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**May 25 2022**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Spartanburg County

Honorable J. Derham Cole, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

BRANDAL SMITH,

APPELLANT

APPELLATE CASE NO. 2021-000939

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ANDERS BRIEF OF APPELLANT

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SARAH E. SHIPE  
Appellate Defender

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

ATTORNEY FOR APPELLANT

**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ..... ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW .....3

ARGUMENT

The trial court erred in denying appellant’s motion for directed verdict because the state’s evidence at trial produced only a suspicion of appellant’s guilt where testimony at trial reflected that law enforcement’s confidential informant was out of sight for a significant period of time during the controlled buy that the state alleged appellant sold drugs to the confidential informant. ....4

Relevant facts.....4

Discussion .....5

CONCLUSION.....8

PETITION TO BE RELIEVED AS COUNSEL .....9

**TABLE OF AUTHORITIES**

**Cases**

*State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011)..... 3, 6, 7

*State v. Hepburn*, 406 S.C. 416, 753 S.E.2d 402 (2013) ..... 3

*State v. Lollis*, 343 S.C. 580, 541 S.E.2d 254 (2001) ..... 5, 7

*State v. Martin*, 340 S.C. 597, 533 S.E.2d 572 (2000) ..... 5, 6, 7

*State v. Mitchell*, 341 S.C. 406, 535 S.E.2d 126 (2000) ..... 3, 5, 7

*State v. Odems*, 395 S.C 582, 720 S.E.2d 48 (2012) ..... 6, 7

**STATEMENT OF ISSUE ON APPEAL**

Did the trial court err in denying appellant's motion for directed verdict because the state's evidence at trial produced only a suspicion of appellant's guilt where testimony reflected that law enforcement's confidential informant was out of sight for a significant period of time during the controlled buy that the state alleged appellant sold drugs to the confidential informant?

## STATEMENT OF THE CASE

On September 25, 2020, a Spartanburg County grand jury indicted appellant for trafficking fentanyl more than four grams but less than fourteen grams and for distribution of fentanyl within one and a half miles of a park or school. R. 249. Appellant's case was called to trial on August 23, 2021, before the Honorable J. Derham Cole and a jury. R. 1. Appellant was represented by Joshua Schultz and the state was represented by Katryna Owens, assistant solicitor. R. 1.

On August 25, 2021, the jury found appellant guilty as indicted. R. 240. Judge Cole sentenced appellant to concurrent terms of twenty-five years' imprisonment for trafficking fentanyl more than four grams but less than fourteen grams and ten years' imprisonment for distribution of fentanyl within one and a half miles of a park or school. R. 246.

This appeal follows.

## **STANDARD OF REVIEW**

“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.” *State v. Bostick*, 392 S.C. 134, 139, 708 S.E.2d 774, 777 (2011) (quoting *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)); *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 in denying appellant's motion for directed verdict because the state's evidence at trial produced only a suspicion of appellant's guilt where testimony at trial reflected that law enforcement's confidential informant was out of sight for a significant period of time during the controlled buy that the state alleged appellant sold drugs to the confidential informant.

### **Relevant facts**

At trial, the state alleged that a confidential informant (CI), Germaine Smith, participated in a controlled buy on February 20, 2018, where he purchased suspected fentanyl from appellant. Officer Jim Ruane testified that he was involved in this controlled buy. R. 57-58. Ruane said that the buy was conducted at a gas station and there were other individuals present at the location. R. 71. Ruane admitted that the CI was out of his sight for, "five to ten minutes," during the buy. Tr. 72, ll. 4-21.

During the CI's testimony, the state introduced State's exhibit 1, video of the transaction which was recorded on a device that looked like a watch that the CI wore during the transaction. The CI admitted that he used drugs in his past and began working as a CI with law enforcement to help his sister get out of legal trouble. R. 120-21. CI testified he knew appellant through a mutual friend. R. 122, ll. 8-12. He admitted that, during the course of the controlled buy, he went inside the gas station where law enforcement could not see him. R. 125-26. CI confessed that since this transaction he had been charged with a drug crime but claimed that his testimony in this case had nothing to do with his pending charges. R. 133; 137; 140-43.

The state also introduced testimony of forensic chemist, Holly Tobias. R. 174. Tobias testified that she tested the substance recovered from the controlled buy and found it to be fentanyl. R. 179, ll. 16-17. During her testimony Tobias admitted that she only tested a "small quantity,"

of the substance and did not analyze the entire sample of alleged fentanyl. R. 179, l. 24-180, l. 4. Tobias acknowledged that it was possible that the untested substance could be something other than fentanyl. R. 180, ll. 4-16.

### **Discussion**

The trial court erred when it failed to direct a verdict in appellant's trial where the state's evidence produced only a suspicion of appellant's guilt. *State v. Bostick*, 392 S.C. 134, 141, 708 S.E.2d 774, 778 (2011).

In *State v. Mitchell*, 341 S.C. 134, 535 S.E.2d 126 (2000), the South Carolina Supreme Court held the lower court erred in failing to direct a verdict where the only evidence presented against defendant was his fingerprint at the scene of the burglary. Similarly, in *State v. Lollis*, 343 S.C. 580, 541 S.E.2d 254 (2001), the South Carolina Supreme Court directed a verdict of acquittal in defendant's favor where the state presented no direct evidence that defendant was involved in setting fire to his home. The circumstantial evidence against defendant was that his wife admitted to the arson, defendant had placed valuables in storage prior to the fire, defendant possessed a key to the storage unit, and defendant allegedly had financial troubles. In that case the court found the evidence insufficient. *Lollis*, at 585, 541 S.E.2d at 257.

In *State v. Martin*, 340 S.C. 597, 533 S.E.2d 572 (2000), the South Carolina Supreme Court directed a verdict of acquittal in defendant's favor where the state failed to meet the "any substantial evidence" standard. In that case the state presented evidence that a car resembling the one defendant was driving was seen parked at the victim's apartment complex on the night of the murder. *Martin*, at 600, 533 S.E.2d at 573. The state also presented evidence defendant and co-defendant were late picking up defendant's girlfriend from work and when his girlfriend asked why they were late defendant replied, "some shit happened" and co-defendant added "somebody

may have died tonight.” *Id.*

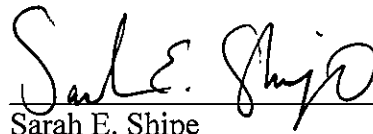
In *State v. Odems*, 395 S.C 582, 720 S.E.2d 48 (2012), the South Carolina Supreme Court held defendant was entitled to a directed verdict based upon a lack of substantial circumstantial evidence that defendant was involved in the burglary. Although the defendant was in a car with other individuals who admittedly burglarized a home, the state failed to provide substantial circumstantial evidence that defendant was present during the home invasion. The witness who saw individuals at the home claimed she saw two men, not three as were found in the car. *Odems*, at 584, 720 S.E.2d at 49. Fingerprints collected from the stolen goods did not match defendant’s but matched the other individuals in the car. *Id.* at 588, 720 S.E.2d at 51. One of the individuals who admitted his involvement claimed defendant was picked up after the burglary at a gas station. *Id.*

In *State v. Bostick*, 392 S.C. 134, 141, 708 S.E.2d 774, 778 (2011), the South Carolina Supreme Court held the state failed to present substantial circumstantial evidence of defendant’s guilt. Rather, the state’s evidence could produce only a suspicion of defendant’s guilt. *Id.* Although the police found items belonging to the victim in a burn pile behind the home of defendant’s mother, the court held no evidence linked defendant to the evidence in the burn pile and the prosecution presented no testimony that defendant had control over the burn pile. *Id.* at 137-141, 708 S.E.2d at 775-778. The only other evidence presented against defendant was that he had a chemical pattern that matched gasoline on his shoes and gasoline was used to start the fire at the victim’s home, and DNA from blood on defendant’s jeans excluded ninety-nine percent of the population, but the expert could not testify the DNA matched the victim. *Id.* at 142, 708 S.E.2d at 778.

Here, the state's evidence consisted of testimony of officers who admittedly lost sight of their CI during the controlled buy, testimony of an unreliable CI, and testimony of a forensic chemist who could not testify that all of the substance recovered from the buy was in fact fentanyl. The evidence the state put forward does not reasonably tend to prove the guilt of appellant. *See State v. Mitchell*, 341 S.C. 134, 535 S.E.2d 126 (2000); *State v. Martin*, 340 S.C. 597, 533 S.E.2d 572 (2000); *State v. Lollis*, 343 S.C. 580, 541 S.E.2d 254 (2001); *State v. Bostick*, 392 S.C. 134, 141, 708 S.E.2d 774, 778 (2011); *State v. Odems*, 395 S.C. 582, 720 S.E.2d 48 (2012).

**CONCLUSION**

By reason of the foregoing, appellant requests this Court reverse the trial court and grant his motion for a directed verdict.

A handwritten signature in black ink, appearing to read "Sarah E. Shipe", written over a horizontal line.

Sarah E. Shipe  
Appellate Defender

ATTORNEY FOR APPELLANT

This 25<sup>th</sup> day of May, 2022.

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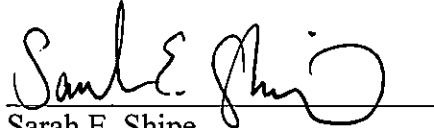
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Brandal Smith states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge J. Derham Cole, which was held on August 23-25, 2021, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Brandal Smith.

Respectfully Submitted,



Sarah E. Shipe  
Appellate Defender

ATTORNEY FOR APPELLANT

This 25<sup>th</sup> day of May, 2022.

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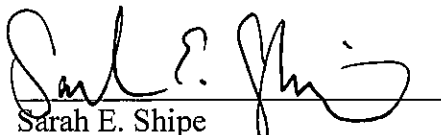
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**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**  
\_\_\_\_\_

Appellant proposes the following be included in the Record on Appeal:

- (1) Trial transcript dated August 23-25, 2021;
- (2) State's Exhibit #1 (DVD);
- (3) State's Exhibit #3 (Photograph); and
- (4) Indictments and Sentence Sheets

I certify that this designation contains no matter which is irrelevant to this appeal.

  
\_\_\_\_\_  
Sarah E. Shipe  
Appellate Defender

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Columbia, SC 29211-1589  
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This 25<sup>th</sup> day of May, 2022.

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders 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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Appellate Defender

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Division of Appellate Defense  
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ATTORNEY FOR APPELLANT

This 25<sup>th</sup> day of May, 2022.