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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

William Jeffrey Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHRISTOPHER W. BROWN,

APPELLANT

APPELLATE CASE NO. 2014-000293

ANDERS BRIEF OF APPELLANT

BENJAMIN JOHN TRIPP
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court committed reversible error by refusing to charge the jury for purposes of the defense of entrapment that where although a defendant had a previous disposition toward a particular criminal offense, inducement still occurs if the defendant is enticed by repeated provocations to return to a habit that he was in the process of overcoming.

STATEMENT OF ISSUE ON APPEAL

Whether the trial court committed reversible error by refusing to charge the jury for purposes of the defense of entrapment that where although a defendant had a previous disposition toward a particular criminal offense, inducement still occurs if the defendant is enticed by repeated provocations to return to a habit that he was in the process of overcoming.

ARGUMENT

THE TRIAL COURT REVERSIBLY ERRED BY FAILING TO CHARGE THAT WHERE ALTHOUGH A DEFENDANT HAD A PREVIOUS DISPOSITION TOWARD A PARTICULAR CRIMINAL OFFENSE, INDUCEMENT STILL OCCURS IF THE DEFENDANT IS ENTICED BY REPEATED PROVOCATIONS TO RETURN TO A HABIT THAT HE WAS IN THE PROCESS OF OVERCOMING.

FACTS

During opening statements at trial, the State alleged that on February 3, 2009, Appellant sold fourteen grams of cocaine to an undercover informant. App. 78, lines 6-19. Counsel for Appellant told the jury the evidence would show the undercover informant lawfully induced him to make the sale through persistent requests. App. 79, line 24—App. 84, line 1.

The State called Will Crosby, who testified he agreed to “roll on” somebody in 2008 after police arrested him for a drug offense. R. 87, lines 1-13. He testified that he agreed to attempt a purchase of cocaine from Appellant, from whom he had purchased the same approximately twenty times during the course of 2008. App. 88, line 19—App. 90, line 15. During the sale at issue, officers wired Crosby with audio and video recording equipment. App. 96, lines 4-11.

On cross-examination, Crosby testified that the drug charges underlying his police cooperation involved his possession of thirty-six grams of cocaine, and the charges carried sentences of at least three years of incarceration. App. 108, line 3—App. 109, line 18. Crosby also testified that he made phone calls to Appellant before and around the time of the undercover sale that were not recorded or witnessed by police. During these calls, Crosby could not find work and did not have “any money coming in.” App. 113, line 12—App. 114, line 8. Knowing Appellant worked in a flooring business, Crosby was basically asking

Appellant if he had any work. App. 112, lines 4-18. When Appellant told Crosby he could not help him, Crosby, known as a drug dealer, began asking for a connection to some cocaine so he could make money by reselling it. App. 114, line 12—App. 115, line 4. After the sale, Crosby's underlying drug charges were dismissed. App. 116, lines 13-15.

Testifying in his own defense, Appellant explained that prior to the sale, Crosby's repeated phone calls appeared as desperation. The desperation grew into more direct pressure and then threats of physical harm when Appellant turned him down again and again. App. 290, line 18—App. 292, line 1. Appellant was not involved in drugs at the time. App. 292, lines 2-4. On cross-examination, Appellant testified that he did not make any money off the sale at issue. App. 300, lines 9-11.

Prior to closing argument, counsel for Appellant requested a charge on the defense of entrapment from *Sherman v. United States*, 356 U.S. 369 (1958); App. 417. The trial judge denied the request, stating the topic was sufficiently covered in his prepared charge. App. 339, lines 4-9. The trial judge ultimately gave a charge on entrapment by stating, *inter alia*, that the State is required to prove beyond a reasonable doubt that the defendant had any predisposition to commit the crime without inducement by the government and that the fact that government agents merely afford opportunity or facilities for the commission of the crime does not constitute entrapment. Additionally, relevant evidence of predisposition includes an existing course of criminal conduct similar to the crime charged, an already formed plan to commit the crime, and a willingness to commit the crime shown by the defendant's ready response to the inducement. App. 384, line 4—App. 386, line 6.

DISCUSSION

The trial court reversibly erred by failing to charge the jury that where although a defendant had a previous disposition toward a particular criminal offense, inducement still occurs if the defendant is enticed by repeated provocations to return to a habit that he was in the process of overcoming. The purpose of jury instructions is to enlighten the jury as to applicable law so that a just, fair and proper verdict can be reached. *See State v. Leonard*, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987); *see also State v. Blurton*, 352 S.C. 203, 207, 573 S.E.2d 802, 804 (2002) (“The purpose of a jury instruction is to enlighten the jury and to aid it in arriving at a correct verdict.”). The law to be charged must be determined from the evidence presented at trial. *Blurton*, 352 S.C. at 208, 573 S.E.2d at 804 (quoting *Leonard*, 292 S.C. at 137, 355 S.E.2d at 273); *see also State v. Lindler*, 276 S.C. 304, 307, 278 S.E.2d 335, 337 (1981). In a criminal case, the judge must charge on all material issues raised by the indictment and evidence. *See State v. Fair*, 209 S.C. 439, 445, 40 S.E.2d 634, 637 (1946). It is reversible error to decline a criminal defendant's requested jury instruction where it (1) is a correct statement of the law, (2) was not substantially covered by other instructions, and (3) was important enough to the case that its omission impaired the defendant's ability to defend himself. *United States v. Frazier-El*, 204 F.3d 553, 562 (4th Cir. 2000) (quoting *United States v. Queen*, 132 F.3d 991, 1000 (4th Cir. 1997)); *see also United States v. Dornhofer*, 859 F.2d 1195, 1199 (4th Cir. 1988), *cert. denied*, 490 U.S. 1005 (holding that a trial court may not refuse a defense theory instruction if it has evidentiary support and is an accurate statement of the law).

The defense of entrapment applies “where one is instigated, induced or lured by an officer of the law or other person for the purpose of prosecution into the commission of a

crime which he had otherwise no intention of committing.” *State v. Haulcomb*, 260 S.C. 260, 269, 195 S.E.2d 601, 605-06 (1973). “When a law enforcement officer merely provides an opportunity for crime, no entrapment is involved.” *Id.* In *Sherman v. United States*, the United States Supreme Court held that where although a defendant had a previous disposition toward an offense involving narcotics, inducement still occurs if the defendant is attempting to avoid narcotics is enticed into not only selling but also the habit of use. *Sherman, Sherman v. United States*, 356 U.S. at 376.

In this case, the evidence raised the material issue of whether Crosby induced Appellant to return to a habit that he was in the process of overcoming. Although evidence existed that Appellant sold cocaine to Crosby in 2008, no evidence showed he sold cocaine or had contact with Crosby in 2009 until shortly before February 3rd. Appellant testified he was not around cocaine and was able to provide for himself financially through a legitimate flooring business. The testimony also strongly suggested that Crosby repeatedly provoked Appellant to return to his old habit of selling cocaine. Crosby made repeated, desperate appeals to Petitioner for help improving his financial situation. Appellant repeatedly declined. Crosby, knowing he would serve serious prison time if he did not serve Appellant to police, turned to direct pressure and then threats of harm for a cocaine connection, finally achieving Appellant’s resignation to a sale from which he made no personal gain.

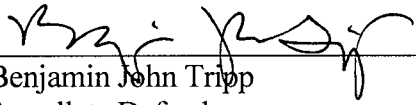
The trial judge denied the request for a charge from *Sherman* stating the topic was sufficiently covered in his prepared charge. To the contrary, the charge he gave did not explain to the jury that entrapment is not unavailable to a defendant who once had a disposition to a crime but who overcame it prior to law enforcement’s approach. Accordingly, the charge from *Sherman* that counsel requested was necessary to enlighten

the jury as to the proper way to consider the evidence that although Appellant was once predisposed to selling cocaine, for the sale at issue he was induced by Crosby's repeated provocations to return to an old habit he was in the process of overcoming.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests reversal of his conviction and remand for a new trial.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of January, 2015.

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William Jeffrey Young, Circuit Court Judge

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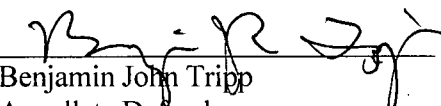
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Christopher W. Brown 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 William Jeffrey Young, which was held on February 5, 2014, 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 Christopher W. Brown.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of January, 2015.

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APPELLATE CASE NO. 2014-000293

**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
- (3) Court's Exhibit #3

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

January 12, 2015



Benjamin John Tripp
Appellate Defender

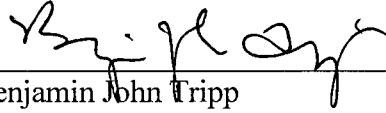
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(803) 734-1343

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 April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

January 12, 2015



Benjamin John Tripp
Appellate Defender

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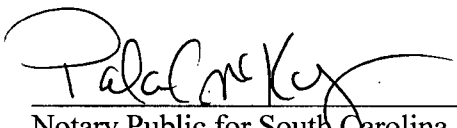
CERTIFICATE OF SERVICE

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 Christopher W. Brown, #358700 at Walden Correctional Institution, 4340 Broad River Road, Columbia, SC 29210, this 12th day of January, 2015.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 12th day of January, 2015.

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