ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Benjamin H. Culbertson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ABEL DEWAYNE GAUSE,

APPELLANT

APPELLATE CASE NO. 2018-001378

ANDERS BRIEF OF APPELLANT

VICTOR R. SEEGER
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF ISSUE ON APPEAL

Whether the lower court erred by refusing to issue a directed verdict where the state did not present any direct or substantial circumstantial evidence that Appellant actually or constructively possessed heroin with intent to distribute it where that heroin was found hidden in his wife's car which she routinely allowed others to borrow?

STATEMENT OF THE CASE

During the June 2017 term, the Horry County Grand Jury indicted Appellant for possession with intent to distribute heroin. R. 157 – 158.

Appellant proceeded to trial on July 18, 2018 before the Honorable Benjamin H. Culberston. R. 1. James Stanko represented Appellant. Id. George Henry Martin, III and David P. Caraker represented the state. Id.

The jury found Appellant guilty as indicted. R. 150, ll. 17 – 23. Due to Appellant's prior record, his conviction was enhanced to a third offense. R. 12, l. 18 – 13, l. 8. Judge Culberston sentenced Appellant to thirty years' imprisonment. R. 154, ll. 11 – 16. On July 19, 2018, Appellant filed a notice of appeal.

This brief follows.

STANDARD OF REVIEW

"A case should be submitted to the jury when the evidence is circumstantial 'if there is any substantial evidence which reasonably tends to prove the guilt of the accused 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) (quoting State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)). "Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt." Id. "Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error." Id. at 139, 708 S.E.2d at 776-777. "On appeal of the denial of a directed verdict of acquittal, this Court must look at the evidence in the light most favorable to the state." Id. at 139, 708 S.E.2d at 777; see also State v. Hepburn, 406 S.C. 416, 429 753 S.E.2d 402, 409 (2013). If the state failed to present any direct evidence or any substantial circumstantial evidence reasonably tending to prove guilt of the accused, the appellate court must reverse the lower court's denial of the directed verdict motion. Hepburn, 406 S.C. at 416, 429 S.E.2d at 409.

ARGUMENT

The lower court erred by refusing to issue a directed verdict where the state did not present any direct or substantial circumstantial evidence that Appellant actually or constructively possessed heroin with intent to distribute it where that heroin was found hidden in his wife's car which she routinely allowed others to borrow.

Relevant Facts

The state alleged the facts as follows: On March 28, 2017, officer Brandon Rabon pulled Appellant over while Rabon was "conducting routine patrol." R. 54, l. 3 – 55, l. 2. Rabon stated he observed Appellant's car in the area in the days prior to the arrest. R. 56, ll. 1 – 6. On the day of his arrest, Appellant made a righthand turn without using his signal, so Rabon pulled him over. Id.

During the traffic stop, Rabon relayed the license plate number to dispatch and found that the license plate did not match the car. R. 56, ll. 7- 15. Appellant could not provide Rabon with a valid driver's license as he was driving on a learner's permit. R. 56, l. 18 – 57, l. 8. Appellant could not provide registration or insurance either. Id.; R. 57, ll. 12 – 22.

Rabon then arrested Appellant because he, "could not let [Appellant] operate the vehicle [without insurance]." Id. Rabon performed a search of the car and found a Morton's salt shaker with a false bottom under the driver's seat. R. 58, ll. 11 – 18.

Rabon looked inside the salt shaker and said he found, "14 slips," of heroin. Id.; R. 70, ll. 4 – 5. Rabon also found a black scale in car. R. 58, ll. 23 – 25. Appellant denied that the salt shaker was his and explained that the scale was used in his "essential oil selling business." R. 65, ll. 7 – 9. Appellant also explained that the car belonged to his wife, and that other people use his wife's car, "frequently." R. 89, ll. 3 – 7. Rabon alleged it was more likely that Appellant was a

dealer rather than a user because he did not have paraphernalia in the car or physical evidence of use. R. 67, ll. 14 – 68, l. 24.

Rabon put the salt shaker into a BEST bag and sent it for fingerprint analysis; however, no fingerprints were found on it. R. 59, l. 9 – 60, l. 21. Rabon claimed that it was common to not find fingerprints on things like this because it was, "under the seat rolling around which could have removed or distorted the print." R. 60, l. 25 – 61, l. 6. Moreover, Rabon admitted that you do not need paraphernalia or physical evidence of use in order to be a user because a user can snort heroin, which does not require paraphernalia or leave physical evidence of use, undermining his claim that Appellant was more likely a dealer than a user. R. 87, ll. 9 – 22.

After the state rested, defense counsel properly moved for a directed verdict because the state had failed present direct or substantial circumstantial evidence that Appellant possessed heroin with the intent to distribute it. R. 112, ll. 1 – 2. The trial court denied defense counsel's motion for a directed verdict. R. 112, ll. 3 – 5.

Discussion

The state's case against Appellant for possession with intent to distribute heroin was entirely circumstantial. During Appellant's trial, none of the state's witnesses offered evidence that Appellant possessed the drugs found in the salt shaker. The car he was driving was his wife's and was, "frequently used," by many other people. R. 88, ll. 3 – 5. Therefore, the drugs that were concealed underneath a seat in his wife's car, unbeknownst to Appellant, were not in his actual or constructive possession.

Additionally, none of evidence presented indicated that Appellant intended to distribute the contents of the salt shaker to anyone. Therefore, the state failed to prove possession with intent to distribute, and the Court should have directed a verdict in Appellant's favor.

When ruling on a motion for a directed verdict, the trial court is concerned with the existence or non-existence of evidence, not its weight. State v. Williams, 303 S.C. 274, 400 S.E.2d 131 (1991); State v. Green, 327 S.C. 581, 491 S.E.2d 263 (Ct.App.1997). On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State. State v. Rowell, 326 S.C. 313, 487 S.E.2d 185 (1997); State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984). If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must find the case was properly submitted to the jury. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998); State v. Huggins, 325 S.C. 103, 481 S.E.2d 114 (1997).

When a case is built wholly on circumstantial evidence, if the state fails to produce substantial circumstantial evidence the defendant committed a particular crime, he is entitled to a directed verdict. State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011). The state has the burden of proving "the accused was at the scene of the crime when it happened and that he committed the criminal act". State v. Schrock, 283 S.C. 129, 133, 322 S.E.2d 450, 452 (1984). "The [trial] court should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty." State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000).

In State v. Arnold, 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004) our Supreme Court held fingerprint evidence placing Arnold with the victim on the day of the murder merely raised a suspicion of Arnold's guilt. In Arnold, the victim was last seen alive three days earlier when he borrowed a friend's BMW to go to a dentist appointment. Id. at 388, 605 S.E.2d at 530.

In Arnold, a state's witness testified he introduced the victim to Arnold. Id. The witness indicated he received a message from Arnold to call him at a phone number belonging to

Arnold's father, who lived in Gray, Tennessee. Id. at 389, 605 S.E.2d at 530. The borrowed BMW was later found in a parking lot in Johnson City, Tennessee, approximately ten miles away from where Arnold's father lived. Id. Inside the BMW was a coffee cup lid containing Arnold's fingerprint. Id.

In concluding that the circumstantial evidence presented by the state was not sufficient to overcome a directed verdict motion, the court reasoned:

> Viewing the evidence most favorably to the State, [Arnold]'s fingerprint on the coffee cup lid tab establishes he was in the borrowed BMW on the same day the victim was last seen alive. The fact that the BMW was found abandoned in Tennessee, the same state where [Arnold] was located after his stay in Savannah, raises a suspicion of guilt but is not evidence that [Arnold] killed [the victim]. Further, there is no evidence [Arnold] was at the scene of the crime, which according to the State's theory was in Colleton County.

Id. at 390, 605 S.E.2d at 531 (footnote omitted).

In the present case, none of the evidence, viewed in the light most favorably to the state, indicated Appellant possessed the heroin in the salt shaker nor did the evidence indicate that he had the intention to distribute it. The state could not show Appellant actually possessed the salt shaker because there were no fingerprints found on it. Moreover, the state could not show constructive possession over the heroin because the car was not Appellant's and Appellant's statement to Rabon that Appellant's wife routinely allowed others to borrow the car went unchallenged. R. 88, ll. 3 – 5.

Therefore, the trial court should have granted Appellant's directed verdict motion because a jury could not have reasonably inferred guilt. "When the evidence submitted raises a mere suspicion that the accused is guilty, a directed verdict should be granted because suspicion implies a belief of guilt based on facts or circumstances which do not amount to proof." State v. Hepburn, 406 S.C. 416, 429, 753 S.E.2d 402, 409 (2013).

CONCLUSION

By reason of the foregoing arguments, Appellant respectfully requests this reverse his conviction and remand this case to the Horry County Court of General Sessions for a new trial.

Victor R Seeger
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of April, 2019.

STATE OF SOUTH CAROLINA

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Abel Dewayne Gause 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 Benjamin H. Culbertson, which was held on July 18, 2018, 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 Abel Dewayne Gause.

Respectfully Submitted,

Victor R. Seeger

Victor R Seeger
Appellate Defender
ATTORNEY FOR APPELLANT

This 19th day of April, 2019.

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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;
(2) Trial transcript dated July 18, 2018.

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

April 19, 2019

Victor R Seeger
Appellate Defender

South Carolina Commission on Indigent Defense
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(803) 734-1330

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."

April 19, 2019.

Victor R Seeger
Appellate Defender

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CERTIFICATE OF SERVICE

The undersigned 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 J. Benjamin Aplin, 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 have been served on Abel Dewayne Gause, 187864, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 19th day of April, 2019.

Victor R. Seeger

Victor R Seeger
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 19th day of April, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028