

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Aug 07 2020

SC Court of Appeals

Appeal from Horry County
Court of General Sessions
Honorable Alexander S. Macauley, Circuit Court Judge

Appellate Case No. 2020-000081

The State of South Carolina,

Appellant,

vs.

John A. Webb,

Respondent.

INITIAL BRIEF OF RESPONDENT JOHN ALEXANDER WEBB

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the Trial Court erred in granting Respondent's Motion for Judgment in Arrest of Verdict where Respondent Webb was charged with failing to keep or produce records pursuant to S.C. Code Section 44-53-390(a)(4), but the State failed to directly reference any statute contained within Article 3, any rule issued by the Department of Health and Environmental Control, or any federal law setting forth record keeping requirements upon which the jury could base its verdicts.

STATEMENT OF THE CASE

Respondent Webb was indicted for three violations of the drug distribution laws contained in S.C. Code Section 44-53-390(a)(4), which states:

(a) It is unlawful for a person knowingly or 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 *by this article*... (emphasis added).

Respondent Webb proceeded to trial on April 23, 2019. At the end of the State's case, Respondent Webb moved for a directed verdict based on the State's failure to reference any statute within Title 44, Chapter 53, Article 3 of the S.C. Code of Laws Ann. (1976), as amended, any federal law, or any rule issued by the Department of Health and Environmental Control (DHEC) as required by S.C. Code Sections 44-53-390(a)(4) and 44-53-340. Transcript, pp. 184-189. The Trial Court denied Respondent Webb's motion for directed verdict. Id. at 189.

After Respondent Webb rested his case without offering any evidence, Respondent Webb renewed his motion for directed verdict. Id. at p. 196/11-13. The Trial Court may or may not have ruled on Respondent Webb's renewed motion for directed verdict at that time. Id.¹

¹ The Trial Court's Order Granting Motion in Arrest of Verdicts states that "the Defendant renewed his motion for Directed Verdict on the grounds stated above which was also denied." Order, p. 4. In the transcript, Respondent Webb's trial counsel states, "Your Honor, at this time the defense rests. And we would renew our motion for directed verdict, we understand the Court's ruling." Transcript, p. 196/11-13. The Trial Court then states, "Very good," and continues to address the jury prior to closing arguments. Id. at 14.

Respondent Webb was found guilty of all charges and the Trial Court sentenced Respondent Webb to concurrent sentences of one year, suspended on service of 90 days to be served on weekends and one year probation to be terminated upon completion of 240 hours of community service. Id. at 237/17.

After the jury's verdicts were returned but before the sentences were given by the Court, Respondent Webb again renewed his motion for directed verdict, stating, "I need to renew my motions..." Id. at 229/6. The Trial Court responded by saying, "The motion is noted for the record and I'll give you 10 days to prepare your motion." Id. at 229/9-11 through 245/23.

Respondent Webb then filed a Motion for New Trial and/or Judgment in Arrest of Verdict. Following a hearing, the Trial Court granted the Motion in Arrest of Judgment and entered verdicts of not guilty but did not rule on Respondent Webb's Motion for New Trial. Order Granting Motion in Arrest of Verdicts. The State's Motion to Reconsider was denied by the Trial Court in a written Order, Order Denying Motion to Reconsider, after which the State filed this appeal and Respondent Webb filed a cross-appeal asking this Court to reverse the Trial Court's denial of directed verdict.

ARGUMENT

- I. **Whether the Trial Court erred in granting Respondent Webb's Motion for Judgment in Arrest of Verdict where Respondent Webb was charged with failing to keep or produce records pursuant to S.C. Code Section 44-53-390(a)(4), but the State failed to directly reference any statute contained within Article 3, any rule issued by the Department of Health and Environmental Control, or any federal law setting forth record keeping requirements upon which the jury could base its verdicts.**

Respondent Webb acknowledges that the grant of judgment in arrest of verdict was improper under controlling South Carolina precedent.

Nevertheless, Respondent Webb respectfully requests that this Court 1) affirm the Trial Court's Order Granting Motion in Arrest of Verdicts pursuant to Rule 220(c), S.C. Rules of Appellate Procedure, 2) remand this case for consideration of Respondent's Motion for New Trial which the Trial Court did not rule upon, or 3) reverse the Trial Court's denial of directed verdict, which has been briefed separately in the Initial Brief of Appellant Webb.

Respondent Webb Requests that this Court Affirm the Trial Court's Order Granting Motion in Arrest of Verdicts Pursuant to Rule 220(C), S.C. Rules of Appellate Procedure

In the Trial Court's Order, the Court below directed verdicts of acquittal for Respondent Webb, expressing great concern over the State's failure to directly reference any statute contained within Article 3, any rule issued by the Department of

Health and Environmental Control, or any federal law setting forth record keeping requirements upon which the jury could base its verdicts.

There are grounds appearing in the Record on Appeal to support this Court's affirmation of the Trial Court's Order and judgment pursuant to Rule 220(C), S.C. Rules of Appellate Procedure.

Respondent Webb was indicted for three violations of the drug distribution laws contained in S.C. Code Section 44-53-390(a)(4), which states:

(a) It is unlawful for a person knowingly or 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 *by this article*... (emphasis added).²

The Trial Court stated the law correctly in the jury instructions, which limits the record-keeping requirements to those provided in Article 3 of Title 44, federal law, or additional regulations promulgated by DHEC:

...to furnish false or fraudulent material, information in, or omit any information from any applicant [sic], report, or other document required to be kept or filed under this article or any record required to be kept by this article. Persons registered to manufacture, distribute or dispense controlled substances under this article shall keep records and maintain inventories in conformance with the

² Undersigned counsel notes that the State's Initial Brief of Appellant, in the Statement of Facts, omits the statutory language "required to be kept or filed *under this article*, or any record required to be kept *by this article*."

record keeping and inventory requirements of Federal law and with any additional regulations by Department of Health and Environmental Control.

Transcript, p. 217/5-14.

The State, however, failed to reference, in testimony or other evidence, any record keeping requirements contained within Article 3 of Title 44, any rule issued by DHEC setting forth record keeping requirements, or any federal law setting forth record keeping requirements. It would have been impossible for the jurors to determine that Respondent Webb violated the record-keeping requirements of S.C. Code Sections 44-53-390(a)(4) and 44-53-340 when the State at no point instructed the jurors as to what the record keeping requirements would be.

During pretrial arguments, trial counsel argued at length that the Court should exclude any testimony regarding “standard of care” or orientation materials from Respondent Webb’s medical residency because the statute expressly states that violations are limited to the requirements contained within Article 3 of Title 44, any rule issued by DHEC setting forth record keeping requirements, or any federal law setting forth record keeping requirements Id. at pp. 61/13 through 77/12, pp. 87-98.

The Trial Court agreed, suggesting that the State simply publish to the jurors any DHEC regulation that the State alleges Respondent Webb had violated. The Trial Court stated, “If it’s a DHEC regulation just publish the regulation.” Id. at 64/14-15. At no point during the trial did the state publish a DHEC regulation or even reference a DHEC regulation to inform the jurors as to what the record keeping requirements would be.

The Trial Court also correctly stated that “it’s not violative of the language unless it’s required to be kept or filed *under this article* or a record required to be kept *by this article*.” Id. at 68/7-9 (emphasis added).

Investigator Strickland’s Testimony

Investigator Strickland incorrectly testified that there are no specific guidelines as to documentation, without referencing any specific requirements from Article 3 of Title 44, a DHEC regulation, or federal law:

Q: How would a medical practitioner document?

A: We at the Board of – at DHEC don’t have any specific guidelines as far as documentation, just has to be documented. It can be a memorandum of such as long as the document is readily available and upon request provided to inspector, no requirements going forward.

Q: And you say readily available, does that also mean the documentation must be kept and maintained by the physician?

A: Correct. By regulation with DHEC the records must be readily available, maintained by the registrant. It is the responsibility of the registrant being the registration holder to maintain those records.

Transcript, p. 164/17 through 165/3.

Investigator Strickland goes on to state that the Bureau of Drug Control requires physicians to maintain records for two years, and states that it is “against the law” for a physician to fail to document or to lose their documentation:

Q: How long should a practitioner keep these prescription documentation?

A: Bureau of Drug Control requires two years on documentations, other may – the Medical Board may require more but as far as the Bureau of Drug Control we require two years.

Q: If a person who is issuing a prescription, if that person omits the information from his documentation or even fails to document it at all what happens?

A: It's against the law.

Q: What happens if the person fails to keep or lose or maintain this information?

A: It's, again, against the law.

Transcript, 166/5-17.

Although Investigator Strickland testified as to what is required for licensing by LLR and the Board of Medical Examiners, the requirements of the Bureau of Drug Control, and some of the record keeping requirements specific to pharmacists, neither Investigator Strickland nor any other witnesses provided testimony as to what the specific record keeping requirements are for physicians under Article 3 of Title 44, a DHEC regulation setting forth record keeping requirements, or any federal law setting forth record keeping requirements.

The jurors were not informed as to what specific records must be kept and what record keeping mechanism must be used, if any, and, therefore, could not have

determined that Respondent Webb violated the specific requirements of Article 3 of Title 44.

During counsel's argument for directed verdict at the close of the State's case, the Trial Court inquired of the State as to whether "any Federal statute or regulation has been referred to," and the State responded:

Mr. Oskin: Your honor, with regards to that objection by defense, we would submit Investigator Strickland's testimony that his role in DHEC is equivalent to the DEA, that's based off State regulations, based off Federal law. And that does bring it under that purview...

Mr. Oskin: the State would submit that when Investigator Strickland referred to his job capacity as a DHEC agent, that his job is based off Federal law in the capacity of what he does investigating, and the likeness of a DEA agent which is based off Federal rules, regulations, and statutes. All of the testimony, Your Honor, goes to 44-53-390, Section (a) to further prove that this defendant knowingly and intentionally omitted keeping the records.

Transcript, pp. 188/15 through 18/10.

There was *no* testimony during the trial that referenced what specific records must be kept under Article 3 of Title 44, a DHEC regulation setting forth record keeping requirements, or any federal law setting forth record keeping requirements, how those records must be kept, or how Respondent Webb violated the specific record keeping requirements of Article 3 of Title 44, any DHEC regulation setting forth record keeping requirements, or any federal law setting forth record keeping requirements,

Additional grounds appearing in the Record on Appeal to support this Court's affirmation of the Trial Court's Order and judgment pursuant to Rule 220(C), S.C. Rules of Appellate Procedure can be found in the Trial Court's Order.

The State, both in argument and through the testimony of witnesses, repeatedly suggested that the burden of proof was on Respondent Webb by:

- Stating that if Respondent Webb was unable to immediately produce the required records, regardless of the reason he was unable to produce the records and whether it was an impossibility, Respondent was in violation of the law. Order Granting Motion for Judgment in Arrest of Verdicts, p. 4.
- Eliciting testimony by Investigator Strickland that Respondent Webb was not permitted to provide recreated records, regardless of the reason he was unable to produce the records and whether it was an impossibility, Order Granting Motion for Judgment in Arrest of Verdicts, p. 4.

Under the section titled "Findings of Facts," the Trial Court stated:

- "No evidence of Federal law regarding keeping records was offered by the State or received by the Court;"
- "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;"
- "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;" and

- “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.”

Order, p. 6.

The Trial Court went on to find that:

[t]he 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 Federal law and any additional rules the Department issues, pursuant to Title 44, Chapter 53, 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.

Order, pp. 6-7.

The Trial Court also addressed the effect of Respondent Webb’s statement in its Order, finding that:

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’s investigator, the records that he had produce 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 information from, any application, report, or

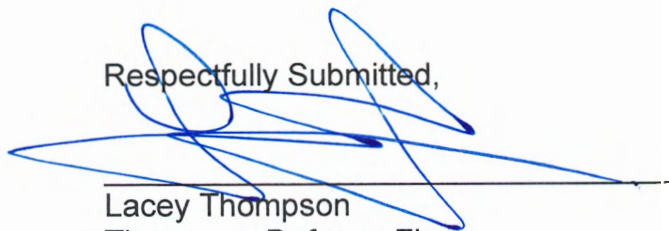
other document required to be kept or filed under this article, or any record required to be kept by this article.” Id.

Order, p. 7.

CONCLUSION

For the foregoing reasons, Respondent Webb respectfully requests that this Court 1) affirm the Trial Court’s Order Granting Motion in Arrest of Verdicts pursuant to Rule 220(c), S.C. Rules of Appellate Procedure, 2) remand this case for consideration of Respondent’s Motion for New Trial which the Trial Court did not rule upon, or 3) reverse the Trial Court’s denial of directed verdict, which has been briefed separately in the Initial Brief of Appellant Webb.

Respectfully Submitted,



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PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent John Alexander Webb to be Included in the Record on Appeal on SC Asst. Attorney General William M. Blich and the Court of Appeals Filings by email at wblitch@sccag.gov and ctappfilings@sccourts.org on this 7th Day of August, 2020.



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