STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
Honorable William A. McKinnon, Circuit Court Judge
Appellate Case No. 2019-000470
Trial Court Case No. 2018GS4607326

THE STATE, ...APPELLANT,

v.

HAROLD GENE WHITE, III .....RESPONDENT.

FINAL BRIEF OF APPELLANT

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ATTORNEYS FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

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.

STATEMENT OF THE CASE

On October 12, 2018, the York County Grand Jury indicted Respondent for trafficking in hydrocodone (2018-GS-46-07326).[1] On March 12, 2019, Respondent proceeded to a bench trial before the Honorable William McKinnon. Christopher Wellborn, Esquire, represented Respondent; Assistant Solicitor Erin Joyner, Esquire, represented the State. The trial judge dismissed Respondent's trafficking hydrocodone charge after finding hydrocodone was not a schedule II drug, rendering it ineligible for a trafficking-level offense. The State filed a timely Notice of Appeal, and this Brief of Appellant follows.

[1] Respondent was also indicted for possession with intent to distribute oxycodone (2018-GS-46-07327), possession of cocaine (2018-GS-46-03874), and possession with intent to distribute marijuana (2018-GS-46-03876). However, these charges were not dismissed and thus are not part of this appeal.

STATEMENT OF FACTS

Prior to trial, the State requested a discussion as to whether Respondent would make any motions challenging the propriety of the trafficking hydrocodone indictment; it sought to resolve any issues with the charge prior to jeopardy attaching to it at trial. The State presented the trial judge with Alabama case law and statutes which indicate its nearly-identical statutory scheme classifies hydrocodone as a schedule II drug. It pointed out that while the trafficking statute, S.C. Code Ann. Section 44-53-370(e)(3), states "four grams or more of any morphine, opium, salt, isomer, or salt of an isomer thereof, including heroin" is directly referenced by the statute, the statute also refers to drugs "described in Section[s] 44-53-190 [and] 44-53-210" and "any mixture" containing these substances as falling under the subsection. S.C. Code Ann. Section 44-53-210(b) defines, in part the following substances as schedule II drugs:

> (1) Opium and opiate[s], and any salt, compound, derivative, or preparation of opium or opiate, excluding Apomorphine, Nalbuphine, Naloxone, and Naltrexone, and their respective salts;
> (2) Any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in paragraph (1), but not including isoquinoline alkaloids of opium.
> (3) Opium poppy and poppy straw;
> (4) Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances . . . .

Thus, according to the State, hydrocodone, an opiate, is a substance classified under S.C. Code Ann. Section 44-53-210, which in turn would make it a substance for which Respondent could be charged with trafficking under Section 44-53-370(e)(3), and the State was prepared to offer testimony to prove as much. (R.p.76, line 19–R.p.85, line 15; R.p.86, line 2–R.p.91, line 19; R.p.94, line 17–R.p.95, line 6).

The trial judge was concerned with the State's interpretation of the statute, noting it was the State legislature's duty to define the legality of drugs and that he must strictly construe

criminal statutes against the State; because "opium" and "opiate" are different terms, opiate itself does not appear in Section 44-53-370(e)(3), and hydrocodone is not a substance listed under S.C. Code Ann. Section 44-53-210, he believed hydrocodone was not a substance for which a trafficking offense could be charged under that subsection. Similarly, trial counsel agreed with the trial judge's interpretation of the statute and his application of the rule of lenity. After hearing the arguments of both parties, the trial judge, who felt constrained by the rule of lenity, dismissed the charge, noting he was unable to discern the legislature's intent on the issue. (R.p.85, line 16–R.p.86, line 1; R.p.91, line 20–R.p.94, line 16; R.p.95, lines 7–23; R.p.99, line 25–R.p.102, line 20).

On March 14, 2019, the trial judge issued a written order memorializing his dismissal, noting hydrocodone is a "synthetic derivative of codeine" and "chemically distinct" from heroin and morphine, and due to its differences from the drugs listed in S.C. Code Ann. Section 44-53-370(e)(3) and the rule of lenity, hydrocodone was not a substance for which trafficking could be charged under that section. (R.pp.1–4)

STANDARD OF REVIEW

"In criminal cases, an appellate court reviews errors of law only and is bound by the factual findings of the trial court unless clearly erroneous." State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). "The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion. Id. "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." Id.

ARGUMENT

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.

The trial judge erred in dismissing Respondent's indictment for trafficking hydrocodone because hydrocodone is a schedule II drug under South Carolina law, pursuant to a combination of statutory law and state regulations.

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007). "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992). "The statute must be interpreted with **realistic circumstances and rationales in mind.**" State v. Elwell, 396 S.C. 330, 336, 721 S.E.2d 451, 454 (Ct. App. 2011)(emphasis added); State v. Baker, 310 S.C. 510, 512, 427 S.E.2d 670, 672 (1993) ("A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers."). Courts will reject an interpretation of a statute leading to an absurd result clearly unintended by the legislature. See Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000); Ray Bell Constr. Co. v. Sch. Dist. of Greenville County, 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998) ("However plain the ordinary meaning of the words used in the statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature. . . .").

S.C. Code Ann. Section 44-53-370(e)(3), states "four grams or more of any morphine, opium, salt, isomer, or salt of an isomer thereof, including heroin" is directly referenced by the statute, the statute also refers to drugs "described in Section[s] 44-53-190 [and] 44-53-210" and

"any mixture" containing these substances as falling under the subsection. S.C. Code Ann. Section 44-53-210(b) defines, in part the following substances as schedule II drugs:

> (5) Opium and opiate[s], and any salt, compound, derivative, or preparation of opium or opiate, excluding Apomorphine, Nalbuphine, Naloxone, and Naltrexone, and their respective salts;
> (6) Any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in paragraph (1), but not including isoquinoline alkaloids of opium.
> (7) Opium poppy and poppy straw;
> Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances . . . .

Pursuant to S.C. Code Ann. Section 44-53-160(A), the South Carolina Department of Health and Environmental Control (DHEC) is responsible for recommending any additions, deletions, or revisions to the various schedules of controlled substances to General Assembly. When the legislature is not in session, DHEC may add, delete, or reschedule a substance and such an action has the full force of law unless later overturned by the General Assembly. S.C. Code Ann. § 44-53-160(B). Such changes are posted on DHEC's website and include the effective date of the change. Id. Further, if a substance is added, deleted, or rescheduled pursuant to federal law or regulation, DHEC must reclassify such substance into the corresponding schedule under State law within thirty days. S.C. Code Ann. § 44-53-160(C). Similar to subsection (B), such additions, deletions, or changes have the full force of law unless later overturned by the General Assembly.

On August 22, 2014, the U.S. Department of Justice, Drug Enforcement Administration published a final rule to reschedule hydrocodone combination substances from a schedule III to schedule II controlled substance. Schedules of Controlled Substances: Rescheduling of Hydrocodone Combination Products from Schedule III to Schedule II, 79 Fed. Reg. 49,661–

49,682 (August 22, 2014); 21 C.F.R. § 1308.12 (2019). Based on that change, and the available date and information regarding hyrdrocodone combination products and their high potential for abuse, South Carolina also rescheduled hydrocodone to a schedule II controlled substance. South Carolina Board of Health and Environmental Control, Rescheduling of Hydrocodone Combination Products from Schedule III to Schedule II for Controlled Substances, (September 11, 2014), http://wwwprod.dhec.sc.gov/Health/docs/BoardOrders/Signed%20Board%20order%209.11.14.pdf.

In the instant case, hydrocodone is a schedule II substance under South Carolina law. After federal regulations reclassified the substance, DHEC followed suit and reclassified it pursuant to S.C. Code Ann. Section 44-53-160(C). Nothing in Section 44-53-160 is ambiguous about DHEC's ability to reclassify controlled substances pursuant to federal law or regulations. Using said authority, DHEC reclassified hydrocodone as a schedule II drug in 2014, years before Respondent was indicted for his charged crime. Hydrocodone is explicitly defined as a schedule II drug, one for which a person may be charged for trafficking, and the trial judge erred in concluding otherwise.

CONCLUSION

For all the foregoing reasons, this Court should reverse the trial judge's dismissal of Respondent's indictment for trafficking hydrocodone.

Respectfully submitted,

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July 9, 2020

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CERTIFICATE OF COUNSEL

The undersigned certifies 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."

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