STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable William A. McKinnon, Circuit Court Judge

THE STATE,

APPELLANT,

V.

HAROLD GENE WHITE, III,

RESPONDENT.

APPELLATE CASE NO. 2019-000470

FINAL BRIEF OF RESPONDENT

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR RESPONDENT

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ISSUE PRESENTED

APPELLANT'S STATEMENT OF THE ISSUE

The trial judge erred in granting Respondent's motion to dismiss his charge of trafficking hydrocodone because hydrocodone is, pursuant to South Carolina law, a schedule II drug.

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUE

Should the trial judge's interpretation of the trafficking statute under which respondent was indicted be affirmed where his reasoning was correct and the State's sole argument on appeal is not preserved?

STATEMENT OF THE CASE

Respondent was indicted for trafficking in York County and on March 12, 2019, the case was called before the Honorable William A. McKinnon. R. 5. Erin Joyner represented the State. R. 5. Christopher Wellborn represented respondent. R. 5. In a written Order filed March 14, 2019, Judge McKinnon dismissed the trafficking charge. R. 1. The State filed this appeal.

STANDARD OF REVIEW

The issue—as presented below—only raised legal questions because the State conceded all factual issues. Therefore, the only proper issue on appeal is a pure question of law regarding statutory construction, which is reviewed *de novo*.

ARGUMENT

The trial judge's interpretation of the trafficking statute under which respondent was indicted should be affirmed where his reasoning was correct and the State's sole argument on appeal is not preserved.

Judge McKinnon issued a comprehensive written order setting forth his interpretation of the trafficking statute and dismissing the indictment based on the Rule of Lenity. R. 1. The trial judge notes a concession by the State and rules on the argument presented at the hearing. R. 1. On appeal, the State challenges neither the concession made below nor the judge's reasoning based on the Rule of Lenity. Initial Br. App. at 6 – 8. Instead, the State makes a completely different argument based on statutes not cited to the trial judge. Because the reasoning of the Order below has not been challenged, those arguments are abandoned and the sole argument raised is not preserved and should not be considered by this Court.

The State indicted respondent for trafficking hydrocodone under S.C. Code Ann. § 44-53-370(e)(3). R. 103. This statute does not mention hydrocodone. S.C. Code Ann. § 44-53-370(e)(3). It prohibits trafficking: "any morphine, opium, salt, isomer, or salt of an isomer thereof, including heroin, as described in Section 44-53-190 or 44-53-210" or "any mixture containing any of these substances." S.C. Code Ann. § 44-53-370(e)(3).

The trial judge ruled that the State "conceded in this matter that hydrocodone" does not fit into the chemical description of morphine, opium, heroin, or their salts or isomers. R. 1. This finding was correct and has not been challenged on appeal. Judge McKinnon asked the solicitor, "I'm assuming from this argument that the State is not going to be able to offer evidence that

hydrocodone is morphine, opium, a salt, or a salt of an isomer, of these drugs, is that correct?" R. 82, l. 14 – 18. The solicitor replied, "Correct."[1] R. 82, l. 19.

The solicitor then made an extensive legal argument that the court should read the word "opiate" into the statute. Tr. 79, l. 8 – 101, l. 7. Judge McKinnon dealt with this statutory argument in his Order and concluded that the Rule of Lenity controlled. R. 2. Nowhere is this ruling addressed in the argument made by the State on appeal. Therefore, this argument is deemed abandoned. See State v. Lindsey, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011).

The likely reason the State chose to abandon its argument below is because the trial judge's ruling is correct. The court examined the meaning of the phrase "as described in Section 44-53-190 or 44-53-210" which the State argued brought "hydrocodone" under the trafficking statute's sweep. Sections 190 and 210 list Schedule I and Schedule II substances. See S.C. Code Ann. §§ 44-53-190 and -210.

Section 190 is the Schedule I list. S.C. Code Ann. § 44-53-190. Part (B) includes "any of the following opiates" and their salts and isomers. S.C. Code Ann. § 44-53-190(B). This list, which includes forty-seven (47) different chemicals, does not include hydrocodone. Id. Part (C) includes "any of the following opium derivatives" and their salts and isomers. S.C. Code Ann. § 44-53-190(C). Part (C) lists twenty-three (23) different chemicals, but not hydrocodone. S.C. Code Ann. § 44-53-190(C). The remainder of the statute has lists of hallucinogens, synthetic cannabinoids, depressants, and stimulants. S.C. Code Ann. § 44-53-190(D) through (F). These three parts list over forty (40) different chemicals, but not hydrocodone. S.C. Code Ann. § 44-53-190(D) through (F).

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[1] Despite claiming that he is not a chemist, Judge McKinnon gave a detailed and thoroughly researched scientific explanation in his Order of salts, isomers, and the chemical formulas of these drugs which has not been disputed.

Section 210 is the Schedule II list. S.C. Code Ann. § 44-53-210. Like Section 190, this statute also refers to opium, opiates, and their derivatives, but does not mention hydrocodone in its list of over thirty (30) different chemicals. S.C. Code Ann. § 44-53-210.

As noted by the trial judge, the State's argument below contended that sections 190 and 210 imported "opiates" into the trafficking statute. R. 3. But as the court correctly ruled, the Legislature has specifically defined "opiates." R. 3. That definition states:

> "Opiate" means any substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability. It does not include, unless specifically designated as controlled under this article, the dextrorotatory isomer of 3-methoxy-n-methylmorphinan and its salts (dextromethorphan). It does include racemic and levorotatory forms.

S.C. Code Ann. § 44-53-110(31). The trial judge perhaps understated his conclusion that this definition "is staggeringly vague and broad." R. 3. This definition could encompass any substance having addictive qualities. The court noted that nicotine could be included in this definition. R. 3.

Criminal statutes must put a person on notice of the proscribed conduct. See State v. Curtis, 356 S.C. 622, 630, 591 S.E.2d 600, 603 (2004). Statutes that do not provide fair notice are vague, overbroad, and ambiguous. The statutory definition of opiates is far too inclusive and broad, therefore, the trial judge's resort to the Rule of Lenity was correct. This rule provides that penal statutes must be strictly construed against the State. State v. Simpson, 429 S.C. 83, 90, 837 S.E.2d 669, 673 (Ct. App. 2020). The statutes list nearly one hundred chemicals, but never mention hydrocodone and the trafficking statute does not use the term "opiate." The inclusion of hundreds of obscure chemicals and compounds demonstrates the intent of the Legislature to exclude those not specifically included. See Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) ("The canon of construction 'expressio unius est exclusio alterius' or 'inclusio unius

est exclusio alterius' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'").

The State's new argument on appeal relies upon DHEC's regulatory classification of drugs to import hydrocodone into the trafficking statute. But for a passing mention that drug schedules "can change according to DHEC action," none of the statutes relied upon by the State in this portion of its argument are mentioned below. R. 94, l. 18 – 95, l. 6. A party may not rely on one argument at trial and another on appeal. See State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003). The State's brief mention of "DHEC action" was not sufficiently specific to inform the trial court of the argument and preserve the issue for this Court. See Broom v. Se. Highway Contracting Co., 291 S.C. 93, 105, 352 S.E.2d 302, 309 (Ct. App. 1986), *abrogated by* Davenport v. Cotton Hope Plantation Horizontal Prop. Regime, 333 S.C. 71, 508 S.E.2d 565 (1998) ("[An] objection must be specific enough to inform the trial court of the point being urged by the objector and to show the opposite party the point of the objection, so that he may have an opportunity to obviate the error, if possible."). Furthermore, the trial judge did not address this argument in his comprehensive written Order and the State did not seek reconsideration.

Even if this Court were to waive the procedural bar and address the merits of its new argument on appeal, the trial judge's application of the Rule of Lenity should still be affirmed. The DHEC document cited by the State is also ambiguous.[2] While the title states it is rescheduling hydrocodone combination products from Schedule II to Schedule III, the text of the document only cites the statute for Schedule III, section 44-53-230. Id. It states that it is "removing paragraphs (e)(3) and (e)(4) and redesignating paragraphs (e)(5) through (e)(8) as

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[2] https://www.scdhec.gov/sites/default/files/docs/Health/docs/BoardORders/Signed%20Board%20order%209.11.14.pdf

(e)(3) through (6), respectively." Id. Importantly, it does not mention the code section for the Schedule II list (S.C. Code Ann. § 44-53-210) in the text. It does not state that it is moving the chemicals from Schedule II to Schedule III in the text. It only states that it modifies the Schedule III list code section. Again, the Rule of Lenity applies. In order to put respondent on notice, the DHEC document would need to, at a minimum, include a reference to the Schedule II code section.

As a direct result of the State's failure to raise this argument below, this Court is also ill-equipped to answer the factual question of whether the substance respondent allegedly possessed is described by the chemicals listed in the DHEC document. The DHEC document uses the term "hydrocodone," but the chemicals listed in the Schedule III code section are codeine, dihydrocodeinone, dihydrocodeine, ethylmorphine, opium, and morphine. S.C. Code Ann. § 44-53-230(e). Whether hydrocodone in the abstract or the actual substances allegedly possessed by respondent meet these chemical definitions was not litigated below and this Court does not have a proper record on which to rule. The lack of a record is precisely why procedural bars exist. The State was the first to raise this issue below—apparently for the purpose of obtaining a ruling from this Court. R. 76, l. 19 – 78, l. 16. R. 98, l. 5 – 102, l. 20. If the State intended to obtain an appellate ruling by raising this issue below, it needed to create a full record (both factual and legal) for this Court. Judge McKinnon's Order should be affirmed.

CONCLUSION

For the foregoing reasons, the decision of the trial court should be affirmed.

This 1st day of July, 2020.

s/David Alexander
Appellate Defender

ATTORNEY FOR RESPONDENT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final 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."

July 1, 2020.

s/David Alexander
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR RESPONDENT