STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Honorable Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JUSTIN GORDON HUNTER,

APPELLANT

APPELLATE CASE NO 2019-000469

INITIAL MERIT BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred where it failed to direct a verdict of acquittal for distribution of methamphetamine, second offense, where there was no evidence Appellant delivered methamphetamine to the confidential informant, since distribution is defined as the delivery of a controlled substance, and since the court must direct a verdict of acquittal when the prosecution fails to produce evidence of the offense charged?

STATEMENT OF THE CASE

On April 13, 2016, a State Grand Jury indicted Appellant on six counts (2016-GS-47-02): conspiracy to traffic heroin, twenty-eight grams or more; trafficking heroin, four to fourteen grams; trafficking heroin, fourteen to twenty-eight grams; two counts of distribution of heroin; and distribution of methamphetamine, second offense. R. p.1150 – 1159.

Appellant was tried in his absence, jointly with codefendant Emory Roberts, from July 24 – 28, 2017, before the Honorable Deadra Jefferson. R. p.200; R. p.261, ll. 20-21. Theresa Johns, Esquire represented Appellant, and Timothy Griffith, Esquire represented Emory Roberts. R. p.200. Assistant Attorneys General Joshua Underwood and David Fernandez prosecuted the case. R. p.200. Appellant was convicted as indicted and the offenses were enhanced based on Appellant's prior record. R. p.1092, ll. 11-24; R. p.1094, l. 22 – p.1097, l. 5. His sentences were sealed. R. p.1107, ll. 1-6.

On July 18, 2018, Appellant came before the court for imposition of sentencing, at which time he was represented by Adam Owensby, Esquire. R. p.1112 – 1113. The court pronounced Appellant's concurrent sentences of thirty-five years' incarceration for conspiracy to traffic heroin, twenty-eight grams or more; twenty-five years' incarceration and one hundred thousand dollars, suspended to twenty-five years, for trafficking heroin, four to fourteen grams, second offense; twenty-five years' incarceration and two hundred thousand dollars, suspended to twenty-five years, for trafficking heroin, fourteen to twenty-eight grams; twenty-five years' incarceration and fifty thousand dollars, suspended to twenty-five years, for distribution of heroin, second offense; twenty-five years' incarceration and fifty thousand dollars, suspended to twenty-five years, for distribution of heroin, second offense; and twenty-five years' incarceration and fifty thousand

dollars, suspended to twenty-five years, for distribution of methamphetamine, second offense. R. p.1117, l. 10 – p.1118, l. 12; R. p.1160 – 1166.

On March 11, 2019, Appellant came before the court for a motion to reconsider sentencing. R. p.1121. The court granted Appellant's motion to reconsider as to the offense of conspiracy to commit trafficking heroin, twenty-eight grams or more, and re-sentenced Appellant to twenty-five years' incarceration and two hundred thousand dollars, suspended to twenty-five years. R. p.1147, l. 23 – 1148, l. 3; R. p.1160 – 1166.

A timely notice of appeal was filed by Mr. Owensby on March 20, 2019 via facsimile. South Carolina Commission on Indigent Defense, Department of Appellate Defense took the case and assigned Joanna K. Delany, Esquire. She filed an Anders[1] brief on behalf of Appellant on July 23, 2020. As part of the brief, Ms. Delany moved to be relieved as counsel. The undersigned substituted in via an order of this court dated September 3, 2020. Thereby, with this motion to withdraw the Anders brief, undersigned counsel files this initial brief of Appellant in which he asks this court to consider the previously-briefed topic on its merits.

[1] Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967)

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 trial court erred where it failed to direct a verdict of acquittal for distribution of methamphetamine, second offense, where there was no direct or circumstantial evidence Appellant delivered methamphetamine to the confidential informant, since distribution is defined as the delivery of a controlled substance, and since the court must direct a verdict of acquittal when the prosecution fails to produce evidence of the offense charged.

Per South Carolina statute, "distribution" is defined as delivery. S.C. Code Ann. § 44-53-110(17). Appellant did not deliver methamphetamine to the confidential informant. Instead, the record is undisputed that Rosemarie Quezada delivered the methamphetamine to the confidential informant. Therefore, the court erred when it refused to grant Appellant a directed verdict, since the State offered no proof that Appellant was the person who delivered the drug.

Evidence Adduced at Trial

In early 2015, police officers were investigating heroin sales in the Lowcountry. R. p.317, l. 19 – 318, l. 11. Officer Lunderberg said, "I was using a confidential informant. And this confidential informant was purchasing quantities of heroin from an individual known as Thomas Sekula, in which we did multiple deals. I built up a case on the distribution of heroin, . . . eventually, I approached Thomas Sekula . . . to see if he would be willing to work with the sheriff's office and provide information and really just cooperate." R. p.318, ll. 10-25.

Sekula went on to become a confidential informant in the case against Appellant and others. R. p.324, ll. 7-9. At the time, Sekula himself was charged with at least four counts of distribution of heroin. R. p.365, l. 8 – 367, l. 14. Lunderberg said he offered Sekula a *quid pro quo* arrangement— "I did promise that I would . . . try to get him some help for the help that he was providing the sheriff's office." R. p.324, l. 24 – 325, l. 3. However, Lunderberg never made definite promises as to what form that help may take. R.p.320, l.16 – p.321, l. 8. Sekula confirmed he was promised that "as long as there was a conviction or I followed through with everything that was asked on me, I would have my charges disposed of." R. p.476, ll. 8-15. Sekula said he was also

motivated to "work off" his girlfriend's charges. R. p.476, ll. 19-22. Sekula was released from jail once he agreed to become a confidential informant. R. p.588, l. 1 – 589, l. 1.

Sekula then did multiple controlled buys of heroin from Appellant's codefendant, Emory Roberts. R. p.325, ll. 8-18; R. p.348, l. 16 – p.350, l. 25. Sekula also bought heroin at the behest of Lunderberg from other people, including from Rosemarie Quezada (Quezada), who was also known as "CiCi" or "Sissy." R. p.350, ll. 8-16; R. p.596, l. 20 – p.597, l. 2; R. p.1150 – 1159. Additionally, the State claimed that Sekula at times bought heroin directly from Appellant. R. p.349, l. 11 – p.351, l. 13. According to Lunderberg, he witnessed Appellant meet Sekula for two heroin sales. R. p.332, l. 13 – p.334, l. 2.

The State ultimately charged six people in a ten-page, sixteen-count indictment, including Appellant, Roberts, Quezada, and others. R. p.1150 – 1159. Appellant and Roberts were tried jointly. R. p.200. As seen, Appellant was indicted for one count of conspiracy to traffic heroin, two counts of trafficking heroin, two counts of distribution of heroin, and one count of distribution of methamphetamine. The distribution of methamphetamine is the subject of this appeal. Sekula alleged that when he called a certain telephone number to place an order for heroin, Appellant would answer the telephone. R. p.465, l. 1 – p.470, l. 21; R. p.478, l. 7 – p.479, l. 9.

According to Sekula, he often called a "hub phone" for "The Boys," the street name by which this group was referred. R. p.462, ll. 6-18. This "hub phone" was manned by multiple people and "they would pretty much tell you where to go." R. p.478, ll. 7-12. Sekula claimed Appellant was the "head" of this heroin-dealing "organization." R. p.470, ll. 14-19. William Brown also claimed Appellant was the "head leader" of a drug operation. Brown was also charged with conspiracy to traffic heroin, testified pursuant to a plea agreement, and admitted

that he hoped to "get probation" in exchange for his testimony against Appellant.[2] R. p.646, ll. 15-25; R. p.647, ll. 3-8; R. p.1150 – 1159.

Police were never able to verify that this hub telephone number belonged to Appellant. R. p.361, l. 25 – 363, l. 20; R. p.802, l. 19 – 803, l. 4. Nevertheless, Lunderberg claimed he recognized Appellant's voice on some of the telephone calls made by Sekula to set up drug buys because Lunderberg spoke with Appellant after Appellant's arrest and was able to hear his voice. R. p.389, l. 23 – 391, l. 17.

However, on one occasion, both the typical method of sale and the typical substance that was sold differed. Rather than Sekula seeking out heroin and picking it up at a trailer or gas station, Sekula claimed he was contacted by "The Boys" and offered methamphetamine on February 3, 2016. R. 521, l. 14 – 522, l. 11. Sekula claimed that "The Boys'" phone number contacted him. He guessed it may have been Appellant but his testimony did not contain certainty. R. p.522, ll. 6-11. Someone using this number texted Sekula and told him Quezada "would meet me at a certain place in the shop center off of Main Street near Target and Kohl's." R. p.522, l. 19 – p.523, l. 8. According to Sekula, he waited in the area until he was told where to meet Quezada. R. 523, ll. 14-18. At this point, he used Appellant's street name of "Mo," stating, "I can't remember if it was a phone call or text from Mo with direction to sit on the bench...." R. p.523, ll.15-17.

Quezada met Sekula and gave him methamphetamine in exchange for money. R. 523, l. 22 – 524, l. 3. This controlled buy was observed by police. R. 912, l. 15 – 914, l. 15. Drug analysis

[2] The State also claimed that Appellant confessed to Officer Wingo that he "had been involved in trafficking heroin since winter of 2015." R. 920, ll. 20-22. Defense counsel challenged the voluntariness of Appellant's alleged confession during pretrial motions but apparently forgot to renew the objection during Wingo's testimony about the matter. R. 139, ll. 3-15.

showed the substance Sekula bought from Quezada contained methamphetamine. R. p.541, ll. 6-12.

After the State rested, defense counsel moved the court direct a verdict of acquittal as to the offense of distribution of methamphetamine, second offense. R. 984, ll. 2-4.

> Your Honor, at this time, I would ask for a directed verdict on count six of the indictment, distribution of methamphetamine. I think that the State has failed to show the elements of this particular count in regards to [Appellant]. I believe the testimony was about Rosemarie Quezada providing that dope to Tommy Sekula . . . and [Appellant] was nowhere near that transaction. He could not have been in constructive or actual possession of those drugs. And I would move to have a directed verdict issued on that count.

R. p.984, ll. 2-12.

The State responded,

> There was testimony provided in order to set up that transaction, a contact was made with [Appellant's] phone. And that is how the deal was set up. Your Honor, the offense of distribution of methamphetamine also includes, as part of the elements, that one could commit that offense by aiding, abetting, attempting or conspiring to distribute, dispense or deliver methamphetamine. Evidence has been presented that the jury could consider that [Appellant], through the use of that phone and arranging the deal, did aid, abet, attempt or conspire to deliver that methamphetamine.

R. p.984, l. 18 – 985, l. 3.

The court denied the motion, ruling, "the difficulty that you have, [defense counsel], is one of 'hand of one is hand of all' theory when you are dealing with both are aiding and abetting one another in a criminal enterprise." R. p.985, l. 24 – p.986, l. 2. "I don't think you can separate a phone call from actual consummation of the deal, where there's been testimony that he was the one in charge of everything." R. p.986, ll. 2-4. As seen, in addition to being convicted and sentenced for the heroin-related offenses, Appellant was convicted of distribution of

methamphetamine, second offense, and he received a sentence of twenty-five years' imprisonment. R. p.1117, l. 10 – 1118, l. 12.

Discussion

Rule 19(a), SCRCrimP provides, in relevant part, "the court shall direct a verdict in the defendant's favor on any offense charged in the indictment after the evidence on either side is closed, if there is a failure of competent evidence tending to prove the charge in the indictment." "In cases where the State has failed to present evidence of the offense charged, a criminal defendant is entitled to a directed verdict." State v. Hepburn, 406 S.C. 416, 429, 753 S.E.2d 402, 408 (2013) (citing State v. Cherry, 361 S.C. 588, 593, 606 S.E.2d 475, 478 (2004)). "A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged." State v. Hernandez, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009).

"[M]ere suspicion is insufficient to support [a] verdict." Id. at 625, 677 S.E.2d at 605. "[T]he court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty." State v. James, 362 S.C. 557, 561, 608 S.E.2d 455, 457 (Ct. App. 2004). "[T]he trial court should grant a directed verdict motion when the evidence presented merely raises a suspicion of guilt." State v. Jackson, 395 S.C. 250, 255, 717 S.E.2d 609, 611 (Ct. App. 2011) (citing Cherry, supra). "Suspicion implies a belief or opinion as to guilt based upon facts or circumstances not amounting to proof . . ." Id.

Here, the State offered evidence as to the elements of the heroin-related charges against Appellant. However, it did not offer any evidence as to the critical elements of the methamphetamine charge, those being distributing, aiding, abetting, attempting or conspiring to distribute, dispensing, or delivering. The State failed to prove Appellant was involved in any way with the sale of the methamphetamine to the Sekula, the confidential informant. Instead, it only

established that Quezada distributed the methamphetamine to the confidential informant. The prosecution improperly relied on the mere suspicion that, since it believed Appellant was dealing heroin in the area, he must be involved in the methamphetamine transaction. The trial court should have directed a verdict of acquittal here since mere suspicion is insufficient to support a verdict of guilt.

Appellant was indicted and convicted for the offense of distribution of methamphetamine pursuant to S.C. Code Ann. § 44-53-375(B), which provides, in relevant part, that

> A person who manufactures, distributes, dispenses, delivers, purchases, or otherwise aids, abets, attempts, or conspires to manufacture, distribute, dispense, deliver, or purchase, or possesses with intent to distribute, dispense, or deliver methamphetamine or cocaine base, in violation of the provisions of Section 44-53-370, **is** guilty of a felony and, upon conviction: . . for a second offense, the offender must be imprisoned for not less than five years nor more than thirty years, or fined not more than fifty thousand dollars, or both.

S.C. Code Ann. § 44-53-110(17), the article's definitional provision, provides that "'Distribute' means to deliver (other than by administering or dispensing) a controlled substance."[3] Methamphetamine is classified as a controlled substance. See S.C. Code Ann. § 44-53-210(d)(2).

Here, the State did not allege that Appellant distributed the methamphetamine to the confidential informant. Instead, it was undisputed that the drug was delivered to the confidential informant by Quezada. R. p.523, l. 22 – p.524, l. 3; R. p.912, l. 15 – p.914, l. 15. Appellant was not alleged to even be present before, during, or after the drug's delivery. Merely, the State could only imply that Quezada received the methamphetamine from Appellant to sell, as this fact was not proven. Although the solicitor argued that the methamphetamine deal was set up using Appellant's telephone, the State was never able to establish, either during investigation or during

[3] It does not specifically define any of the other elements.

trial, that the telephone number Sekula called belonged to Appellant or that he answered the phone that day. R. p.361, l. 25 – p.363, l. 20; R. p.802, l. 19 – p.803, l. 4.[4] Therefore, the court erred when it ruled that the "hand of one, hand of all" theory prevented the court from directing a verdict in Appellant's favor as there is simply no evidence connecting Appellant to this sale of methamphetamine.

It was undisputed that Quezada, not Appellant, was the person officers observed deliver methamphetamine to the confidential informant. The court's failure to direct a verdict here was error. Compare State v. Pollard, 261 S.C. 389, 391, 200 S.E.2d 233, 234 (1973) (defendant not entitled to directed verdict for distribution of heroin where there was "abundant evidence in the record tending to establish not only [the defendant's] presence but his active participation in the crime"). Here, Appellant was neither present nor actively participated in the delivery of methamphetamine to Sekula. He was not linked to the home on Bear Island Road from which Quezada emerged before the sale. He was not

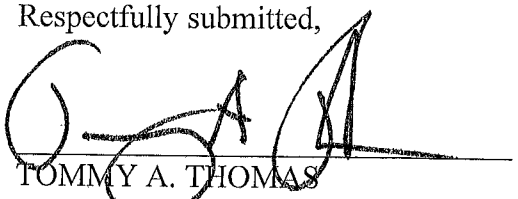
The trial court erred by refusing to direct a verdict of acquittal, since no evidence was produced that Appellant distributed methamphetamine to the confidential informant. Rule 19(a), SCRCrimP; State v. Hepburn, 406 S.C. at 429, 753 S.E.2d at 408; State v. Cherry, 361 S.C. at 593, 606 S.E.2d at 478; State v. James, 362 S.C. at 561, 608 S.E.2d at 457. This Court should reverse.

[4] The State went into detail linking another phone number to Appellant during the course of trial. Had they been able to link the "hub" number with him, it stands to reason they would have clearly made this point.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his conviction and sentence for distribution of methamphetamine, second offense, and remand for entry of a verdict of acquittal.

Respectfully submitted,



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THE STATE,

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JUSTIN GORDON HUNTER,

APPELLANT

APPELLATE CASE NO 2019-000469

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, Paralegal to Tommy A. Thomas, Attorney for the Appellant, does hereby certify that I emailed a copy of a Motion to Withdraw Anders Brief, Initial Merit Brief of Appellant and Designation of Matter to:

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October 9, 2020

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RE: State v. Justin Gordon Hunter
Appellate Case No.: 2019-000469

Dear Sir or Madam:

Attached please find a Motion to Withdraw Anders Brief, Initial Merit Brief of Appellant, Designation of Matter to be Included in the Record on Appeal and a Certificate of Service to be filed in the above referenced matter.

Please feel free to contact me should you have any questions.

Yours truly,

Tommy A. Thomas,
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