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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Williamsburg County

Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID VICE,

APPELLANT

Appellate Case No. 2012-213412

FINAL BRIEF OF APPELLANT

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II. The trial judge erred in charging the jury that "actual knowledge of the presence of marijuana is strong evidence of the defendant's intent to control its disposition or use" because this negated the mere presence charge, and constituted a comment on the weight of the evidence, and also denied the jurors the prerogative to draw permissive inferences when deciding issues of intent and possession in connection with both of the drug offenses (marijuana and cocaine) for which appellant was on trial.

STATEMENT OF THE CASE

Appellant David R. Vice was convicted of failure to stop for a blue light, possession with intent to distribute marijuana, and trafficking in cocaine during the November, 2012 term of the Williamsburg County General Sessions Court before Judge Clifton Newman. Appellant was sentenced to imprisonment for an aggregate period of ten years. Matthew Swilley represented appellant at trial.

Appellant appealed his convictions and sentences. This brief follows.

QUESTION I

The trial judge erred in allowing the jury to hear testimony that appellant had previously "run from the law" because this was prior bad acts evidence that prejudiced appellant's trial.

A traffic stop of appellant led to the drug charges (cocaine and marijuana) and a failure to stop charge lodged against him. At trial, Deputy Loy Hayes testified that he was patrolling the Red Road area of Williamsburg County on December 9, 2011, when he noticed a gray Chevy on the roadway. Deputy Hayes recalled that appellant usually drove this vehicle and that appellant's license had been suspended. Nonetheless, Detective Hayes stated that he watched the Chevy vehicle cross the center line and move left of the center line while rounding a curve on Red Road. Deputy Hayes explained that as a result, he activated his blue lights and attempted to initiate a traffic stop, but that appellant kept driving until the chase ended. Also, Deputy Hayes remembered that he saw appellant throw a bag out of the window during the chase. R. 16, line 1-9.

Officer Robert Shearer stated that he assisted Deputy Hayes in the chase of appellant and stopped to retrieve the bag he saw appellant throw out of the car during the chase. Officer Shearer stated that the bag contained narcotics. R. 72, line 12- R. 75, line 23. Officer Shearer learned later that marijuana and cocaine were found inside the bag thrown out of the vehicle appellant drove on the day in question. R. 53, line 2- R. 59, line 24.

Appellant did not testify at trial and presented no witnesses or exhibits in his defense. However, an error occurred at trial when testimony about prior bad acts attributed to appellant was heard by the jury. This evidence came into play when Deputy Hayes made a comment regarding appellant's past as follows:

> Deputy Loy Hayes: I noticed that as he come (sic) around a curve I noticed the vehicle crossed over the center line.
>
> Solicitor: Okay.

> Deputy Loy Hayes: Which was left of center. Considering knowing that – of who the suspect was and knowing he was known to run from law enforcement.
>
> Mr. Swilley: Objection, Your Honor. Your Honor, I'd make a motion for mistrial at this juncture.
>
> Whereupon, the jury exits the courtroom.
>
> The Court: Yes, sir?
>
> Defense Counsel: Your Honor, based upon what I just heard I believe Deputy Hayes testified that [appellant] was known to run from law enforcement. Your Honor, that's an introduction of prior bad acts. I think that the jury now is going to be prejudiced against my client. The fact that he's put into the record the fact that [appellant] has had prior incidents [with] police indicates that he's had prior charges in relation to this – to this case and I would move – I would move the Court grant a mistrial in this case.

R. 16, l. 7-R. 17, l. 2.

The court sustained the objection, gave a curative instruction, and denied the motion for a mistrial. R. 21, l. 25 – R. 23, l. 1. Counsel responded with a "thank you." R. 22, l.1. Nonetheless, this "run[ning] from law enforcement" comment was unduly prejudicial.

First, note that a defendant's character cannot be attacked in a case unless the defendant places his character in issue. Mitchell v. State, 298 S.C. 186, 379 S.E. 2d 123 (1989). Appellant, who did not testify at trial, did not place his character in issue at trial.

Next, note that the evidence of flight creates an inference of a guilty conscience. State v. Martin, 403 S.C. 19, 742 S.E.2d 42 (2013). Thus, Officer Hayes' message communicated to the jury was that appellant had "run from law enforcement" in the past (prior bad acts) probably because he was guilty in the past, and that since he allegedly failed to stop for a blue light in the instant case, then he was probably guilty of the crimes for which he was on trial.

Also, the prior bad acts testimony that appellant had a habit of running from police meant that appellant was well known by police in the criminal arena because he had obviously run from

police enough times in that past that he was able to gain this reputation. This in turn suggested that appellant had multiple criminal encounters with police, and that there was a likelihood that those encounters might have involved drug crimes as well. Nevertheless, despite the absence of details, Officer Hayes' prior bad act testimony painted a negative picture of appellant as one who frequently engaged in criminal activities and the attempted to elude capture by police.

Evidence of prior bad acts is inadmissible to show that the accused is a bad person or has the propensity to commit the crime charged. State v. Peake, 302 SC 378, 396 S.E. 2d 362 (1990). State v. Smith 309 SC 409, 419 S.E. 2d 816 (1992). Also, even if prior crimes are considered admissible under any Lyle[1] exceptions; nonetheless, the probative value of the priors must outweigh the prejudicial value. State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480 (2008).

Here, Officer Hayes' prior bad act testimony in question portrayed appellant in a negative light and suggested that appellant possessed a criminal character and predisposition to commit crimes and run from police and that as a result, he was guilty of the offenses for which he was on trial.

The trial judge erred in allowing the jury to hear prior bad acts testimony indicating appellant's flight in connection with prior police encounters because the prejudicial value of such evidence outweighed its probative value, which in turn violated appellant's right to a fair trial guaranteed under the Fourteenth Amendment to the United States Constitution and Article 1, §3 of the South Carolina State Constitution.

[1] Prior crimes can only be used in order to show motive, intent, identity, absence of mistake or accident or common scheme or plan. State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

QUESTION II

The trial judge erred in charging the jury that "actual knowledge of the presence of marijuana is strong evidence of the defendant's intent to control its disposition or use" because this negated the mere presence charge, and constituted a comment on the weight of the evidence, and also denied the jurors the prerogative to draw permissive inferences when deciding issues of intent and possession in connection with both of the drug offenses (marijuana and cocaine) for which appellant was on trial.

Petitioner was tried and convicted of possession with intent to distribute marijuana and trafficking in cocaine. In connection with these drug charges, the trial judge gave the following instructions to the jury:

> The Court: the defendant is charged with possession with intent to distribute marijuana. The State must prove beyond a reasonable doubt that the defendant possessed marijuana with the intent to distribute it. To prove possession, the State must prove beyond a reasonable doubt that the defendant had both the power and the intent to control the disposition or use of the marijuana.
>
> Possession may be either actual or constructive. Actual possession means that the defendant was in the actual physical custody. It means that the marijuana was in the actual physical custody of the defendant. Constructive possession means that the defendant had dominion and control or the right to exercise dominion or control either the marijuana itself or the property on which the marijuana 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 marijuana is strong evidence of the defendant's intent to control its disposition or use. The defendant's knowledge and possession may be inferred when a substance is found on the property under the defendant's control. However, this inference is simply an evidentiary fact to be taken into consideration by you along with the other evidence in this case and to be given the weight you decide it should have. Distribute means to deliver rather than administering or dispensing a – or dispensing a drug. Intent may be shown by acts and conduct of the defendant and other circumstances from which you may naturally and reasonably infer intent. R. 107, l. 2 – R. 108, l. 5.

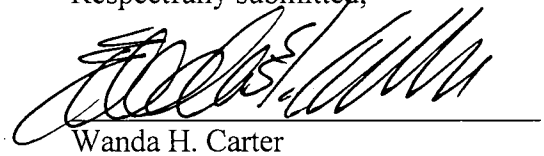
Defense counsel objected to the above charge as a charge on the facts. R. 111, l. 25-R. 112, l. 8.

In State v. Cheeks 401 S.C. 322, 737 S.E.2d 480 (2013), the Court addressed the propriety of a charge instructing the jury that "actual knowledge of the presence of marijuana is strong evidence of the defendant's intent to control its disposition or use," and held that such a charge denied the jurors of their prerogative to draw whatever inferences they chose to do so from the actual knowledge of the presence of drugs in connection with issues of "intent" and "possession" and on the actual knowledge of the presence of drugs issue, and that this charge negated the mere presence charge and converted a permissive evidentiary inference (on the actual knowledge of drugs) into a mandatory proposition of law that they must follow. Thus, this jury charge violated appellant's right to due process via the Fourteenth Amendment to the United States Constitution.

CONCLUSION

Based on the foregoing argument, appellant requests that his convictions and sentences be reversed and his case remanded to the lower court for a new proceeding.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of October, 2013.

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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 William M. Blitch Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 28th day of October, 2013.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 28th day of October, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.