granted Defendant the opportunity to file this motion and any other post-trial motions in writing within ten (10) days of the verdicts and sentences. Rule 29 (a), SCRCrimP.

Inasmuch as the State, through testimony of its witnesses and in closing argument, had suggested that the burden of proof was on the Defendant, the Court was concerned that the State in its presentation and summation intimated that: if the Defendant was unable to produce the records related to his prescribing practices with the individuals alleged in the indictments, immediately upon request by law enforcement, the Defendant was in violation of the law upon which he was indicted (regardless of the reason or reasons he was unable to produce the records). Moreover, the State elicited testimony in their case from Agent Derek Strickland of the Bureau of Drug Control, that the Defendant was not permitted to provide "alternate" or "recreated" records upon his inability to produce the original records. The Defendant, through Counsel, consistently commented on the burden shifting nature of the testimony and evidence presented by the State, both through cross examination and in closing argument. The State's conduct, if burden shifting, would be inimical to Due Process under the Fifth and Fourteenth Amendments to the

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United States Constitution, Article 1, Section 3 of the South Carolina Constitution and the core principles of the American system of justice.

The South Carolina Supreme Court noted in State v. Attardo, 263 S.C. 546, 552, 211 S.E.2d 868, 870 (1975) that: "A shifting of the burden of proof would impose a significantly greater onus on the defendant and, even more significantly, it would obliterate the presumption of innocence." In that case, the Supreme Court ruled that requiring the defendant to prove he lacked knowledge of his possession of drugs shifted the burden of proof to the defendant. In the instant case, the issue is whether or not the requirement of the Defendant to produce patient records of his prescribing practices, upon their loss or destruction, with no alternative provided him, is burden shifting and, therefore, constitutionally prohibited. If burden shifting, such facts could fatally infect the trial of the Defendant preventing a fair trial.

Moreover, there is another equally compelling principal, when the case rests entirely on circumstantial evidence, such as the absence of evidence or "when the evidence fails to positively prove the guilt of the accused to the exclusion of any other reasonable hypothesis," State v. Dobson, 281 S.C. 36, 38, 314 S.E.2d 310, 311 (1984), such evidence is too speculative to support a finding that "a person knowingly or intentionally" did "fraudulent[ly] omit any material information from, any application, report, or other document to be kept . . . under this article, or any record required to be kept by this article" SECTION 44-53-390 (a) (4), S.C. Code of Laws Ann. (1976).

After careful review of the evidence in the trial of the case and the able arguments of counsel, the Court makes the following:

FINDINGS OF FACTS

1. The statutes under which the Defendant was indicted, Title 44, Chapter 53, Article 3, S.C. Code Ann. (1976), provide, in pertinent part:

Section 44-53-390(a)(4) "(a) It is unlawful for a person to knowingly and intentionally to: . . . (4) furnish false or fraudulent material information in , or omit any material information from, any application, report, or other document required to be kept or filed under **this article**, or any record required to be kept **this article**; [and]

Section 44-53-340 "(p)ersons registered to . . . , distribute, or dispense controlled substances under this article shall keep records and maintain inventories in conformance with record-keeping and inventory requirements of Federal law and **with any additional rules the Department issues.**" (Emphasis supplied)

2. No evidence of Federal law regarding keeping records was offered by the State or received by the Court;
3. No direct reference to any specific law contained within Title 44, Chapter 53, Article 3, regarding record keeping was offered by the State or received by the Court;
4. No direct reference to any specific DHEC rule, commonly known as Regulations, regarding record keeping was offered by the State or received by the Court;
5. No request to charge on the law by the State, other than Sections 44-53-390(a)(4) and 44-53-340, was offered to the Court and no other statutory or regulatory law was charged to the jury;
6. Both statutes, Sections 44-53-390(a)(4) and 44-53-340, crave reference to other statutes and/or DHEC Regulations to set out lawful requirements to be met by the Defendant, and those similarly situated, relative to the generation and maintenance of records, but do not, within the statutes themselves, provide these legal requirements;
7. The jury in this case would necessarily have had to find the Defendant guilty, without the benefit of the law regarding what records must be generated and maintained under the Federal law and any additional rules the Department issues, pursuant to Title 44, Chapter 53, Article 3, Section

Article 3, Section 44-53-340, and 44-53-390 (a)(4), S. C. Code Ann. (1976), with which the Defendant was charged with violating in each of the Indictments.

8. Moreover, when the State's arbiter in the investigation, Inspector Derek Strickland, is recorded in State's Exhibit 1, telling the Defendant that "the burden is on you to produce those records," but "I'll assist you as much as I can", the inference might be drawn by the jury "that the burden was on the defendant to produce evidence to rebut any adverse inference which had arisen on the issue of fraudulent", Gray v. Leeke, 584 F.Supp. 650, 652 (1984), omission of the "material information . . . required to be kept," Section 44-53-390 (a)(4), SC Code Ann. (1976).

9. There was no direct testimony or other evidence that the Defendant did not maintain any record required to be produced and maintained, but, to the contrary, there was his statement to the effect that he had, and, moreover, his explanation as to why he could not produce, when demanded by the State Investigator, the records that he had produced and maintained, as related in State's Exhibit 1, was a reasonable hypothesis to the exclusion of the State's hypothesis that the Defendant did unlawfully, "knowingly or intentionally . . . furnish false or fraudulent material information in, or omit any material information from, any application, report, or other document required to be kept or filed under this article, or any record required to be kept by this article". Id.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, it is the conclusion of the Court, that:

1. On motion of the defendant of the defendant or on its own motion, the court shall direct in the defendant's favor on any offense charged in the indictment after the evidence on either side is closed, if there is a failure of competent evidence tending to prove the charge in the indictment. In ruling on the motion, the trial judge shall consider the existence or non-existence of the evidence and not its weight. Rule 19, SCRCrimP.
2. "It is fundamental that an accused can be convicted only upon proof beyond a reasonable doubt of every essential element necessary to constitute the crime charged." Gray v. Leeke, supra.

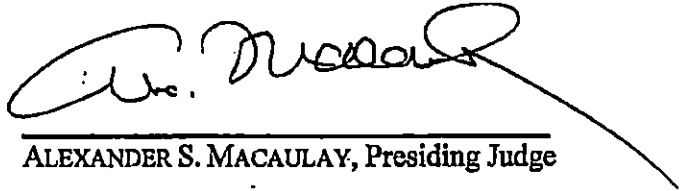
3. "Here, the jury was permitted to 'infer' or 'conclude' that the missing [report or other document required to be kept — though none were particularly defined or designated by the State] were fraudulently [omitted] unless he physically produced evidence to the contrary." *Id.*
4. "[W]hen the case rests entirely on circumstantial evidence, a directed verdict is proper when the evidence fails to positively prove the guilt of the accused to the exclusion of any other reasonable hypothesis." *Dobson, supra.*

JUDGMENT

Accordingly, the Defendant's Motion in Arrest of Judgment is **GRANTED**.

IT IS, THEREFORE, ORDERED that the verdicts of Guilty for violations of Section 44-53-390(a)(4), S.C. Code Ann. (1976), are SET ASIDE and VACATED, and verdicts of NOT GUILTY entered as to the Defendant, John Alexander Webb.

AND, IT IS SO ORDERED.



ALEXANDER S. MACAULAY, Presiding Judge

October 18, 2019
Walhalla, South Carolina

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