STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable William A. McKinnon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LAGERALD L. DUNHAM,

APPELLANT.

APPELLATE CASE NO. 2019-001538

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err by denying Appellant's motion for a directed verdict for trafficking methamphetamine when the chemist only tested four of the one hundred and one pills found in a grocery bag under the passenger seat in the car Appellant was driving since the evidence merely raised a suspicion all one hundred and one pills contained methamphetamine, particularly when the pills were not commercially made?

STATEMENT OF THE CASE

A York County Grand Jury indicted Appellant on January 18, 2018 for trafficking methamphetamine and possession with intent to distribute marijuana. R. 153-156. His case was called to trial on September 3, 2019 before the Honorable William McKinnon, and a jury. R. 1. Assistant Solicitor Matthew Hogge represented the state, and Geoff Dunn represented Appellant. R. 1.

Judge McKinnon directed a verdict for possession with intent to distribute marijuana. R. 105, l. 25 – 106, l. 5. On September 5, 2019, the jury found Appellant guilty of trafficking methamphetamine. R. 141, ll. 9-13. He was sentenced to eighteen years imprisonment. R. 147, ll. 2-9.

This appeal follows.

STANDARD OF REVIEW

"The defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011) (citing State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001)). "However, if there is any direct or *substantial* circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." Id. (citing State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000)) (emphasis in original). "On appeal from the denial of a directed verdict, this Court must view the evidence in the light most favorable to the State." Id. (citing State v. Lollis, 343 S.C. 580, 583, 541 S.E.2d 254, 256 (2001)).

"A [trial] judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty." Id. (citing State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984)). "Suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." State v. Buckmon, 347 S.C. 316, 322, 555 S.E.2d 402, 404-405 (2001) (citing Lollis, 343 S.C. at 584, 541 S.E.2d at 256). "When ruling on a motion for a directed verdict, the trial [judge] is concerned with the existence or nonexistence of evidence, not its weight." State v. Shands, 424 S.C. 106, 135, 817 S.E.2d 524, 539 (Ct. App. 2018) (citing State v. Hernandez, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009)).

ARGUMENT

The trial judge erred by denying Appellant's motion for a directed verdict for trafficking methamphetamine when the chemist only tested four of the one hundred and one pills found in a grocery bag under the passenger seat in the car Appellant was driving since the evidence merely raised a suspicion all one hundred and one pills contained methamphetamine, particularly when the pills were not commercially made.

Relevant Facts

Sergeant Shaun Watson of the Rock Hill Police Department stopped Appellant on May 26, 2017 for a traffic violation after Appellant allegedly failed to use a turn signal when making a righthand turn. R. 20, ll. 4-19. Watson approached the driver's door and asked Appellant for his license and registration. Almost immediately thereafter, Watson ordered Appellant to get out of the car claiming he smelled marijuana. State's Exhibit No. 1 (DVD of Body Camera Footage). Appellant consented to a search of his person. State's Exhibit No. 1 (DVD of Body Camera Footage). Watson found plastic baggies and approximately fourteen hundred dollars in cash in Appellant's pockets. R. 31, ll. 4-23; State's Exhibit No. 1 (DVD of Body Camera Footage). After the search, Appellant was arrested for driving without a license and placed in the backseat of Watson's patrol car. R. 124, ll. 7-22; State's Exhibit No. 1 (DVD of Body Camera Footage).

Appellant's then girlfriend, Jessica Hamilton, was sitting in the front passenger seat. She was also asked to get out of the car. State's Exhibit No. 7 (DVD of Body Camera Footage). After verifying her identity, Sergeant Watson and Officer Daniel Shealy began to search the car without a warrant based solely on the alleged smell of marijuana. State's Exhibit No. 1 (DVD of Body Camera Footage); State's Exhibit No. 7 (DVD of Body Camera Footage). Under the front passenger seat where Ms. Hamilton had been sitting moments earlier, Shealy found a grocery

bag containing suspected marijuana and one hundred and one pills. R. 32, ll. 5-14; R. 65, ll. 10-13; R. 81, l. 15 – 82, l. 3; R. 84, l. 22 – 85, l. 7; State's Exhibit No. 1 (DVD of Body Camera Footage); State's Exhibit No. 7 (DVD of Body Camera Footage). Both Watson and Shealy thought the pills were ecstasy. R. 82, ll. 4-13; State's Exhibit No. 1 (DVD of Body Camera Footage).

The alleged marijuana was weighed and analyzed by Michael Smothers of the Rock Hill Police Department. R. 44, ll. 1-22. The trial judge refused to qualify Smothers as an expert and ultimately directed a verdict for possession with intent to distribute marijuana after there was no expert testimony that the substance found in the car Appellant was driving was in fact marijuana. R. 49, ll. 7-25; R. 105, l. 21 – 106, l. 5.

The pills, which law enforcement suspected to be ecstasy, were sent to the South Carolina Law Enforcement Division (SLED) for analysis. Maribeth McCormack, who was qualified as an expert in the identification and analysis of controlled substances, testified that she received two plastic bags containing tablets. R. 53, ll. 15-23; R. 55, ll. 20-24. There was a mixture of pills in each bag. R. 60, ll. 3-5. She sorted the pills from each of the two bags into two different categories based on their markings and colors for a total of four subgroups or "populations." R. 60, ll. 6-11; R. 60, l. 23 – 61, l. 2; R. 61, ll. 13-17; R. 57, ll. 5-6. McCormack then tested one pill from each of the four populations. R. 60, ll. 12-23. She claimed it was standard policy to only test one pill from each population because SLED simply does not have the time or resources to test every pill. R. 62, ll. 8-22.

McCormack testified that methamphetamine and caffeine were found in the four pills analyzed. R. 56, ll. 12-16; R. 61, ll. 3-9. She weighed the four populations separately on a

certified scale and determined the various weights to be 9.02 grams, 8.18 grams, 9.96 grams, and 10.03 grams for a total weight of 37.19 grams. R. 58, ll. 14-16.

McCormack maintained that it was not uncommon for law enforcement to suspect a substance is ecstasy, but it is later found to be methamphetamine. R. 56, l. 17 – 57, l. 2.

The state admitted photographs of text messages allegedly exchanged between Appellant and Jessica Hamilton sometime prior to the traffic stop. The messages were found on Hamilton's phone after her arrest. R. 94, l. 7 – 95, l. 18. In one set of messages, Hamilton asked Appellant whether he left her any pills to which he responded, "Yea you had ten and snow and tree." R. 151 (State's Exhibit No. 8 – Photograph of Text Messages). While there was no evidence as to what snow and tree meant, the assistant solicitor argued in closing that the messages proved Appellant was a "drug dealer." R. 125, l. 22 – 126, l. 12.

How the Issue was Presented Below

After the state rested, Appellant moved for a directed verdict. Defense counsel summarized the evidence presented through the chemist. He explained that the chemist sorted the one hundred and one pills into four categories based on their appearance and markings. The pills were multi-colored. Some were stamped with a dollar sign and others with a red bull. R. 106, ll. 6-17. Ultimately, the chemist only tested one pill from each group. Counsel argued there were one hundred and one separate doses. While four tested positive for methamphetamine, there was no evidence presented that the other ninety-seven doses or pills contained methamphetamine. R. 106, l. 20 – 107, l. 9. Consequently, counsel asserted the judge should direct a verdict for trafficking methamphetamine and submit the case to the jury as mere possession of the four pills that were tested. R. 108, ll. 2-14.

Defense counsel further argued that S.C. Code Ann. § 44-53-392 does not apply. This statute states, "The weight of any controlled substance referenced in this article is the weight of that substance in pure form or any compound or mixture thereof." Counsel asserted that this statute applies, for example, when powder cocaine or a similar controlled substance is commingled with a cutting agent. However, because the one hundred and one pills in this case are separate doses, counsel asserted each pill had to be analyzed and weighed separately. R. 106, l. 19 – 107, l. 18.

Lastly, defense counsel emphasized that the state has the burden of proof. The fact that it may be more time consuming for the state to test all one hundred and one pills should have no bearing on whether it met its burden of proof. R. 108, l. 18 – 109, l. 2.

The trial judge maintained that the chemist opined all one hundred and one pills with a total weight of over thirty-seven grams contained methamphetamine. Consequently, the judge concluded there was direct evidence to support the offense of trafficking methamphetamine. R. 109, l. 15 – 110, l. 3. He emphasized that if defense counsel were correct then his argument would apply to "every pill case," including cases involving Xanax, Hydrocodone, and Oxycodone. R. 111, ll. 19-21. The judge also asserted that he was not aware of any South Carolina case law "that says to survive a directed verdict the State must individually test every pill." R. 111, ll. 22-24.

In response, defense counsel argued that this case is different than the average "pill case" because the pills in this case were not commercially produced. He emphasized that pseudoephedrine or Xanax, for example, purchased from a pharmacy is commercially produced by a pharmaceutical company. If a chemist analyzed a single pill of commercially produced Xanax and found a controlled substance, it would be easier to infer the other pills in the same

population contain the same controlled substance. However, that is not the case with homemade pills, such as the pills seized in this case. R. 112, ll. 2-12.

The trial judge ultimately denied the motion for a directed verdict relying on the fact that there was no South Carolina case law on point. R. 112, ll. 18-25.

Discussion

The trial judge erred by denying Appellant's motion for a directed verdict for trafficking methamphetamine when the chemist only tested four of the one hundred and one pills found in the grocery bag under the passenger seat in the car Appellant was driving since the evidence merely raised a suspicion all one hundred and one pills contained methamphetamine, particularly when the pills were not commercially made. Only the lesser included offense of possession of methamphetamine should have been submitted to the jury.

"The defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011) (citing State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001)). "However, if there is any direct or *substantial* circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." Id. (citing State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000)) (emphasis in original). "On appeal from the denial of a directed verdict, this Court must view the evidence in the light most favorable to the State." Id. (citing State v. Lollis, 343 S.C. 580, 583, 541 S.E.2d 254, 256 (2001)).

"A [trial] judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty." Id. (citing State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984)). "Suspicion implies a belief or opinion as to guilt based upon facts or

circumstances which do not amount to proof." State v. Buckmon, 347 S.C. 316, 322, 555 S.E.2d 402, 404-405 (2001) (citing Lollis, 343 S.C. at 584, 541 S.E.2d at 256). "When ruling on a motion for a directed verdict, the trial [judge] is concerned with the existence or nonexistence of evidence, not its weight." State v. Shands, 424 S.C. 106, 135, 817 S.E.2d 524, 539 (Ct. App. 2018) (citing State v. Hernandez, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009)).

Appellant was charged with trafficking methamphetamine pursuant to S.C. Code Ann. § 44-53-375(C), which states in relevant part: "A person who knowingly sells, manufactures, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of ten grams or more of methamphetamine . . is guilty of a felony which is known as 'trafficking in methamphetamine' and, upon conviction, must be punished as follows if the quantity involved is: . . . (2) twenty-eight grams or more, but less than one hundred grams: . . . (b) for a second offense, a term of imprisonment of not less than seven years nor more than thirty years." Consequently, the state had to prove Appellant constructively possessed at least ten grams or more of methamphetamine or, for purposes of the sentencing enhancement, twenty-eight grams or more.

In denying Appellant's motion for a directed verdict, the trial judge found the chemist opined all one hundred and one pills with a total weight of over thirty-seven grams contained methamphetamine. However, nowhere in her testimony or her report, admitted as State's Exhibit No. 6, did McCormack maintain all one hundred and one pills contained methamphetamine. Her report specifically states, "Methamphetamine found in the sample tested." R. 148-150 (State's Exhibit No. 6 – Drug Report). She then provided the weight for each of the four populations. R.

148-150 (State's Exhibit No. 6 – Drug Report). In her testimony, she maintained methamphetamine was found, but again admitted she only analyzed one pill from each population. R. 56, ll. 12-16; R. 60, ll. 12-23. Consequently, the trial judge erred by finding there was direct evidence in the form of McCormack's opinion that all one hundred and one pills totaling over thirty-seven grams contained methamphetamine.

Just as there was no direct evidence, the state failed to present substantial circumstantial evidence that all one hundred and one pills or 37.19 grams contained methamphetamine. The evidence merely raised a suspicion all one hundred and one pills contained methamphetamine, particularly since the pills were not commercially made. As defense counsel argued below, it would be possible to infer pills in the same population contained the same controlled substance if the pills were commercially produced by a pharmaceutical company and sold by a doctor or pharmacy. However, in this case, the pills, which were stamped with a red bull and dollar sign, were not uniform and clearly not commercially made. Therefore, it was improper to allow the jury to speculate that the other ninety-seven pills, which were not analyzed, also contained methamphetamine. If anything, the fact that one pill from each population contained methamphetamine raised a suspicion the other ninety-seven pills also contained methamphetamine.

Moreover, again as defense counsel argued below, § 44-53-392 does not apply to the facts of this case. See R. 106, l. 19 – 107, l. 18. The statute states, "The weight of any controlled substance referenced in this article is the weight of that substance in pure form or any compound or mixture thereof." This statute applies, for example, when powder cocaine or a similar controlled substance is commingled with a cutting agent or other substance. In this case, the statute would apply to that fact that the chemist found methamphetamine and caffeine in the four

pills she analyzed. The total weight of each of the four pills tested would include the weight of the methamphetamine and caffeine mixture. However, the other ninety-seven pills are separate doses and, therefore, should have been analyzed and weighed separately.

Only the lesser included offense of possession of methamphetamine should have been submitted to the jury since there was no evidence Appellant possessed ten grams or more of methamphetamine. Because there was no direct or substantial circumstantial evidence to support the offense of trafficking methamphetamine, the trial judge erred by denying Appellant's motion for a directed verdict. Respectfully, this Court should direct a verdict of acquittal for trafficking methamphetamine.

CONCLUSION

Based on the foregoing argument, this Court should direct a verdict for trafficking methamphetamine.

Respectfully Submitted,

s/ Lara M. Caudy_____
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of September, 2020.

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."

September 17, 2020.

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