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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Certiorari - Court of Appeals
APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2022-001228

The State . . . . . **Respondent,**

vs.

Mutekis Jamar Williams . . . . . **Petitioner.**

PETITION FOR WRIT OF CERTIORARI

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Index

Table of Authorities

Cases: **Page:**

Court Rules:

Other Authorities:

Statement of Issues Presented

Question I: Did the trial court err in failing to strike the testimony of Officer Scott Brown when he stated in an unresponsive answer that Mitekis Williams was in constructive possession of the drugs in found in the automobile?

Question II: Did the Court of Appeals err in holding that the error in failing to strike the opinion testimony of Officer Scott Brown as to the guilt of Mutekis Brown was not prejudicial when the case against Mr. Brown was entirely circumstantial?

Certification of Counsel

I hereby certify that a timely Petition for Rehearing was filed with the South Carolina Court of Appeals on June 22, 2022. The Court of Appeals denied the Petition on August 8, 2022.

Statement of the Case

Procedural History

Mutekis Williams was tried before Judge Markley Dennis and a jury on June 11-12, 2018 in Charleston County. He was convicted of trafficking more than 100 grams of cocaine. A pre-trial motion to suppress the evidence was held on June 6, 2018. The Motion to Suppress was denied. After he was convicted he was sentenced to 25 years imprisonment. Rec. on App. at 290, ll 2-9.

Mr. Williams filed his notice of Appeal on June 19, 2018.

The South Carolina Court of Appeals affirmed the conviction on March 16, 2022. Mr. Williams filed his first Petition for Rehearing on March 28, 2022. The State filed their Petition for Rehearing on March 31, 2022. The Court of Appeals filed a new opinion on June 8, 2022. Mr. Williams filed his second Petition for Rehearing on June 22, 2022. The State filed Petitions for Rehearing on March 31, 2022 from the first opinion and on June 23, 2022 from the second opinion. Pursuant to an Order of the Court of Appeals both parties filed a Return to the other party's Petition for Rehearing. As to the second opinion, Mr. Williams filed his Return on July 18, 2022 and the State filed its Return on July 7, 2022. On August 8, 2022, the Court of Appeals denied both Petitions for Rehearing. On September 8, 2022, this Court granted a 30 day extension to file the Petition for Writ of Certiorari.

Factual History

Mutekis Williams was driving an automobile that had been rented by his sister. The arresting office detected Mr. Williams traveling 81 mph in a 60 mph speed zone. This stop occurred on Highway 17, near Nebo, SC. Rec. at 65, l 19 to 65, l 3. After the stop, the arresting officer learned that Mr. Williams had an outstanding bench warrant from the family court. Rec. on App. at 69, ll 4-9. At that point Mr. Williams was placed under arrest.

During the search of Mr. Williams person, the officers discovered that Mr. Williams had $4,000 in his pockets. Rec. on App. at 70, l 25 to 71, l-3. The officers then questioned Mr. Williams as to whether any more money was in the automobile and he informed them there was an additional $8,000 in the automobile. Rec. on App. at 73, ll 14-17. Mr. Williams informed them it was in the trunk. Rec. on App. at 74, ll 20 - 25. The State and the Defendant stipulated the money was lawfully obtained and owned by Mr. Williams. Rec. on App. at 71, ll 17-18; 84. Ll 21-24. The money came from $20,000 Mr. Williams had won in the lottery. Rec. on App. at 174, ll 9 - 22.

The officers found the money in the trunk. Directly underneath the money was a yellow bag containing the cocaine. Rec. on App. at 100, ll 15 - 19. The cocaine was in a different bag. Rec. on App. at 105, ll 4 - 8. Some of the officers testified to smelling marijuana, but no marijuana was found in the automobile. Rec. on App. at 106, ll 1 - 7.

The automobile had been rented by his sister, Eutopia William, who testified for the State. She testified that she let her father and Mr. Williams drive the rental car on occasions. Rec. on App. at 165, 7-9. The only day Mr. Williams used the automobile was on July 21, 2015, the day he was arrested. Rec. on App. at 166, ll 4 - 9. She denied knowing 122 grams of cocaine

was in the automobile. Rec. on App. at 20-24.

During the cross-examination of Officer Scott Brown, he was asked the following question:

> Q. (By Mr. Byrd) But it was in the trunk right? It wasn't on his person?
> A. It was in his constructive possession.
> Rec. on App. at 86, ll 10-13

At that point, Counsel for Mr. Williams objected and asked that the comment be stricken as a legal conclusion. The request was denied by the trial judge. Rec. on App. at 86, ll11-13.

After only 15 minutes of deliberations, the jury asked the trial judge to re-charge them on the meaning of constructive possession. Rec. on App. at 272, l 7 to 273, l 14. After a little over an hour of deliberations, the jury asked to re-hear the testimony of Officer Corey Shelton, the officer who found the drugs. Rec. on App. at 276, ll 5-7. After a total of about two hours of deliberation, Mr. Williams was convicted. He was sentence to the mandatory minimum of 25 years.

Question I

Did the trial court err in failing to strike the testimony of Officer Scott Brown when he stated in an the unresponsive answer that Mitekis Williams was in constructive possession of the drugs in found in the automobile?

In the two Opinions issues by the Court of Appeals, the only difference between the two is in the first opinion, the Court makes references to the trial attorney "opening the door" to the improper comment by Officer Scott Brown. In both opinions the court ruled there was error and the error was harmless.

During the cross-examination of Officer Scott Brown, trial counsel asked a question which should have elicited a simple yes or no answer. The question asked by trial counsel was "It wasn't on his person was it?" Rec. on App. 86, ll 8-9. This question was proper and not misleading. The proper answer under the facts of this case is a simple "no." But instead of answering the question properly, the officer elected to assert an opinion as to a legal conclusion and said, "It was in his constructive possession." Rec. on App. at 86, l 10. Officer Brown had not been qualified as an expert under Rule 702 of the South Carolina Rules of Evidence. Nor was his statement admissible as a lay opinion testimony under Rule 701 of the South Carolina Rules of Evidence. As a lay opinion, the testimony certainly was not helpful to the jury as they were as well qualified to make the factual determination of constructive possession as Officer Brown. *See, United States v. Rea,* 958 F.2d 1206, 1215 (2d Cir. 1992) ("Rule 701's helpfulness requirement is designed to provide 'assurance[ ] against the admission of opinions which would merely tell the jury what result to reach.'")(internal citations omitted) The same logic would prohibit the use of such a statement even if Officer Brown had been qualified as an expert. The

testimony would not "assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." Rule 702. Officer Brown gave an opinion as to the ultimate issue which, under the facts of this case, no expert would ever be permitted to opine.

The first error with the testimony is, as noted by trial counsel, that the statement is a legal conclusion. Whether the facts of this case constitute constructive possession is a legal conclusion. The trial judge defined constructive possession for the jury. Rec. on Ap. at 271, ll 4-7. The officer testified as to his opinion what the legal conclusion of this case should be. He gave a legal opinion.

This Court has held an expert while permitted under some circumstances to give an opinion as to the ultimate issue, cannot give that opinion in the form of a legal conclusion. "In general, expert testimony **on issues of law** is inadmissible." *Dawkins v. Fields*, 354 S.C. 58, 66, 580 S.E.2d 433, 437 (2003)(emphasis in original). *See,* Note, *Expert Legal Testimony*, 97 HARV.L.REV. 797, 798-799 (1984)("A question of fact involves concrete issues, such as whether the fingerprints found on a glass belong to a certain person. In contrast, a question of law involves the jural significance that the state attaches to a certain set of facts."). Under established South Carolina law the statement of Officer Brown should have been stricken from the record and the jury instructed to disregard the testimony.[1]

New Jersey, in a similar case, held that even a qualified expert was not permitted to testify that the defendants were in constructive possession of the drugs found in the automobile in

[1] Arguably, trial counsel should have moved for a mistrial as the testimony was so prejudicial. As the trial judge refused to give a curative instruction, one would not have expected the trial judge to have granted a mistrial.

which they were riding. The officer, testifying as an expert, stated:

> Q [Prosecutor] Assuming all those hypothetical facts, do you have an opinion as to why the drugs, specifically the heroin, totaling several hundred bags or folds, would be possessed?
> A [Expert] *My opinion they would be possessed with the intent to distribute.*
> Q And would that opinion be as to suspects one, two and three?
> A *All constructive possession with the intent to distribute.*
> [(Emphasis added).]
> *State v. Reed*, 197 N.J. 280, 295, 962 A.2d 1087, 1095 (2009)(emphasis added by the Court in the opinion)

The Court noted that the statement by the Officer was not elicited by the prosecutor asking the question. Very similar facts exist in this case. The Court noted:

> Although the prosecutor appeared to ask for an opinion about the intent of the participants, the last response by the expert inappropriately addressed the point of constructive possession. Thus, the expert reached to address the factual issue about who in the car could be found to be in possession of the drugs. That should not have been permitted.
> *Id.*

The New Jersey court noted, as discussed above, "'Constructive possession,' the phrase used by Detective Swan, is a legal term referenced in the statutes under which the defendant was charged." *Id.* at 295, 962 A.2d at 1097-1098. The Court stated:

> Here, by mimicking the language of the statute, and positing on the pivotal legal element, the expert's testimony on constructive possession of drugs found in the vehicle did not constitute probative, helpful testimony for the jury. . . . Rather, the expert's constructive possession opinion was tantamount to a legal conclusion, resulting in a veritable pronouncement of guilt on the two possession crimes for which defendant was charged, which clearly was unduly prejudicial.

Id. at 296-297, 962 A.2d at 1097(internal citations omitted).

In reversing the conviction the Court finally stated:

> In sum, defendant suffered undue prejudice from the evidence in the form of expert testimony opining, in effect, that he constructively possessed the drugs found in the vehicle he was driving. This ultimate-issue testimony usurped the jury's singular role in the determination of defendant's guilt and irredeemably tainted the remaining trial proofs.
> *Id.* at 300, 962 A.2d at 1099.

Similarly, this Court in *State v. Ellis,* 345 S.C. 175, 547 S.E.2d 490 (2001) found an officer was qualified as an expert. This Court held he should not have been so qualified and should not have permitted to testify as to the ultimate issue of self defense. The Court said "Sergeant Walters was allowed to give his opinion on the ultimate issue: Whether appellant was acting in self defense when he shot and killed the victim. This was error." *Id.* at 178, 547 S.E.2d at 491. *c.f. State v. Andrews*, 424 S.C. 304, 318, 818 S.E.2d 227, 234 (Ct. App. 2018), reh'g denied (Sept. 20, 2018), aff'd as modified, No. 2018-001765, 2019 WL 2519043 (S.C. June 19, 2019)("However, an opinion may be offered on the ultimate issue of the case only when the witness is otherwise qualified."); "Ultimate issue signifies such an issue as within itself is sufficient and final for the disposition of the entire case or one which in connection with other issues will serve such end." Black Law Dictionary, 4th ed 1951 at 965. Permitting Officer Brown to testify Mr. Williams was in constructive possession of the drugs found in the automobile was prejudicial error requiring reversal of the conviction. The Court of Appeals erred as a matter of law in not following the *Ellis* opinion. As a result of the opinion in this case, the Court of Appeals has created confusion as to when an improper legal opinion is properly admitted. .

While the lower court did not conduct an analysis under Rule 403 of the South Carolina

Rule of Evidence, the admissibility of the statement could never pass such an analysis. "But where an opinion comes close to an opinion on the ultimate issue of guilt or innocence, the probative value of the opinion must be weighed against the danger of unfair prejudice." *Commonwealth. v. Canty*, 466 Mass. 535, 543–44, 998 N.E.2d 322, 330 (2013). A police officer saying the defendant is guilty will virtually always be more prejudicial than probative.

Question II

Did the Court of Appeals err in holding that the error in failing to strike the opinion testimony of Officer Scott Brown as to the guilt of Mutekis Brown was not prejudicial when the case against Mr. Brown was entirely circumstantial?

The Court of Appeals erred in holding the error in this case was harmless. The error was not harmless. Mr. Williams never admitted the drugs belonged to him. He borrowed the car from his sister that morning. He had not been the only driver of the automobile. Rec. on App. at 165, 7-9. He only drove the automobile one time which was the day of the incident. Rec. on App. at 166, ll 6-7. As trial counsel correctly argued, "The point is that why in the world would he direct officers to [the cocaine] if he knew it was there. It makes no sense." Rec. on App. 256, ll 8-10. The State, in closing, argued constructive possession. They argued, incorrectly, all they had to prove was dominion and control over the automobile. Rec. on App. at 251, ll 1-19. The trial judge instructed the jury on constructive possession. Rec. on App. at 271, ll 1-14. He even instructed the jury "Constructive possession means that the defendant had dominion and control or the right to exercise dominion and control over the cocaine itself *or the property in which the cocaine is found."* Rec. on App. at 271, ll 4-7(emphasis added). The jury easily could have concluded this statement was exactly what Officer Brown meant by "constructive possession"

and therefore Mr. Williams was guilty. Whether the opinion of officer Brown buttressed the charge from the judge or vice versa, the testimony was still prejudicial. It aided the jury in reaching a cedision on an improper basis to convict Mr. Williams.

The Court of Appeals improperly concluded that trial counsel asking questions after the objection had been overruled made the improper statement not prejudicial. The Court of Appeals opinion places trial counsel in an untenable position. Once the objection was overruled, the Court of Appeals opinion then punishes the trial lawyer for trying to minimize the admittedly improper testimony. No trial lawyer should be expected to do less. Had the objection been sustained, there would have been no need for the trial lawyer to minimize the damage.

The jury asked to be re-charged on the definition of "constructive possession." Rec. on App. at 278, ll 19-20.[2] The Court of Appeals noted this in the opinion. The Court then stated, "This indicates the jury properly relied on the trial court, not Deputy Brown for legal instruction." *State v. Williams,* Op. № 2022-UP-114 (S.C.Ct.App. filed June 8, 2022) at 6. Under the facts of this case, there is no basis for such a conclusion. The jury could have just as easily remembered clearly that Officer Brown said Mr. Williams was in constructive possession and simply wanted confirmation the trial court agree with him. The Court of Appeals also placed emphasis on the fact that the jury wanted to hear the testimony of Deputy Shelton and not Officer Brown. Whose testimony they wanted to hear is of no consequence as to the prejudice of the

[2] The trial court did not track the exact same language as he used in the original charge. At the requested re-charge he used the phrase "dominion or control" and not dominion and control." The State used "or" in their closing argument. Rec. on App. at 251, l 2-5. While no objection was raised, the definition of "constructive possession" is important to the determination of the issue in this case because Officer Brown was incorrectly permitted to interject his opinion that Mr. Williams was in constructive possession. Therefore based upon the record in this case, the jury could have determined that Officer Brown also believed it was "dominion or control."

statement. The jury could have believed Officer Brown's improper testimony that Mr. Williams was in constructive possession and simply wanted to know if Deputy Shelton's testimony confirmed it. Under this scenario, an argument could be made that the facts as testified by Deputy Shelton were used by the jury to support the legal conclusion of Officer Brown that Mr. Williams was in constructive possession of the drugs.

In addition, as noted above, the jury asked to be re-charged on the definition of "constructive possession." Rec. on App. at 278, ll 19-20. They obviously decided the case on the issue of constructive possession and concluded, based on what Officer Brown had said, Mr. Williams was in fact in constructive possession of the cocaine.

In *Ellis*, this Court was also faced with whether the testimony of an improperly qualified expert was prejudicial to the defendant. In determining the opinion by the unqualified expert was prejudicial the Court said, "An officer's opinion which goes to the heart of the case is not harmless." *Id*. at 178, 547 S.E.2d at 491. The same is applicable here. Whether the State had proven Mutekis Williams was in constructive possession of the drugs found in the automobile was the sole issue. The improper testimony of Officer Brown went to the "heart of the case." The testimony was prejudicial. The testimony gave the jury an improper basis upon which to base their conviction. *State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) ("Unfair prejudice means an undue tendency to suggest decision on an improper basis."). The improper basis here is that Officer Brown testified Mr. Williams was in constructive possession of the drugs. The jury elected to believe his legal conclusion

The Court of Appeals was incorrect when it stated, "The State conclusively proved Williams guilt by other competent evidence." *Williams,* at 5. What the state has conclusively

proven in this case is that Mr. Williams was in dominion and control of an automobile that was rented by his sister that had cocaine in the trunk. While it may be sufficient to survive a directed verdict motion, it is not conclusive proof of guilt.

As to constructive possession, this Court has held, "[T]he second element is now stated as the defendant must have knowledge of the drugs and the intent to control their disposition or use." *State v. Stewart*, 433 S.C. 382, 387, 858 S.E.2d 808, 810 (2021), reh'g denied (June 16, 2021). With no direct evidence as to either actual knowledge or the right to exercise dominion and control, the case is purely a circumstantial evidence case. The comment by the officer, coupled with the incorrect charge by the trial judge, could easily have led the jury to believe that all the State had to prove was Mr. Williams knowingly possessed the automobile. That fact was not in dispute. Possession of the car rented by someone else alone should not be sufficient to convict.

No fingerprints were found on the bags containing the drugs. No DNA was reported in this case. The evidence was only circumstantial. A jury today is not told they can even infer dominion and control over drugs if a person has dominion and control over the automobile. *See, Stewart*, *supra*. Thus, in a purely circumstantial evidence case, the prejudice from an improper statement by a law enforcement officer is enhanced.

In determining if the statement is prejudicial to Mr. Williams, this court is guided by this Court's statement, "Engaging in this harmless error analysis, we note that our jurisprudence requires us not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict." *State v. Tapp*, 398 S.C. 376, 389–90, 728 S.E.2d 468, 475 (2012). The Court of Appeals did not use

this analysis. No court could say beyond a reasonable doubt the improper statement of Officer Brown did not contribute to the verdict in this circumstantial evidence case. This Court in *Ellis* stated that a police officer's statement on the ultimate issue is prejudicial. The Court of Appeals should have heeded this advice.

CONCLUSION

For the foregoing reasons this Court should grant the Petition for Writ of Certiorari and reverse the conviction of Mutekis Williams and remand this matter to the lower court for a new trial.

October 6th, 2022

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