THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM YORK COUNTY
Court of Common Pleas
Heath P. Taylor, Circuit Court Judge

Appellate Case No. 2023-001400
Lower Case № 2019-CP-46-3761

Reginald Raynard White, Jr. SCDC No. 353172, ... Petitioner,

vs.

State of South Carolina ..... Respondent.

PETITIONER'S REPLY TO RESPONDENT'S RETURN

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Question I

Did the Post Conviction Relief Judge err in failing to find trial counsel was not ineffective for his failure to object to the prior drug crimes which were more prejudicial than probative?

Testimony of two prior acts of distribution prejudicial to drug trafficking charge

The argument of the State seems to be that anytime one is charged with possession of a drug, any evidence that a defendant had previously distributed drugs is admissible to show an intent and ability to control the drugs. As the South Carolina Court of Appeals has said in reference to the introduction of another drug sale:

> There is no legal connection between these two purchases sufficient to come within the framework of the common scheme or plan exception. Indeed, the purpose of the State's use of the evidence appears similar to that articulated by this Court in Campbell in that the State was not trying to prove a common scheme or plan, but was instead trying to convince the jury that because Carter sold crack cocaine to Stamps on January 14th, he was selling crack cocaine on January 18th. This is the precise type of inference prohibited by *Lyle*.
> *State v. Carter*, 323 S.C. 465, 468, 476 S.E.2d 916, 918 (Ct. App. 1996)

The court of appeals has also held, "Appellant was charged because he was allegedly in possession of a large enough quantity of the drugs to constitute trafficking. Therefore, whether Appellant was regularly involved in the sale or distribution of drugs was not crucial to the State's case . . . ." *State v. Ostrowski*, 435 S.C. 364, 392, 867 S.E.2d 269, 283 (Ct. App. 2021). The same principles apply in this case. The other alleged distributions were not admissible as to the trafficking charge. Whether Mr. White gave away a small amount of crack cocaine is not relevant to the trafficking charge. Nor is it relevant to his knowledge and ability to control the

drugs found in the vent. No evidence shows that the drugs he gave away came from the vent. *See, also, State v. Humphries*, 354 S.C. 87, 91, 579 S.E.2d 613, 615 (2003)("Since we conclude Seruya's testimony concerning Claude's delivery of marijuana to his residence and his redelivery to Claude was not harmless, we reverse petitioners' convictions.").

The cases cited above show that other acts of drug distribution are not admissible in a charge of trafficking drugs. In this case, as noted in the opening brief, had Mr. White been charged only with trafficking cocaine, the two distribution charges would not have been admissible. The claim of the State in its brief that the two crack distribution charges were admissible to prove trafficking is simply contrary to the prior cases in our state. No cases support the theory of the state that a prior drug sale is admissible to prove an intent to control disposition of use of the drug. Br. of Resp. at 7. In fact, this specific theory was rejected by the court of appeals when it held, "This pattern of inferences could work only for the exact reason that such evidence is generally barred: because Appellant often owned drugs, he must have owned these drugs." *Id.* at 397, 867 S.E.2d at 286.[1]

Prior acts of distribution not admissible to prove possession with intent to distribute

As a general rule, a prior act of distribution is admissible to prove a defendant possessed a drug with the intent to distribute. "The evidence that appellant sold cocaine from the trailer on two occasions only one month earlier tends to establish his intent regarding the cocaine in his possession at the time in question." *State v. Gore*, 299 S.C. 368, 370, 384 S.E.2d 750, 751(1989)

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[1] *But see, State v. Martin*, 347 S.C. 522, 531, 556 S.E.2d 706, 711 (Ct. App. 2001)("In the instant case, we find evidence of Martin's marijuana use was logically relevant and admissible, not to impugn his character, but rather to establish his motive, as well as his intent for possession marijuana.")

(1989). "In light of the State's reliance on circumstantial evidence to prove intent, the evidence of a prior drug transaction only two days earlier at the same location was especially probative." *State v. Wilson*, 345 S.C. 1, 8, 545 S.E.2d 827, 830 (2001).

The Petitioner agrees with the State that, "The central issue in Petitioner's trial was whether the stash of drugs found in the air vent in the Silver Creek Road residence belonged to him." Br. of Resp. at 5. Because the petitioner agreed the drugs were not for personal use, the intent to distribute was not an issue. As noted in the opening brief, *State v. Lyle,* 125 S.C. 406, 118 S.E. 803 (1923) held that when the defendant admits the required intent, other bad acts to prove intent are not admissible. The Court held, "When this class of evidence was offered by the state the defendant through his counsel caused to be spread upon the record an admission to the effect that his defense was an alibi, and that for the purposes of the trial the criminal intent or guilty knowledge of the person who uttered the forged check, as charged. would be freely and fully conceded." *Id.* at ___, 118 S.E. at 810. Simply because the Petitioner did not admit to the possession of the drugs, the state is not allowed to introduce other bad acts to prove the intent to control disposition or use. Under this theory, a prior distribution or even a prior possession charge would always be admissible in a drug case. This is not the law in South Carolina.

The other two admissions of distribution of crack cocaine would not be admissible as to the trafficking charge. They should not be admissible as to the possession with intent to distribute charge as defense counsel admitted they were not going to argue the drugs were for personal use. The admission of those to charge made the trafficking trial not fair as the state would have succeeded in introducing evidence they otherwise would not have been able to admit. When the state has the opportunity to give a defendant an unfair trial, they should be prohibited

from doing so. The state could have tried this case with no prejudice to the Petitioner by either trying only the most serious charge, the trafficking cocaine, and not included the other bad acts. Or they could have elected to try only the less serious charge, possession with intent to distribute crack cocaine, and introduced the other bad acts. The state should not be permitted to make a trial on one of the charges unfair by trying both of them together. This Court should grant relief to the Petitioner and order a new trial.

Question II

Did the Post Conviction Relief Judge err in failing to rule counsel was ineffective for not objecting to the hearsay testimony that a neighbor had seen Reginald White's automobile at the residence when whether Mr. White lived at the residence was a contested issue at the trial?

Regardless of the position taken by the Respondent, the issue of where the Petitioner was living was a contested issue at the trial. While he did stay at the residence on Silver Creek Road on occasions, that is not the same as living at the residence. The Petitioner agrees that hearsay can be deemed harmless. *State v. Brewer,* 411 S.C. 401, 768 S.E.2d 656 (2015). The problem for the Respondent in this case is that the evidence that the Petitioners lived in the residence was not overwhelming. The evidence on this issue was not clear. The Petitioner produced several witnesses who testified he did not live at the address where the drugs were found. This officer, told the jury "Other people had told us that he was living there." App. at 228, ll 8. The jury could have based their verdict upon this hearsay testimony. The state bears the burden of proving the error was harmless. "The key factor for determining whether a trial error constitutes reversible error is 'whether it appears 'beyond a reasonable doubt that the error complained of

did not contribute to the verdict obtained.'" *State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012)(internal citations omitted). The Respondent has not met this burden.

The importance of the issue is amplified when the jury was improperly charged, as noted in the opening brief, to infer guilt if the Petitioner resided in the residence. At the trial, the judge instructed the jury, "The defendant's knowledge and possession may be inferred when a substance is found on the property that's under a defendant's control." App. at 410, ll's 7-9. The assistant solicitor echoed this charge in his closing argument. He stated in defining constructive possession, "When a person has what lawyers and judges refer to as dominion and control, or the right to exercise dominion and control, the ability, the access, over either the object, i.e. the drugs, or the premises upon which the object is located' the Silver Creek residence in this case." App. at 384, l 25 to 385, l 5.[2] The jury could have found the hearsay testimony was sufficient evidence for them to us the improper inference to convict the Petitioner. As the hearsay evidence was not harmless beyond a reasonable doubt, a new trial should be ordered.

Question III

Did the Post Conviction Relief Judge err in failing to find trial counsel was ineffective for this failure to object to the statement of the trial judge that the jury is to "search for the truth" when such language had been prohibited by the courts of our state before the trial of this case?

In arguing against the Petitioner on this issue, the States has said, "This argument is

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[2]As argued by the solicitor and charged by the judge, the jury was told they can convict Mr. White by his simply being in possession of the trailer without any knowledge that the drugs were present. Such a charge completely eliminates any mens rea requirement on the part of the defendant.

meritless; at the time of Petitioner's trial, there was no authority for objecting to such 'search for the truth' language outside the context of jury instructions on reasonable doubt and circumstantial evidence." Br. of Resp. at 12. As noted in the opening brief, this case was tried over 6 years after this Court decided *State v. Daniels*, 401 S.C. 251, 255, 737 S.E.2d 473, 475 (2012). In that case, this court said, "Appellant also now argues the trial judge erred in charging the jury that their verdict would represent the 'truth and justice for all parties.'" *Id.* at 255, 737 S.E.2d at 475. The "truth" charge in *Daniels* not given in the context of a reasonable doubt or circumstantial evidence charge. The charge was prejudicial to the Petitioner. The jury should have been told that if they do not know what the truth is, they should acquit the Petitioner. The charge forced the jury to decide what they believed the truth as to the facts were and not whether the state had proven the case beyond a reasonable doubt. Trial counsel should have made an objection.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition for Writ of Certiorari, this Court should grant the petition, reverse the findings of the Post Conviction Relief judge and remand this matter for a new trial.

May 23, 2024

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