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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

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Ex parte Natasha Lashay Cunningham

**PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS**

(In re: Natasha Lashay Cunningham

v.

State of Alabama)

**(Houston Circuit Court, CC-18-888 and CC-18-889;
Court of Criminal Appeals, CR-18-0551)**

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SELLERS, Justice.¹

Natasha Lashay Cunningham petitioned for, and this Court granted, certiorari review of the judgment of the Court of Criminal Appeals holding that the offense of possession of a controlled substance is a lesser-included offense of the offense of distribution of a controlled substance. See Cunningham v. State, [Ms. CR-18-0551, September 20, 2019] ___ So. 3d ___ (Ala. Crim. App. 2019). We reverse and remand.

Facts

The Houston County grand jury returned an indictment charging Cunningham with distribution of a controlled substance, a violation of § 13A-12-211, Ala. Code 1975.² That indictment reads:

"The Grand Jury of said county charge that before the finding of this indictment, Natasha Lashay Cunningham, whose name is otherwise unknown to the Grand Jury, did unlawfully sell, furnish, give away, deliver or distribute a controlled substance, to-wit: methamphetamine, in violation of Section 13A-12-211

¹This case was previously assigned to another Justice on this Court; it was reassigned to Justice Sellers on October 1, 2020.

²Cunningham was also indicted for second-degree possession of marijuana, a violation of § 13A-12-214, Ala. Code 1975. She was convicted of that charge. That conviction is not at issue in this appeal.

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of the Code of Alabama against the peace and dignity of the State of Alabama."

(Emphasis added.)

Following a trial, the Houston Circuit Court granted Cunningham's motion for a judgment of acquittal as to the distribution-of-a-controlled-substance charge because the evidence did not support that charge. Over Cunningham's objection, the circuit court instructed the jury on possession of a controlled substance as a lesser-included offense of distribution of a controlled substance. The jury returned a verdict finding Cunningham guilty of possession of a controlled substance, a violation of § 13A-12-212, Ala. Code 1975. The circuit court sentenced Cunningham to 48 months in prison. She appealed. On appeal, the Court of Criminal Appeals held that the circuit court properly instructed the jury on the offense of possession of a controlled substance as a lesser-included offense of distribution of a controlled substance. As part of its analysis, the Court of Criminal Appeals recognized that there could be circumstances in which a controlled substance could be distributed without a defendant being in actual or constructive possession of the substance. The court then

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reasoned that, because there was evidence indicting that Cunningham actually possessed a controlled substance, the jury was free to consider possession as a lesser-included offense of the charged offense of distribution. This Court granted the petition for the writ of certiorari to review the Court of Criminal Appeals' decision.

Standard of Review

In reviewing the Court of Criminal Appeals' decision on a petition for a writ of certiorari, this Court applies de novo the standard of review applicable in the Court of Criminal Appeals. Ex parte Knox, 201 So. 3d 1213 (Ala. 2015).

Discussion

Cunningham argues that the circuit court erred in instructing the jury on the possession-of-a-controlled-substance offense as a lesser-included offense of distribution of a controlled substance. In an unusual stance and contrary to its position below, the State agrees with Cunningham that, under the facts presented, the possession-of-a-controlled-substance offense should not have been submitted to the jury for its consideration. For the reasons provided herein, we agree.

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"[T]o be a lesser included offense of one charged in an indictment, the lesser offense must be one that is necessarily included, in all of its essential elements, in the greater offense charged." Payne v. State, 391 So. 2d 140, 143 (Ala. Crim. App. 1980). "Whether a crime constitutes a lesser-included offense is to be determined on a case-by-case basis." Aucoin v. State, 548 So. 2d 1053, 1057 (Ala. Crim. App. 1989). In determining whether an offense is a lesser-included offense of the charged offense, "the potential relationship of the two offenses must be considered not only in the abstract terms of the defining statutes but must also be considered in light of the particular facts of each case." Ingram v. State, 570 So. 2d 835, 837 (Ala. Crim. App. 1990). To that end, the Court of Criminal Appeals has explained:

"The 'particular facts' of each case are those facts alleged in the indictment. Thus, 'the statutory elements of the offenses and facts alleged in an indictment -- not the evidence presented at trial or the factual basis provided at the guilty-plea colloquy -- are the factors that determine whether one offense is included in another.' Johnson v. State, 922 So. 2d 137, 143 (Ala. Crim. App. 2005)."

Williams v. State, 104 So. 3d 254, 264 (Ala. Crim. App. 2012) (emphasis added).

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Moreover, § 15–8–25, Ala. Code 1975, provides:

"An indictment must state the facts constituting the offense in ordinary and concise language, without prolixity or repetition, in such a manner as to enable a person of common understanding to know what is intended and with that degree of certainty which will enable the court, on conviction, to pronounce the proper judgment."

Similarly, Rule 13.2(a), Ala. R. Crim. P., mandates:

"The indictment or information shall be a plain, concise statement of the charge in ordinary language sufficiently definite to inform a defendant of common understanding of the offense charged and with that degree of certainty which will enable the court, upon conviction, to pronounce the proper judgment."

In other words, an indictment must clearly inform the criminal defendant of the offense with which he or she is being charged and against which he or she is expected to defend. In this case, the indictment charging Cunningham tracked the distribution-of-a-controlled-substance statute and alleged that "Cunningham ... did unlawfully sell, furnish, give away, deliver or distribute a controlled substance, to-wit: methamphetamine, in violation of Section 13A-12-211 of the Code of Alabama." The circuit court granted Cunningham's motion for a judgment of acquittal as to that charge and, over her objection, instructed the jury

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on the offense of possession of a controlled substance as a lesser-included offense of the offense of distribution. Section § 13A-12-212(a)(1) provides that "[a] person commits the crime of unlawful possession of a controlled substance if[,] ... [e]xcept as otherwise authorized, he or she possesses a controlled substance enumerated in Schedules I through V."

The indictment charging Cunningham with distribution of a controlled substance, however, does not include the statutory element of possession, nor does it allege any facts essential to the offense of possession of a controlled substance. Thus, under the facts of this case, because the indictment enumerated only the statutory language for the offense of distribution of a controlled substance, Cunningham was not given sufficient notice that she would have to defend against the offense of possession of a controlled substance. As indicated, the Court of Criminal Appeals held that the circuit court properly found possession of a controlled substance to be a lesser-included offense of distribution of a controlled substance because, it reasoned, evidence was presented at trial indicating that Cunningham actually possessed a controlled substance. However, it is not the evidence adduced at trial that anchors our analysis;

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rather, we look to the indictment and must strictly construe it. To do otherwise would treat the proceedings in this case as if the terms of the indictment were so flexible as to imply a factual allegation that Cunningham was in possession of a controlled substance. To reach such a determination would require us to disregard the law enunciated in Williams, supra. That is, the statutory elements of the offenses and the facts alleged in an indictment -- not the evidence presented at trial -- are the factors that determine whether one offense is included in another.

Conclusion

Based on the foregoing, we reverse the judgment of the Court of Criminal Appeals, and we remand the cause to that court for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Parker, C.J., and Stewart, J., concur.

Bryan and Mitchell, JJ., concur in the result.

Bolin, Shaw, Wise, and Mendheim, JJ., dissent.

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MITCHELL, Justice (concurring in the result).

In its brief to this Court, the State confesses error and urges us to reverse Natasha Lashay Cunningham's conviction for possession of a controlled substance. That is a remarkable position for the State to take, and it weighs heavily as I analyze the issue before us. For that reason, and for the reasons generally outlined in the main opinion, I concur in the result.

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BOLIN, Justice (dissenting).

Because Natasha Lashay Cunningham failed to raise the issue whether her indictment was defective, I must respectfully dissent.

Cunningham was indicted for distributing a controlled substance (methamphetamine), a violation of § 13A-12-211(a), Ala. Code 1975, and second-degree possession of marijuana, a violation of § 13A-12-214, Ala. Code 1975. She was convicted of unlawful possession of a controlled substance (methamphetamine), a violation of § 13A-12-212, Ala. Code 1975, and second-degree possession of marijuana. On appeal to the Court of Criminal Appeals, Cunningham argued that the circuit court erred: 1) by considering the offense of possession of a controlled substance to be a lesser-included offense of the offense of distribution of a controlled substance and submitting a charge on possession of a controlled substance to the jury for consideration; 2) by denying her motion for a mistrial after a witness stated that Cunningham had prior drug offenses; 3) by, in effect, denying her motion for a judgment of acquittal; 4) by denying her motion

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to suppress the evidence seized from her purse; and 5) by denying her Batson³ motion.

With regard to the lesser-included offense of possession, which is the ground as to which Cunningham argues a conflict exists and as to which this Court granted certiorari review, the Court of Criminal Appeals stated:

"Cunningham argues that the circuit court erred when, after granting her motion for a judgment of acquittal to the charge of distributing a controlled substance, it submitted the charge of unlawful possession of a controlled substance as a lesser-included charge to the jury.

"This Court has never directly decided the question of whether simple possession of a controlled substance is a lesser-included offense of distribution of a controlled substance. However, in Harris v. State, 274 So. 3d 304 (Ala. Crim. App. 2018), this Court held that possession of a controlled substance was a lesser-included offense of an attempt to commit distribution. Because Harris had been convicted of attempting to commit distribution of a controlled substance and of marijuana, double jeopardy precluded his convictions for possession of a controlled substance and possession of marijuana.

"....

³Batson v. Kentucky, 476 U.S. 79 (1986).

"In Williams v. State, 104 So. 3d 254 (Ala. Crim. App. 2012), this Court explained that,

"''''to be a lesser included offense of one charged in an indictment, the lesser offense must be one that is necessarily included, in all of its essential elements, in the greater offense charged[,] Payne v. State, 391 So. 2d 140, 143 (Ala. Cr. App.), writ denied, 391 So. 2d 146 (Ala. 1980), ... unless it is so declared by statute."

'''' James v. State, 549 So. 2d 562, 564 (Ala. Cr. App. 1989). "Whether a crime constitutes a lesser-included offense is to be determined on a case-by-case basis." Aucoin v. State, 548 So. 2d 1053, 1057 (Ala. Cr. App. 1989). "In determining whether one offense is a

lesser included offense of the charged offense, the potential relationship of the two offenses must be considered not only in the abstract terms of the defining statutes but ... also ... in light of the particular facts of each case." Ingram v. State, 570 So. 2d 835, 837 (Ala. Cr. App. 1990) (citing Ex parte Jordan, 486 So. 2d 485, 488 (Ala. 1986); emphasis in original). See also Farmer v. State, 565 So. 2d 1238 (Ala. Cr. App. 1990).'

" '[Ford v. State,] 612 So. 2d [1317,] 1318 [(Ala. Crim. App. 1992)]. The 'particular facts' of each case are those facts alleged in the indictment. Thus, 'the statutory elements of the offenses and facts alleged in an indictment -- not the evidence presented at trial or the factual basis provided at the guilty-plea colloquy -- are the factors that determine whether one offense is included in another.' Johnson v. State, 922 So. 2d 137, 143 (Ala. Crim. App. 2005)."

" 'Williams, 104 So. 3d at 264.'

" Harris v. State, 274 So. 3d at 308.

"Section 13A-12-211, Ala. Code 1975, provides that '[a] person commits the crime of unlawful distribution of controlled substances if, except as otherwise authorized, he or she sells, furnishes, gives away, delivers, or distributes a controlled substance enumerated in Schedules I through V.' Section 13A-12-212(a)(1), Ala. Code 1975, provides that '[a] person commits the crime on unlawful possession of a controlled substance if[,] ... [e]xcept as otherwise authorized, he or she possesses a controlled substance enumerated in Schedules I through V.'

" 'Based on the statutory elements of the offenses and facts as alleged in the indictments, possession of [methamphetamine] ... [is a lesser-included offense] of [distribution of methamphetamine]. Specifically, the commission of the [distribution offense] as alleged in the indictment necessarily included all the elements of the possession offense[] as alleged in the indictment.'

" Harris, 274 So. 3d at 309.

"This Court recognizes, as have other courts, that there may be circumstances in which a substance may be distributed without the defendant's having any actual or constructive possession. However, in this case, Cunningham did have possession of the controlled substance; therefore, under these circumstances, the circuit court properly found possession to be a lesser-included offense of distribution. Thus, the circuit court did not err in instructing the jury on the offense of unlawful possession of a controlled substance."

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Cunningham v. State, [Ms. CR-18-0551, Sept. 20, 2019] __ So. 3d __, __ (Ala. Crim. App. 2019) (footnotes omitted).

In her petition for certiorari review, Cunningham argues conflict as the only ground for review. See Rule 39(a)(1)(d), Ala. R. App. P. Specifically, she argues that possessing a controlled substance is not a lesser-included offense of distributing a controlled substance because, she says, possession, either actual or constructive, is not an element of distribution. Although Cunningham cites general propositions of law regarding indictments, she does not argue that the indictment in her case was defective. Instead, her argument is that the indictment included the statutory elements of unlawful distribution and that those elements do not include the element of possession.

This Court granted certiorari review of the only issue Cunningham raised. In her brief, Cunningham again argues that the statutory elements of unlawful distribution do not include the element of possession. In response, the State argues that the indictment was defective because it did not include a charge of possession or facts that indicated Cunningham possessed the controlled substance. I disagree -- the

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indictment was sufficient to serve its constitutional purpose of enabling the accused to prepare a defense, and the alleged factual defect raised by the State does not rise to the level of rendering the indictment defective.⁴ Furthermore, the State did not concede this point before the Court of Criminal Appeals. If we were to address the defective-indictment argument the State raises before this Court, we would be reversing the judgment of the Court of Criminal Appeals on a ground not raised in that court and not raised by the petitioner for certiorari review. Although there may be an occasion when a lower appellate court opinion raises a "new" issue that may then be addressed in a certiorari petition, that is not the case here. Cunningham could have raised the issue now raised by the State before the circuit court and before the Court of Criminal Appeals, but she did not.

⁴"The fundamental constitutionally guaranteed benefits of an indictment to an accused are 'that he may prepare his defence, and plead the judgment as a bar to any subsequent prosecution for the same offence.'" Gayden v. State, 262 Ala. 468, 47[1], 80 So. 2d 501, 504 (1955) (quoting United States v. Simmons, 96 U.S. 360, 362, 24 L.Ed. 819 (1877))." Ash v. State, 843 So. 2d 213, 216 (Ala. 2002), overruled on other grounds, Ex parte Seymour, 946 So. 2d 536 (Ala. 2006).

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The State is correct that whether a crime constitutes a lesser-included offense depends on the particular facts of each case. The State's argument that the indictment should have included the word "possession" (or facts that indicated Cunningham possessed the drugs) was not made by Cunningham in her certiorari petition. Additionally, the State's argument ignores the fact that, although there may be circumstances in which a substance may be distributed without the defendant's having any actual or constructive possession, Cunningham did have possession of the controlled substance. In other words, in this case, it is a question of law as to whether possession of a controlled substance is a lesser-included offense of distribution of a controlled substance.

I do not believe that the Court of Criminal Appeals' opinion conflicts with Harris v. State, 274 So. 3d 304 (Ala. Crim. App. 2018), as Cunningham argues in her petition, because Harris involved "attempt" and actually supports the argument that possession is a lesser-included offense of the offense of distribution as explained by the Court of Criminal Appeals. Second, the petition is not before us on the ground of first impression; only the ground of conflict is before this Court.

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Therefore, I dissent to reversing the Court of Criminal Appeals' judgment.

Mendheim, J., concurs.

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SHAW, Justice (dissenting).

According to the main opinion, because the indictment in this case "enumerated only the statutory language for the offense of distribution of a controlled substance," ___ So. 3d at ___, the petitioner and defendant in this case, Natasha Lashay Cunningham, "was not given sufficient notice that she would have to defend against the offense of possession of a controlled substance." ___ So. 3d at ___. I disagree; the common understanding of the description in the Alabama Code of what it means to "distribute" a controlled substance can clearly indicate possession of the controlled substance. Thus, under the law specifying what an indictment must describe, the language of the indictment in this case was sufficient to give Cunningham "notice" that she was accused of not only distributing, but also possessing, that controlled substance. I therefore respectfully dissent.

An indictment, among other things, (1) is a statement of legal conclusions rather than a statement of facts; (2) is not required to set up the proof necessary for a conviction; (3) needs to allege only the essential facts necessary to apprise a defendant of the crime charged, not the

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State's theory of the case; and (4) is sufficient if it substantially tracks the language of the statute violated. See Vaughn v. State, 880 So. 2d 1178, 1193 (Ala. Crim. App. 2003), and the numerous authorities quoted and cited therein. The ""particulars as to manner, means, place or circumstances [of the offense] need not in general be added to the statutory definition."" Smith v. State, 797 So. 2d 503, 514 (Ala. Crim. App. 2000) (quoting People v. Soto, 74 Cal. App. 3d 267, 273, 141 Cal. Rptr. 343, 346 (1977), quoting in turn People v. Britton, 6 Cal. 2d 1, 5, 56 P.2d 494, 496 (1936)). Rule 13.2(a), Ala. R. Crim. P., provides that an indictment "shall be a plain, concise statement of the charge in ordinary language sufficiently definite to inform a defendant of common understanding of the offense charged and with that degree of certainty which will enable the court, upon conviction, to pronounce the proper judgment." Further, "[t]he words used in an indictment must be construed in their usual acceptance in common language." Ala. Code 1975, § 15-8-5. Finally, "[s]pecification of an offense in an indictment or information shall constitute a charge of that offense and of all lesser offenses necessarily included therein." Rule 13.2(c), Ala. R. Crim. P.

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A person commits the crime of unlawful distribution of a controlled substance if "he or she sells, furnishes, gives away, delivers, or distributes a controlled substance." Ala. Code 1975, § 13A-12-211(a). A person commits the crime of unlawful possession of a controlled substance if he or she "possesses a controlled substance." Ala. Code 1975, § 13A-12-212(a)(1). In order to "possess" something, one must "have physical possession or otherwise ... exercise dominion or control over" it. Ala. Code 1975, § 13A-1-2(13) (emphasis added). "Possession" of a controlled substance includes what is called "constructive possession," which is simply defined as being "knowingly in a position to exercise dominion and control over the drug, either directly or through others." Bailey v. State, 67 So. 3d 145, 156 (Ala. Crim. App. 2009). The common meaning of an allegation that one "sells, furnishes, gives away, delivers, or distributes" a controlled substance can easily be understood as an allegation that one exercises "dominion or control" over the controlled substance.⁵

⁵The State contends that there can be situations in which distribution of a controlled substance under § 13A-12-211(a) could be accomplished by someone who is not in possession of the controlled substance. But that is not the way this language, under its usual

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In the instant case, the indictment alleged that the petitioner, Cunningham, "did unlawfully sell, furnish, give away, deliver[,] or distribute" methamphetamine, which, under the common meaning of those terms, can be read as alleging, among other things, that she exercised dominion and control over that controlled substance; thus, it can clearly be understood as alleging that she possessed the methamphetamine. No further facts must be alleged to indicate possession. Just because it may be possible for one to distribute a controlled substance without possessing it does not negate a common meaning of those terms; it cannot be said that the words "sell, furnish, give away, deliver, or distribute" cannot include possession, which is how one must read those terms to say that Cunningham had no "notice" that possession was alleged in this case. The allegations of the distribution charge in the indictment, which track the language of the distribution statute, were sufficient to inform a defendant of common understanding

acceptance, would be solely understood. The terms "sells, furnishes, gives away, delivers, or distributes" encompass many acts, including, but not limited to, exercising dominion or control.

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that possession was alleged and enabled the court to pronounce the proper judgment. I thus respectfully dissent.