STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Oconee County
Honorable J. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2012-212261

THE STATE,

Respondent,

vs.

WALTER GOODINE,

Appellant.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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I.

The trial judge properly denied Appellant's motion for a directed verdict because the State presented both direct and substantial circumstantial evidence that Appellant knowingly possessed the cocaine found in the vehicle and was not just merely present.

STATEMENT OF THE CASE

On January 10, 2012, an Oconee County Grand Jury indicted Appellant on two counts of possession of cocaine. On February 27, 2012, Appellant was tried by a jury in his absence. The Honorable J. Lawton McIntosh presided over the jury trial. Attorney C. Nicholas Lavery represented Appellant at trial, and Assistant Solicitor Lindsey S. Simmons represented the State at trial. On February 28, 2012, the jury found Appellant guilty of both possession offenses.

On June 12, 2012, Judge McIntosh published Appellant's sentence. Appellant was present at the sentencing hearing. Judge McIntosh sentenced Appellant to ten years of imprisonment for one of the possession convictions and five years concurrent for the other possession conviction.

On June 13, 2012, Appellant filed a timely notice of appeal. On March 14, 2013, Appellant served the Initial Brief of Appellant. This brief follows.

STATEMENT OF FACTS

On November 8, 2010, the police pulled a vehicle over because they observed the driver commit multiple traffic violations. (Tr. pp. 64-67.) When the police approached the vehicle, they saw Robert Lee Hunter in the driver's seat, Antonio Holden in the front passenger's seat, Cynthia Lewis in the back passenger's side seat, and Appellant in the back driver's side seat. (Tr. p. 68.) The police asked the occupants to exit the vehicle. (Tr. p. 67.) Thereafter, the police saw, in plain view, a clear plastic bag containing cocaine. (Tr. p. 68; Tr. p. 82; Tr. p. 86.) The bag of cocaine was located in the back seat between where Appellant and Lewis were sitting. (Tr. pp. 68-69; Tr. p. 82.) Although Hunter claimed the cocaine belonged to him, the police officers did not believe Hunter because Hunter could not answer the officers' basic questions about the drugs. (Tr. p. 83; Tr. p. 90; Tr. p. 93.) The officers arrested all of the occupants and transported them to the jail. (Tr. p. 70.)

When Appellant arrived at the jail, Officer Jason Addis did a routine intake search of Appellant. (Tr. pp. 105-107.) Officer Addis found a clear plastic bag of cocaine in Appellant's shoe. (Tr. p. 107; Tr. p. 108.) The bag of cocaine found in Appellant's shoe was packaged similarly to the bag of cocaine found in the vehicle. (Tr. p. 86; Tr. p. 107.)

At trial, Lewis testified for the State. (Tr. p. 95.) Lewis testified that she sat in the back passenger's side seat of the vehicle on the night the vehicle was pulled over. (Tr. p. 96.) Further, Lewis testified that the cocaine found in the back seat of the vehicle belonged to Appellant, not her. (Tr. p. 100.) According to Lewis, Appellant pulled cocaine out of his pocket and ate some of the cocaine when the police activated their blue lights in order to pull the vehicle over. (Tr. p. 96.) Appellant told Lewis to eat the drugs

but she refused. (Tr. p. 96.) Further, Lewis testified that she did not know there was cocaine in the back seat until Appellant put the drugs on top of the seat. (Tr. p. 96.)

ARGUMENT

I.

The trial judge properly denied Appellant's motion for a directed verdict because the State presented both direct and substantial circumstantial evidence that Appellant knowingly possessed the cocaine found in the vehicle and was not just merely present.

Appellant's argument fails on appeal because of two reasons: First, the State presented testimony from Lewis that Appellant had actual possession of the cocaine found in the vehicle, which is direct evidence of Appellant's guilt.[1] Second, the State presented substantial circumstantial evidence that Appellant constructively possessed the cocaine found in the vehicle, which included testimony that the cocaine was found right beside Appellant and the cocaine was packaged similarly to the cocaine found in Appellant's shoe. Thus, the trial judge properly denied Appellant's motion for a directed verdict.

Standard of Review

In criminal cases, appellate courts only review errors of law. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). On appeal from the denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). Further, an appellate court must affirm the trial judge's ruling "[i]f there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused[.]" State v. Cherry, 361 S.C. 588, 593-594, 606 S.E.2d 475, 478 (2004).

When an appellate court is reviewing the denial of a directed verdict motion in a case **solely** involving circumstantial evidence, our Supreme Court has instructed:

[1] Notably, on appeal, Appellant only challenges his possession conviction relating to the cocaine found in the vehicle.

> When the state relies exclusively on circumstantial evidence and a motion for a directed verdict is made, the circuit court is concerned with the existence or nonexistence of evidence, not with its weight. The circuit court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. "Suspicion" implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. However, **a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis**.

Id. at 594, 606 S.E.2d at 478 (citations omitted) (emphasis in original).

Thus, an analysis of the trial judge's ruling hinges on whether all of the circumstantial evidence taken together was sufficient for the jury to reasonably infer the defendant's guilt beyond a reasonable doubt. Id. at 595, 606 S.E.2d at 478. Critically, the appellate court may only reverse the trial judge's denial of a directed verdict motion if there is no evidence supporting the trial judge's ruling. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002). **"[U]nless there is a total failure of evidence** tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict must stand absent an error of law." State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986) (emphasis added).

Law on Possession of Cocaine

In South Carolina, it is illegal for a person to knowingly or intentionally possess cocaine. See S.C. Code Ann. § 44-53-370 (c) & (d)(3); S.C. Code Ann. § 44-53-110. In order to convict a defendant of possession of cocaine, the State must prove the defendant had actual or constructive possession of the cocaine and knowledge of its presence. See State v. Muhammed, 338 S.C. 22, 26, 524 S.E.2d 637, 639 (Ct. App. 1999); State v. Hudson, 277 S.C. 200, 202, 284 S.E.2d 773, 774 (1981).

In Hudson, our Supreme Court explained the difference between actual and constructive possession:

> Actual possession occurs when the drugs are found to be in the actual physical custody of the person charged with possession. To prove constructive possession, the State must show a defendant had dominion and control, or the right to exercise dominion and control, over the [drugs]. Constructive possession can be established by circumstantial as well as direct evidence, and possession may be shared.

Hudson, 277 S.C. at 202, 284 S.E.2d at 774-775.

Our Supreme Court has also stated that a defendant has possession of drugs when he or she "has both the power and intent to control its disposition or use." State v. Kimbrell, 294 S.C. 51, 54, 362 S.E.2d 630, 631 (1987). "[A]ctual knowledge of the presence of the drug is strong evidence of intent to control its disposition or use[;]" therefore, knowledge may be substituted for the intent element. Id.

Further, our Supreme Court has noted that the knowledge element of possession is usually proven by circumstantial evidence, which includes evidence of "acts, declarations, or conduct of the accused form which the inference may be drawn that the accused knew of the existence of the prohibited substances." State v. Hernandez, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009).

In State v. Tabory, our Supreme Court held that the State presented sufficient evidence that the defendant had possession of the drugs. State v. Tabory, 260 S.C. 355, 365, 196 S.E.2d 111, 113 (1973). The State presented evidence that the drugs were purchased and loaded on to a boat in Jamaica, and the drugs were unloaded at Hilton Head Island and found in a truck in which the defendant was a passenger. Id. at 364, 196 S.E.2d at 113. One of the State's witnesses testified that he discussed the loading and

boating of the drugs with the defendant in Jamaica. Id. The Court pointed out that evidence of mere presence is not enough to convict a person of possession. Id. While the defendant's presence in the truck alone might not have been enough evidence of his possession, his presence coupled with the witness' incriminating testimony was enough evidence to submit the possession charge to the jury. Id. at 365, 196 S.E.2d at 113.

In State v. Ballenger, our Supreme Court held that the State presented sufficient evidence that the defendant had actual possession of the drugs. State v. Ballenger, 322 S.C. 196, 200, 470 S.E.2d 851, 854 (1996). The police observed the defendant participating in what they believed to be a drug transaction. Id. The defendant put something in his pocket and ran from the scene when he saw the unmarked patrol car. Id. Approximately five feet from where the defendant jumped the fence, the police found crack cocaine wrapped in newspaper on the ground. Id. at 198, 470 S.E.2d at 853. Our Supreme Court noted that this was an actual possession case even though the defendant did not have physical custody of the drugs when he was caught. Id. at 199-200, 470 S.E.2d at 854. In support of its holding, the Court pointed out that it is impermissible for appellate courts to weigh the evidence in directed verdict cases. Id. at 200, 470 S.E.2d at 854. Instead, the appellate court's sole job in a directed verdict case is to determine if sufficient evidence existed as to the defendant's guilt. See Id.

In State v. Brown, our Supreme Court reversed the defendant's convictions and sentences because the State failed to present evidence that the defendant had possession of the drugs. State v. Brown, 267 S.C. 311, 317, 227 S.E.2d 674, 677 (1976). When the police pulled over the vehicle, they saw the defendant sitting in the passenger seat. Id. at 313, 227 S.E.2d at 675. The police noticed a large brown, opaque garbage bag on the floorboard behind the back seat. Id. at 314, 227 S.E.2d at 676. The defendant's co-

defendant admitted to the police that the bag contained marijuana. Id. In support of its holding, the Court pointed out that the State failed to present any evidence of ownership of the vehicle or any special relationship that the defendant had with his co-defendant or the owner of the vehicle. Id. at 315, 227 S.E.2d at 676. Further, the Court pointed out that the co-defendant's statements did not incriminate the defendant in any way. Id. at 317, 227 S.E.2d at 677. Simply put, there was no evidence of the defendant's actual or constructive possession of the drugs. See Id.

In State v. Heath, our Supreme Court reversed the defendant's conviction and sentence because the State failed to present evidence that the defendant had possession of the drugs. State v. Heath, 370 S.C. 326, 330, 635 S.E.2d 18, 19 (2006). The defendant lived in a house with his mother and a child. Id. at 328, 635 S.E.2d at 18. When the police arrived at the defendant's house, they saw the defendant outside in front of the house appearing to have just finished washing his vehicle. Id. at 328, 635 S.E.2d at 18-19. The police discovered a car-washing mitt that contained over forty grams of crack cocaine located in a recycling bin near the back door of the defendant's house. Id. at 329, 635 S.E.2d at 19. Because the State did not present any evidence linking the defendant to the crack cocaine found in the recycling bin, the question became whether or not the defendant had dominion and control over the property where the crack was found. Id. at 330, 635 S.E.2d at 19. According to the Court, the only evidence the State presented with respect to the defendant's dominion and control over the property was that the defendant lived in the home. Id. But the defendant's mother owned the house; therefore, the Court found that it was "arguable that [the defendant] merely had a right to access the area where the crack was found, not actual dominion and control of the property." Id.

Application of Law to Facts

In the case at hand, Appellant's argument on appeal fails for two primary reasons: First, the State presented direct evidence that Appellant knowingly had actual physical possession of the cocaine found in the vehicle. Viewing the evidence in the light most favorable to the State, Lewis' testimony was enough in itself to establish Appellant's knowing possession of the cocaine found in the vehicle. In contrast to the evidence in Heath, the evidence in this case directly linked Appellant to the drugs found in the back seat of the vehicle. At trial, Lewis testified that the cocaine found in the back seat of the vehicle belonged to Appellant, not her. (Tr. p. 100.) Moreover, when the police activated their blue lights in order to pull the vehicle over, Appellant pulled cocaine out of his pocket and ate some of the cocaine. (Tr. p. 96.) Appellant told Lewis to eat the drugs but she refused. (Tr. p. 96.) Further, Lewis testified that she did not know there was cocaine in the back seat until Appellant put the drugs on top of the seat. (Tr. p. 96.) Lewis' testimony was direct evidence that Appellant knowingly had actual possession of the cocaine found in the vehicle. Similar to the defendant's presence in the vehicle in Tabory and the witness' incriminating statements, Appellant's presence in the vehicle containing the cocaine coupled with Lewis' incriminating testimony was enough evidence to submit the possession charge to the jury. Even though Appellant did not have physical custody when Appellant was caught by the police, his actual physical custody of the drugs prior to his apprehension was sufficient to prove actual possession. See Ballenger, 322 S.C. at 199-200, 470 S.E.2d at 854 (holding that the defendant had actual possession of the drugs even though he did not have physical custody of the drugs when he was caught by the police).

Second, in the alternative, the State presented direct and substantial circumstantial evidence that Appellant knowingly had constructive possession of the cocaine found in the vehicle. As discussed above, the State presented testimony from Lewis, which directly implicated Appellant in the crime and proved that Appellant was not merely present in the vehicle. Further, the State presented evidence that the police saw the cocaine in plain view in the back seat of the vehicle where Appellant was sitting, which is strong evidence of Appellant's knowledge of the drugs. Unlike the drugs found in Brown, the drugs found in this case were in a clear plastic bag right beside where Appellant was sitting. Moreover, the State presented evidence that the packaging of the cocaine found in the vehicle was similar to the packaging of the cocaine found in Appellant's shoe. Thus, Lewis' testimony was direct evidence that Appellant knowingly had constructive possession of the drugs found in the vehicle, and the other evidence listed above was substantial circumstantial evidence that Appellant knowingly had constructive possession of the drugs found in the vehicle.

In summary, Lewis' testimony alone was enough to get the State past a directed verdict motion. However, the State presented even more evidence reasonably tending to prove Appellant's guilt. Thus, the trial judge properly denied Appellant's motion for a directed verdict.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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June 13, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Oconee County
Honorable J. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2012-212261

THE STATE,

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Appellant.

DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

In addition to the matter designated by Appellant, Respondent proposes the following to be included in the Record on Appeal:

(1) Tr. pp. 58-63; Tr. pp. 182-194

To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers.

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

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BY: Julie Kate Keeney

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ATTORNEYS FOR RESPONDENT

June 13, 2013

STATE OF SOUTH CAROLINA

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THE STATE,

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vs.

WALTER GOODINE,

Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served. This 13th day of June, 2013.

Ellen R. DuBois

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ALAN WILSON
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June 13, 2013

Wanda H. Carter, Esquire
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RE: State v. Walter Goodine
Appellate Case No. 2012-212261

Dear Ms. Carter:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Julie Kate Keeney

Julie Kate Keeney
Assistant Attorney General
SC Bar # 100145

JKK/erd
Enclosures

cc: ~~Honorable Jenny A. Kitchings (original and one enclosed)~~
Victim Services