

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

AUG 20 2013

SC Court of Appeals

Appeal from Lexington County

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TRAVAS D. JONES,

APPELLANT

APPELLATE CASE NO. 2012-211992

FINAL BRIEF OF APPELLANT

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES	2
STATEMENT OF ISSUE ON APPEAL	3
STATEMENT OF THE CASE	4
ARGUMENT	5
CONCLUSION	11

TABLE OF AUTHORITIES

Cases

<u>State v. Ballenger</u> , 322 S.C. 196, 470 S.E.2d 355 (Ct. App. 1995)	7
<u>State v. Cheeks</u> , Op. No. 27211 (Filed January 16, 2013)	9
<u>State v. Hernandez</u> , 382 S.C. 620, 677 S.E.2d 605 (2009).....	9
<u>State v. Hudson</u> , 27 S.C. 200, 284 S.E.2d 773 (1981)	9
<u>State v. Williams</u> , 400 S.C. 308, 733 S.E.2d 605 (Ct. App. 2012)	9

STATEMENT OF ISSUE ON APPEAL

Did the trial court err in denying Jones' request that the jury charge on constructive possession contain the language that proof of possession of an item requires more than proof of control over the premises where the item is found?

STATEMENT OF THE CASE

On January 9, 2012, the Lexington County Grand Jury indicted Travas D. Jones on the charges of trafficking crack cocaine more than ten grams but less than twenty-eight grams, possession with intent to distribute cocaine (PWID), and possession of a weapon during a crime of violence. On April 4-6, 2012, Jones proceeded to trial before the Honorable R. Knox McMahon and a jury. Jones was represented by Wayne Floyd, and the state was represented by Charles William Whetstone and Christopher Dale Scott. The jury found Jones guilty as indicted. On May 7, 2012, Judge McMahon held a hearing for sentencing. The judge sentenced Jones to eighteen years on the trafficking crack cocaine and PWID cocaine as second offenses, and to five years on the possession of a weapon charge. All sentences were to run concurrently. Jones' attorney filed a notice of appeal. This appeal follows.

ARGUMENT

The trial court erred in denying Jones' request that the jury charge on constructive possession contain the language that proof of possession of an item requires more than proof of control over the premises where the item is found.

Travas Jones and his half-brother, Theyatti Glover, lived in a rented house in the Twelfth Street area in Cayce. Both of their names were on the lease. R. 10, ll. 20 – R. 12, ll. 24; R. 121, ll. 5 – 25.

In September 2009, Jennifer Meador, who lived next door to Jones, called the police to report that she believed there was drug activity at Jones' house. She reported that there was heavy vehicle traffic next door all hours of the day and night. Cars would stop, a person would go inside for about two minutes and return to the car which then drove away. R. 104, ll. 13 – 24; R. 105, ll. 25 – R. 107, ll. 23.

The police then began a surveillance of the house in September 2011 following Ms. Meadors' call. R. 23, ll. 15 – 18; R. 24, ll. 5 – 9; R. 25, ll. 12 – 22; R. 27, ll. 20 – R. 28, ll. 25. On November 10, 2011, Detective Ed Pereira obtained a search warrant for Jones' address. R. 42, ll. 22 – R. 43, ll. 1. On November 14, 2011, Detective Pereira along with several other officers executed the search warrant on Jones' house. R. 43, ll. 2 – R. 44, ll. 25.

When the police entered the house, they found one black male standing outside and five people inside the house sitting around a table playing cards. R. 44, ll. 8 – R. 46, ll. 1; R. 72, ll. 14 – 24; R. 77, ll. 7 – R. 78, ll. 25. None of the five people had drugs on their person, but drugs were found at different places in the house as well as one Hi-Point .40 caliber handgun, digital scales, green leafy substance, and other drug paraphernalia. The crack cocaine was twenty-eight grams, and the cocaine was two grams. Appellant Travas Jones

along with Bradley West and Theyatti Glover, were charged with trafficking crack cocaine and possession of cocaine. Jones was also charged with the possession of a weapon during a crime of violence. Glover was not at the house at the time, but warrants were issued for him. R. 46, ll. 14 – 48, ll. 5; R. 100, ll. 5 – 13.

Officer Thomas helped search the house during the execution of the search warrant. The police found a gun under a mattress in the first bedroom which also had paperwork with Jones' name on it. A bag of crack and a bag of cocaine were found behind the heater in the main room. R. 72, ll. 14 – 24; R. 76, ll. 4 – 23; R. 79, ll. 11 – R.81, ll. 24. Officer Caleb searched the kitchen where he found in a drawer several plastic bags with crack cocaine and cocaine. R. 81, ll. 20 – R. 82, ll. 16.

Willie Glover, stepfather to Jones and father to Theyatti Glover, testified that he had been at the house on the morning of the incident. He put the gun under the mattress and put the crack cocaine in the kitchen drawer. Jones did not know Glover had these items nor that Glover left them in his house. R. 220, ll. 1 – R. 221, ll. 13.

Glover was holding the gun and drugs for a friend of his. Glover needed to go to the store to get beer, and stayed longer than he expected. When he returned, he saw the police cars and did not stop. R. 221, ll. 1 – R. 222, ll. 8.

Defense counsel asked for a dismissal of the charge against Jones based on Willie Glover' testimony which the judge denied. The judge said the jury could still find Jones guilty of constructive possession. The judge said this was a case of constructive possession and mere presence. R. 230, ll. 2 – R. 231, ll. 25. The judge had Willie Glover arrested outside the presence of the jury. R. 229, l. 16 – 23.

Defense counsel submitted a request for a jury charge on constructive possession. R. 233, ll. 6-11. The judge later tells the attorneys what his constructive possession charge will be. The judge stated his charge:

Constructive possession means that the defendant had the dominion and control or the right to exercise dominion and control over either the crack cocaine or the property on which the crack cocaine was found. Mere presence at the scene where the drugs were found is not enough to prove possession. Actual knowledge of the presence of the crack cocaine is strong evidence of the defendant's intent to control its disposition. The defendant's knowledge and possession may be inferred when a substance is found on the property under the defendant's control; however, the inference is simply an evidentiary fact to be taken into consideration by you along with the other evidence in the case and to be given the weight you decide it should.

Two or more persons may have possession of a drug.

R. 233, ll. 6 – R. 234, ll. 9.

Defense counsel requested the judge to include the language that “proof of possession of an item requires more than proof of control over the premises where the item is found.” R. 235, ll. 1 – R. 236, ll. 19. The judge said he took the charge from the case of State v. Ballenger, 322 S.C. 196, 470 S.E.2d 355 (Ct. App. 1995) which provided that constructive possession required dominion and control over either the drugs or the premises where the drugs were found *as well as knowledge of the presence of the drugs*. R. 236, ll. 20 – R. 237, ll. 7.

Defense counsel argued that it still seemed to indicate that if the jury believed Travas Jones was the person in control of the property through the lease, that jury instruction seemed to say that was it. The judge disagreed and denied his request. Counsel asked that his objection be noted for the record. R. 237, ll. 1 – 22.

Later during the discussion of jury charges, defense counsel again argued against the constructive possession charge. He argued that if the jury read the instruction literally, the

jury could believe that if Jones was just present there, he might not be guilty. But if he owned the premises, then he had to be guilty. R. 238, ll. 20 – R. 239, ll. 14.

The judge said except for the language on knowledge of the drugs. There followed a lengthy discussion of the charge. The judge finally said he was “sticking” with his charge, but that defense counsel was protected on the record. R. 239, ll. 15 – R. 244, ll. 22.

The judge instructed the jury with the charge as he stated initially above. R. 288, ll. 10 – R. 289, ll. 5. Defense counsel objected to the jury charge on constructive possession. The judge again told him he was protected on the record. R. 295, ll. 24 – R. 296, ll. 297, ll. 4.

During deliberations, the jury sent the judge a note asking if the gun had to be in direct possession or in his dominion of the premises of the house to be considered in his possession. The judge said he would charge the jury again on constructive possession. R. 297, ll. 9 – R. 298, ll. 5.

Defense counsel objected stating this was the issue he had been concerned about with the judge’s charge on constructive possession. Counsel argued again that the jury seemed to believe that if Jones was in control of the property, then he was responsible for everything on the premises. Counsel asked the judge to incorporate into the constructive possession charge the language he had requested earlier that mere ownership of the premises or control of the premises was not sufficient in and of itself for possession. R. 298, ll. 1 – 18.

The judge recharged the same language in his constructive possession charge. R. 303, ll. 23 – R. 304, ll. 18. Defense counsel objected again after the recharge. R. 306, ll. 15 – R. 307, ll. 17.

After the verdict, defense counsel moved for a new trial based on his motions and objections. He renewed his objection to the court's refusal to charge his requested charge on constructive possession. The judge denied the motion. R. 309, ll. 1 – R. 310, ll. 25.

In State v. Williams, 400 S.C. 308, 733 S.E.2d 605 (Ct. App. 2012), the Court of Appeals held that law on which the jury is instructed must be determined from the evidence presented at trial. The Court also wrote that when reviewing the circuit court's refusal to deliver a requested jury charge, the appellate court must consider the evidence in a light most favorable to the defendant.

In State v. Hudson, 27 S.C. 200, 284 S.E.2d 773 (1981), the Supreme Court held that to prove constructive possession, the state must show the defendant had dominion and control, or the right to exercise dominion and control over the drugs (heroin). The drugs were found at the home husband and wife shared but husband not at home when police found drugs. Husband found guilty of constructive possession of the heroin.

In State v. Hernandez, 382 S.C. 620, 677 S.E.2d 605 (2009), the Supreme Court held that knowledge can be proven by evidence of acts, declarations, or conduct of the accused from which the inference may be drawn that the accused knew of the existence of the prohibited substance.

In State v. Cheeks, Op. No. 27211 (Filed January 16, 2013), the Supreme Court held that a jury instruction that "actual knowledge of the presence of a drug is strong evidence of intent to control its disposition or use" is improper as an expression of the judge's view of the weight of certain evidence, and the "bench is to no longer use the instruction."

The trial judge in Jones' case used the very same instruction in his charge to the jury on constructive possession which was in error. The trial judge told the jury: "Actual

knowledge of the presence of the crack cocaine is strong evidence of the defendant's intent to control its disposition." R. 233, ll. 6 – R. 234, ll. 9.

Defense counsel, on the other hand, submitted a request to charge that was free of error. Defense counsel's Request to Charge #2 provided:

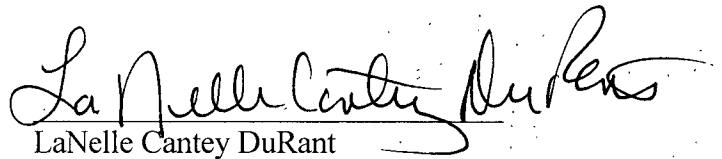
Proof of possession of an item requires more than proof of control over the premises where the item was found or control over the vehicle in which the item was found. It is also necessary to show that Defendant knew of the item and that Defendant had dominion and control over the item or had the right to exercise dominion and control over it and show that the defendant had the intent to control the disposition and use of the item.

There were no acts or evidence that Jones had knowledge of the presence of the drugs in his home. The only evidence linking him to the drugs was the rental lease. The state did not prove that he had knowledge of the drugs. The judge used the language in his charge that the Supreme Court now has instructed judges not to use. This way prejudicial to Jones.

CONCLUSION

Based on the above, the conviction and sentences should be reversed, and the case remanded for a new trial.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

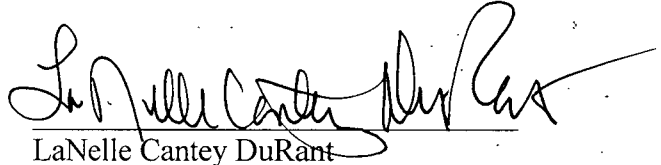
ATTORNEY FOR APPELLANT

This 20th day of August, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

August 20th, 2013

A handwritten signature in black ink, appearing to read "LaNelle Cantey DuRant", written over a horizontal line.

LaNelle Cantey DuRant
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589
(803) 734-1343

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

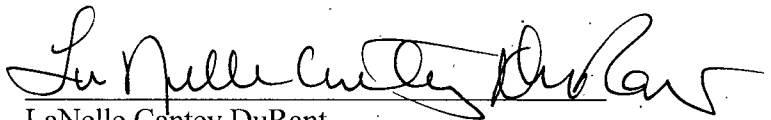
TRAVAS D. JONES,

APPELLANT

APPELLATE CASE NO. 2012-211992

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon David Spencer, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 20th day of August, 2013.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of August, 2013.



(L.S.)

Notary Public for South Carolina

My Commission Expires: July 3, 2023.