STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from State Grand Jury Pickens County

Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WILLIAM R. OLIVER, II,

APPELLANT

APPELLATE CASE NO. 2024-001236

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On May 20, 2021, a fourth superseding indictment for unlawful drugs was filed with the clerk of the State Grand Jury. (R. p. **). The indictment names eighty-two (82) defendants. Appellant, William R. Oliver, II, was named in eight counts of the indictment, counts 51-58). On June 24, 2024, Appellant proceeded to jury trial before the Honorable R. Lawton McIntosh on counts 55, 56, and 58 of the indictment – trafficking methamphetamine 28-100 grams, possession of weapon during a violent crime, and possession of hydrocodone. Lawrence Crane represented Appellant. Savanna Goude and Christopher Fazel prosecuted the case. The jury found Appellant guilty of all three charges. Judge McIntosh deferred sentencing. On July 18, 2024, Appellant appeared again before Judge McIntosh for post-trial motions and sentencing. Judge McIntosh sentenced Appellant to twenty-five (25) years for trafficking, five (5) years concurrent for the weapon charge and five (5) years concurrent for the possession charge. (R. p. **). A timely notice of intent to appeal was served on July 24, 2024. This appeal follows.

STATEMENT OF FACTS

Law enforcement received information from two co-defendants claiming Appellant sold methamphetamine and linking Appellant to the Prison Empire Investigation. (June 24, 2024 Tr. p. 43, line 18 – p. 44, lines 1-14; p. 49, line 24 – p. 50, lines 1-18; p. 51, line 21 – p. 52, lines 1-6). Law enforcement learned that Appellant was on probation and coordinated with Probation Parole and Pardon Services to conduct a home visit. (June 24, 2024 Tr. p. 45, lines 1-25). Pre-trial the judge ruled, pursuant to S.C. Code §24-21-410, 430, Appellant had no grounds to challenge a warrantless search unless the State failed to show reasonable suspicion. (June 24, 204 Tr. pp. 37-40). After hearing testimony the judge ruled, "So I'm going to find that there was reasonable suspicion to go forward and do a warrantless search of the premises. I don't think they need to get a search warrant, quite frankly, but the fact that they did, I'm not going to dismiss the charges nor suppress the evidence." (June 24, 2024 Tr. p. 57, lines 18-23).

At trial Corporal Corey Baker with Pickens County Sheriff's Office testified that on February 16, 2018, he participated in the search of a residence where Appellant lived with his father and sister. (June 24, 2024 Tr. p. 89. Lines 8-23). Baker testified that he searched a drawer found in an outbuilding. (June 24, 2024, Tr. pp. 92-94). Baker was asked to tell the jury what was reflected in State's exhibit #6, a photograph, admitted without objection, of items found in the drawer. (June 24, 2024 Tr. p. 90, line 16 – p. 91, line 1). Baker testified that he found baggies, a glass smoking pipe with meth residue, and meth residue in a pill bottle. (June 24, 2024 Tr. p. 93, lines 3-16). He additionally testified he found a brown substance in a yellow plastic bag, some other crystal substance, digital scales and white powder in a plastic bag. (June 24, 2024 Tr. p. 94, lines 2-8).

Baker then testified that State's exhibit #8 consisted of cups and spoons and glass smoking pipes with residue. Baker classified the items as drug paraphernalia. (June 24, 2024, Tr. p. 94, lines 12-22). The State moved to admit exhibit #8. (June 24, 2024 Tr. p. 94, lines 12-24). Appellant objected because the chain of custody had not been established. (June 24, 2024. Tr. p. 95, lines 1-3). The State attempted to complete the chain. (June 24, 2024, Tr. p. 95, lines 4-23). Appellant again objected. (June 24, 2024 Tr. p. 95, line 24 – p. 96, lines 1-4). The prosecutor told the judge, "Your Honor, the items in this exhibit are –I don't believe they were tested for drugs. The State was admitting these items as drug paraphernalia. There are non-fungible items. Fungible items are items like drugs, blood, where the court requires the identity of each custodian and for the items to be admitted, it must establish a chain of custody. Items like this do not face that same requirement, Your Honor." (June 24, 2024 Tr. p. 96, lines 14-22). The judge overruled the objection stating, "Well, I'm going to allow that into evidence. I'm going to overrule your objection. That's more of a matter for cross-examination instead of admissibility." (June 24, 2024, Tr. p. 97, lines 16-19).

Baker additionally testified about baggies found in the outbuilding with a crystal residue consistent with methamphetamine and scales. (June 24, 2024 Tr. p. 98, line 17 – p. 99 – 100, lines 1-5). It appears that the baggies were marked for identification as State's exhibit #9 but not admitted in evidence. (June 24, 2024 Tr. p. 3). The scales were admitted, over objection, as State's exhibit #10. (June 24, 2024 Tr. p.100, lines 6-13).

Baker also testified about items found in Appellant's bedroom. (June 24, 2024, Tr. p. 100, line 15 -p. 101, lines 1-24). Baker testified, "Item I was the brown substance in the plastic bag, that would have been the pipe scrapings I was speaking of. And there was another dark

substance that was in a pink plastic bag. And I know it was submitted for analysis, but I'm no sure what the finding was on that particular one." (June 24, 2024, Tr. p. 101, lines 11-16).

Baker testified about he found a Crown Royal bag in Appellant's room that contained a glass smoking pipes with methamphetamine residue. (Tr. 102, lines 3-19). The State moved to admit the items as State's exhibit #11. (June 24, 2024. Tr. p. 102, lines 20-21). Appellant objected because the chemist had not yet testified that the substance was methamphetamine. (Jue 24, 2024, Tr. p. 102, line 22 – p. 103, line 1-25). The judge overruled the objection stating, "But I'm going to allow it in because I think it came in without objection, quite frankly. But I'll note your objection for the record." (Tr. p. 104, lines 1-4).

Lieutenant Blankenship, also with with the Pickens County Sheriff's Office, testified that on February 16, 2018, he participated in an investigation of Appellant and assisted with the search of an outbuilding. (June 24, 2024 Tr. p. 128 lines 1-14). Lieutenant Blankenship searched a safe and small pull-out drawer. (June 24, 2024 Tr. p. 128, line 21 – p. 129, lines 1-5). Another officer gave him a key to open the safe. (June 24, 2024 Tr. p. 129, lines 6 – 24). The lieutenant identified four photos of items he found inside the safe. (June 24, 2024 Tr. p. 130, lines 1-7). The photos were admitted in evidence without objection as State's exhibits #13, #14, #15, #16. (June 24, 2024 Tr. p. 130, lines 8-15: R. p. **). Lieutenant Blankenship testified that State's exhibit #14 was a photo of a small zipper pouch with a white crystal substance he found in the safe. (June 24, 2024, Tr. p. 130, line 25 – p. 131, lines 1-5). The lieutenant testified that State's exhibit #15 was a photo of bags with a white rock crystal substance. (June 24, 2024 Tr. p. 131, lines 6-12). State's #16 showed a gun in a case the lieutenant found inside the safe. (June 24, 2024 Tr. p. 131, lines 13-16). On redirect examination Lieutenant Blankenship

testified that State's exhibit #15 also showed a small bag with white oblong pills. (June 24, 2024 Tr. p. 135, lines 1-19).

Lynn Black, formerly a forensic chemist with the South Carolina Law Enforcement Division [SLED] testified that State's exhibit #17 contained the evidence she analyzed for the case. (June 24, 2024 Tr. p. 155, lines 21-25). Appellant objected because the State failed to establish the chain of custody for substances tested. (June 24, 2024, Tr. p. 156, line 1 – p. 157, 158, lines 1-11). The judge overruled the objection. (June 24, 2024 Tr. p. 158, line 12). Black testified that the ten tablets she tested were hydrocodone and acetaminophen. (June 24, 2024 Tr. p. 160, lines 17-22). Black testified the other items she tested came back as approximately 93.07 grams of methamphetamine. (June 24, 2024 Tr. p. 165, line 1 – p. 166, 167, lines 1-12).

ARGUMENTS

1. **The trial judge erred in refusing to suppress the drugs when the State failed to establish a complete chain of custody.**

Standard of Review

"'The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.'" State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007)). "'In criminal cases, the appellate court sits to review errors of law only.'" State v. Pulley, 423 S.C. 371, 815 S.E.2d 461 (2018) (quoting State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006)). The appellate court "is bound by the trial court's factual findings unless they are clearly erroneous." Id. (quoting Baccus, 367 S.C. at 48, 625 S.E.2d at 220)).

Discussion

Lieutenant Blankenship testified that on February 16, 2018, he found drug evidence in a safe and small pull-out drawer in an outbuilding at a residence where Appellant lived with his father and sister. (June 24, 2024 Tr. pp. 128 – 131; p. 135, lines 6-11). The lieutenant identified the drugs he found in photographs marked State's exhibits #14, and #15. (June 24, 2024 Tr. p. 128, line 25 – p. 131, lines 1-12). The prosecutor asked the lieutenant, "Okay. Now, what did you do with these items when you collected them from the safe?" (June 24, 2024 Tr. p.132, lines 1-2). Lieutenant Blankenship answered, "So they were photographed, documented on where they were found, who found them. Then I would have turned them over to the case agent." (June 24, 2024 Tr. p. 132, lines 3-5). The lieutenant did not identify the case agent. The prosecutor failed to ask the lieutenant to identify the case agent. The prosecutor failed to ask the lieutenant who received the drug evidence from him. The prosecutor failed to ask the

lieutenant to identify the drugs that were later admitted in evidence, over objection, as State's exhibit #17.

Corporal Baker testified he found drug evidence in Appellant's bedroom. Baker testified, "Item I was the brown substance in the plastic bag, that would have been the pipe scrapings I was speaking of. And there was another dark substance that was in a pink plastic bag. And I know it was submitted for analysis, but I'm not sure what the finding was on that particular one." (June 24, 2024, Tr. p. 101, lines 11-16). Baker testified he found a Crown Royal bag in Appellant's room that contained a glass smoking pipes with methamphetamine residue. (Tr. 102, lines 3-19). The prosecutor failed to ask Baker who received the drug evidence from him. The prosecutor failed to ask Baker to identify the drugs that were later admitted in evidence, over objection, as State's exhibit #17.

Baker testified he also found drug evidence in the outbuilding. Baker identified the drugs he found in the outbuilding in a photograph marked State's exhibits #6. (June 24, 2024 Tr. p. 93, lines 3-16). Baker testified that he found baggies, a glass smoking pipe with meth residue, and meth residue in a pill bottle. (June 24, 2024 Tr. p. 93, lines 3-16). He additionally testified he found a brown substance in a yellow plastic bag, some other crystal substance, digital scales and white powder in a plastic bag. (June 24, 2024 Tr. p. 94, lines 2-8). The prosecutor failed to ask Baker who received the drug evidence from him. The prosecutor failed to ask Baker to identify the drugs that were later admitted in evidence, over objection, as State's exhibit #17.

Lieutenant Andy Robinson with the Pickens County Sheriff's Office testified that he was part of the investigation on February 16, 2018. (June 24, 2024 Tr. p. 137, lines 19-21). Robinson testified, "My role at the scene was I was the deputy that was at the collection point for all evidence that was brought to me." (June 24, 2024 Tr. p. 137, lines 23-25). The prosecutor

asked, "So you collected all of the evidence that's been testified about today?" (June 24, 2024 Tr. p. 138, lines 1-2). Robinson answered, "That's correct." (June 24, 2024 Tr. p. 138, line 3). The prosecutor failed to ask Robinson who turned the drugs over to him. Robinson did, however, testify that Corporal Baker brought a ledger to him. (June 24, 2024 Tr. p. 138, line 4 – p. 139, lines 1-6). Robinson did not testify that Baker brought drug evidence to him. Robinson did not testify that Lieutenant Blankenship brought drug evidence to him.

The prosecutor asked Robinson, " . . . [W]hat did you do with the items that were submitted to you ?" (June 24, 2024 Tr. p. 139, lines 8-9). Robinson answered, "Those items were then transported back to the sheriff's office where they were logged and they were placed into evidence. They were placed into an evidence locker." (June 24, 2024 Tr. p. 139, lines 10-13). When asked specifically about the drug evidence, Robinson testified, "To submit drug evidence to SLED, we use what we refer to as a SLED BEST kit. It is a plastic envelope that you can keep the chain of custody. You put the evidence inside. You can seal it. That's where you basically, start the official chain." (June 24, 2024 Tr. p. 139, lines 17-21).

Lieutenant Anthony Raines with the Pickens County Sheriff's Office testified that he retrieved drug evidence that was dropped off in the evidence locker by agent Robinson and transported the drug evidence to SLED for analysis. (June 24, 2024, Tr. p. 146, line 1 – p. 147, 148, lines 1-2). Lynn Black, the forensic chemist from SLED testified that the evidence she tested in this case was brought in by the Pickens County Sheriff's Office and placed in the evidence locker. (June 24, 2024 Tr. p. 154, lines 1-10). The chemist testified once at SLED Jackie Davis, a forensic technician in the evidence control section logged the evidence and placed it into the drug evidence intake storage. (June 24, 2024 Tr. p. 154, lines 10-15). When the chemist was ready to test the evidence, another technician, Charlotte Pitts, retrieved the

evidence and scanned it to herself and the chemist. (June 24, 2024 Tr. p. 154, lines 15-22). Once the analysis was complete the evidence was returned to Jackie Davis. (June 24, 2024 Tr. p. 154, line 22 – p. 155, line 1). The chemist testified that the evidence would remain with evidence control until the agency picks it up. It is unclear who picked the evidence up from SLED after the analysis.

When the State moved to admit the drug evidence tested by SLED, State's exhibit #17, Appellant objected. (June 24, 2024 Tr. p. 155, line 21 -p. 156, lines 1-2). Defense counsel argued, "There's been no foundation or chain of custody. This is not in evidence. My notes don't say it's in evidence. Now, maybe I missed something. **But no one's identified that bag and what's in it** until this lady took the stand. There's no chain of custody that's been done." (June 24, 2024 Tr. p. 156, lines 4-9)(emphasis added). The judge overruled the objection. (June 24, 2024 Tr. p. 157, line 16). Defense counsel noted:

> Blankenship did not identify that bag. Robinson did not identify that bag. Raines did not identify that bag. She didn't show it to anyone of those three people. No one had identified that bag yet or what's in it. They looked at photographs. We don't know what's in that photograph. We don't know what happened with that in the photographs. No one has said the stuff in the photographs went into those bags. It's not been testified. So you're missing three links of the chain. I mean, all she had to do was ask Blankenship, can you identify this bag? Yes, that's the bag they found. I gave it to Robinson, then Robinson gave it to Raines, Raines took it down to SLED. They didn't do that. There's no chain, Judge. You can't let evidence in without a chain.

(June 24, 2024 Tr. p. 158, lines 1-11). The judge ruled, "Understand. Overruled. Okay." (June 24, 2024 Tr. p. 154, lines 1-10). The judge erred. The drug evidence should have been suppressed because the State failed to establish a complete chain of custody. The State failed to establish the identity of those who handled the drug evidence.

At the close of the State's case the judge asked counsel for Appellant if he was "making any motion with regard to the chain of custody?" (June 24, 2024, Tr. p. 176, lines 8-9).

Counsel noted that he asked that the drug evidence not be admitted because the State failed to establish a complete chain of custody. (June 24, 2024, Tr. p. 176, line 10 – p. 177, lines 1-17). The judge denied the motion. (June 24, 2024, Tr. p. 177, lines 21-22). The chain issue was again raised by counsel for Appellant. (June 24, 2024, Tr. p. 184, line 20 – p. 185, lines 1-13). The judge noted, "You know what, Mr. Crane, if I'm wrong, then you'll have grounds to appeal, if necessary. But I don't think I am. Of course, I never do. And sometimes I am." (June 24, 2024, Tr. p. 185, lines 14-17). The judge finally noted, "You extraneously argued the one about the chain and you may have a point." (June 24, 2024, Tr. p. 187, lines 22-23). The State failed to establish a complete chain for the drug evidence.

Lieutenant Blankenship did not identify the drug evidence that was tested by SLED. Lieutenant Blankenship did not testify to whom he gave the drug evidence after he found it in the outbuilding other than naming a "case agent" who he did not identify. Lieutenant Blankenship did not testify he gave the drug evidence to Lieutenant Robinson. Lieutenant Robinson did not testify he received the drug evidence from Lieutenant Blankenship.

Corporal Baker did not identify the drug evidence that was tested by SLED. Baker did not testify to whom he gave the drug evidence after he found it. Baker did not testify he gave the drug evidence to Lieutenant Robinson. Lieutenant Robinson did not testify he received the drug evidence from Baker. When the State moved to admit State's exhibit #8, paraphernalia, Baker testified, "Well, once we collect those items, we take them to the central collection point. Once they're photographed, then we take and, at that point, the person that's going to be making the charges and submitting evidence takes all of that and brings it back to the office to submit into evidence." (June 24, 2024, Tr. p. 95, lines 16-21). Baker, however, did not testify who that person was who was making the charges and brought the drug evidence back to the office.

In State v. Pulley, 423 S.C. 371, 377, 815 S.E.2d 461, 464 (2018), the South Carolina Supreme Court wrote:

> "[T]his Court has long held that a party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007)).
>
> Where multiple people have handled the analyzed substance, "the identity of individuals who acquired the evidence and what was done with the evidence between the taking and the analysis must not be left to conjecture." Sweet, 374 S.C. at 6, 647 S.E.2d at 205. "Testimony from each custodian of fungible evidence, however, is not a prerequisite to establishing a chain of custody sufficient for admissibility." Id. at 7, 647 S.E.2d at 206 (citing State v. Taylor, 360 S.C. 18, 27, 598 S.E.2d 735, 739 (Ct. App. 2004)). "Where other evidence establishes the identity of those who have handled the evidence and reasonably demonstrates the manner of handling of the evidence, our courts have been willing to fill gaps in the chain of custody due to an absent witness." Id. at 7, 647 S.E.2d at 206.
>
> "Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete." State v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001). "In applying this rule, we have found evidence inadmissible only where there is a missing link in the chain of possession *because the identity of those who handled the [substance] was not established at least as far as practicable*." Id. (Emphasis added.)

The drug evidence in the present case was fungible and the State was required to establish a complete chain of custody. The State failed to establish the identity of who handled the drugs after Lieutenant Blankenship and Corporal Baker found them. Neither Blankenship nor Baker identified State's exhibit #17, the drug evidence tested by SLED, as the drug evidence they found. Neither testified to whom they gave the drug evidence. Lieutenant Robinson did not testify who gave him the drug evidence that he sealed and placed in a BEST bag. Robinson's testimony that he collected "all of the evidence that's been testified about today" is not sufficient as it leaves to conjecture and speculation the identity of who gave him the drug evidence. (June

24, 2024 Tr. p. 138, lines 1-3). No other evidence establishes the identity of who may have handled the drug evidence after being found by Blankenship and Baker.

"Courts have abandoned inflexible rules regarding the chain of custody and the admissibility of evidence in favor of a rule granting discretion to the trial courts. United States v. De Larosa, 450 F.2d 1057, 1068 (3d Cir.1971)." State v. Hatcher, 392 S.C. 86, 94, 708 S.E.2d 750, 754 (2011). However, "[e]vidence is still required as to how the item was obtained and how it was handled to ensure that it is, in fact, what it is purported to be." Hatcher, 392 S.C. at 95, 708 S.E.2d at 755. The State failed to establish that the drug evidence tested by SLED was what it was purported to be – the drug evidence found by Lieutenant Blankenship and Corporal Baker.

The State failed to present proof of the chain of custody as far as practicable. The State could have asked Lieutenant Robinson from whom he received the drug evidence. The State could have asked Lieutenant Blankenship and Corporal Baker to whom they gave the drug evidence. Robinson testified that Baker brought a ledger to him but did not testify that Baker or Blankenship brought drug evidence to him. (June 24, 2024 Tr. p. 138, line 4 – p. 139, lines 1-6). The State failed to establish the chain of custody.

In a case dealing with the chain of custody of a blood sample the South Carolina Supreme Court wrote:

> A complete chain of evidence must be established as far as practicable, tracing possession from the time the specimen is taken from the human body to the final custodian by whom it is analyzed. State v. Cribb, 310 S.C. 518, 426 S.E.2d 306 (1992); Raino v. Goodyear Tire and Rubber Co., 309 S.C. 255, 422 S.E.2d 98 (1992); State v. Kahan, 268 S.C. 240, 233 S.E.2d 293 (1977) (citing Benton v. Pellum, 232 S.C. 26, 100 S.E.2d 534 (1957)). Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete. State v. Williams, 301 S.C. 369, 392 S.E.2d 181 (1990).
>
> In applying this rule, we have found evidence inadmissible only where there is a missing link in the chain of possession because the identity of those who handled the blood was not established at least as far as practicable. See State v. Cribb,

> supra; Raino v. Goodyear, supra; State v. Williams, supra; Benton v. Pellum, supra; see also State v. Joseph, 328 S.C. 352, 491 S.E.2d 275 (Ct.App.1997). On the other hand, where the identity of persons handling the specimen is established, we have found evidence regarding its care goes only to the weight of the specimen as credible evidence. See, *e.g.*, State v. Smith, supra (storage of blood in arresting officer's home). In other words, where there is a weak link in the chain of custody, as opposed to a missing link, the question is only one of credibility and not admissibility. See Ex parte: Williams, 548 So.2d 518 (Ala.1989); State v. Stevenson, 136 N.C.App. 235, 523 S.E.2d 734 (1999).

State v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001).

In Carter the Court found the chain of custody was not missing a link. In contrast, in the present case there is not just a weak link but completely missing links in the chain of possession between when Lieutenant Blankenship and Corporal Baker found the drug evidence and when Lieutenant Robinson received the drug evidence and placed it in the BEST bag. The State failed to establish the identity of those who handled the drug evidence after it was found. See Cribb (While the admission of evidence is within the discretion of the trial judge, we have held that it is an abuse of discretion to admit the results of a blood alcohol test where the identity of those who sealed, labeled, and transported the blood sample is not established. State v. Williams, 301 S.C. 369, 392 S.E.2d 181 (1990). The evidence in the record of this case does not identify those persons who handled the blood from the time it was drawn until the time it was tested." 310 S.C. 518, at 426 S.E.2d at 309). As in Cribb, the trial judge in the present case abused his discretion in admitting the drug evidence.

2. **The trial judge erred in instructing the jury that, "Constructive possession means that [t]he Defendant had dominion or control or the right to exercise dominion or control of either the methamphetamine itself or the property on which the methamphetamine was found."**

Standard of Review

"An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." State v. Lemire, 406 S.C. 558, 565, 753 S.E.2d 247, 251 (Ct. App. 2013) (quoting Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id. (quoting Clark, 339 S.C. at 389, 529 S.E.2d at 539). "In reviewing jury charges for error, this Court considers the trial court's jury charge as a whole and in light of the evidence and issues presented at trial." State v. Logan, 405 S.C. 83, 90, 747 S.E.2d 444, 448 (2013).

State v. Custer, 443 S.C. 172, 179, 903 S.E.2d 237, 240 (Ct. App. 2024).

Discussion

During the charge conference on constructive possession counsel for Appellant requested the judge charge, "That not only can you not charge what you've taken out, but, quite honestly, I would ask that you charge just the converse. And that would be that they cannot infer possession of the drugs simply if possession of property is proven." (July 24, 2024 Tr. p. 229, lines 7-11). The transcript reflects counsel referenced two cases – Stewart and Custard. (July 24, 2024 Tr. p. 229, lines 2-7). It appears counsel was referencing State v. Stewart, 433 S.C. 382, 858 S.E.2d 808 (2021) and State v. Custer, 443 S.C. 172, 903 S.E.2d 237 (Ct. App. 2024). The judge replied, "I'm not going to charge that. But my law clerk brought that question, if you had out there, what does constructive possession mean?" (July 24, 2024 Tr. p. 229, lines 12-14).

Appellant again requested the charge and the judge asked for the actual wording. (July 24, 2024 Tr. p. 229, lines 16-17). Counsel for Appellant repeated, "That the jury cannot infer possession of the drugs simply because ownership of the property is proven beyond a reasonable doubt." (July 24, 2024 Tr. p. 229, lines 18-20). The judge responded, "Okay." (July 24, 2024 Tr. p. 229, lines 21).

During the charge on the law the judge told the jury, "Constructive possession means that [t]he Defendant had dominion or control or the right to exercise dominion or control of either the methamphetamine itself or the property on which the methamphetamine was found." (June 24, 2024, Tr. p. 269, lines 17-21). After the charge Appellant objected to the constructive possession charge, again citing Stewart and Custer. (June 24, 2024, Tr. p. 278, line 24 – p. 279, 280, lines 1-24). Counsel for Appellant asked the judge, "I would have you charge up to where it says, right to exercise dominion and control over methamphetamine itself, period. Not or the property." (June 24, 2024, Tr. p. 280, lines 17-20). The judge denied the request stating, "I will not charge that to the jury. I will not correct it. If I'm wrong, I'm wrong. I think I'm right." (June 24, 2024, Tr. p. 280, lines 22-24). The trial judge was wrong.

In State v. Stewart, 433 S.C. 382, 388–89, 858 S.E.2d 808, 811 (2021), the South Carolina Supreme Court wrote:

> In this case, the trial court began its jury instruction correctly, informing the jury the State must prove both required elements to convict Stewart of trafficking or simple possession. The trial court stated, "To prove possession, ... the State must prove beyond a reasonable doubt the defendant had knowledge of, power over, and the intent to control the disposition or use of the drugs involved." As the court continued, however, it informed the jury, "Constructive possession means that the defendant had dominion and control or the right to exercise dominion and control over either the drugs itself or the property upon which the drugs were found."
>
> This is the statement to which Stewart objected. If we considered the statement only in isolation as a complete definition of constructive possession, the statement would be problematic. The primary problem would be that the statement ignores

> the second element we described above. We are particularly concerned with the language "the property upon which the drugs were found." Under the four cases, if the State presents evidence the defendant had control over the property on which the drugs were located, then the trial court should deny a directed verdict motion. But, the mere existence of evidence the defendant had control over the property does not equate to a finding of constructive possession. It remains the burden of the State to convince the jury the defendant had the requisite knowledge and intent.
>
> With regard to this part of the instruction the Court in Stewart held,

"When considered as a whole, the trial court's definition of constructive possession adequately conveyed both elements to the jury. Therefore, we find no error in the trial court's definition of constructive possession." 433 S.C. at 390, 858 S.E.2d at 812. The Court in Stewart, however, found the trial court erred when it instructed the jury, "The defendant's knowledge and possession may be inferred when a substance is found on the property under the defendant's control." The inference instruction from Stewart was also found to be reversible error in State v. Custer, 443 S.C. 172, 903 S.E.2d 237 (Ct. App. 2024).

The present case does not involve the erroneous inference instruction found in Stewart and Custer. Instead, viewing the constructive possession charge given in the present case as a whole, the charge failed to convey the knowledge element required for constructive possession. In contrast to the charge in Stewart, the constructive possession charge in the present case was not prefaced by, "To prove possession, ... the State must prove beyond a reasonable doubt the defendant had knowledge of, power over, and the intent to control the disposition or use of the drugs involved."

The judge in the present case charged the jury:

> This is the law of trafficking methamphetamine between 28 and 100 grams under code section 44-53-375(c)(2). The Defendant is charged with trafficking in methamphetamine 28 to 100-grams. The State must prove beyond a reasonable

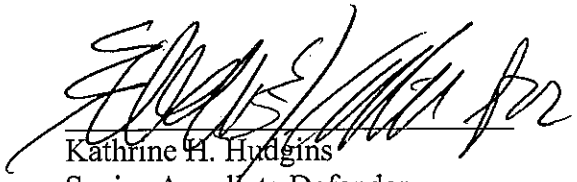
> doubt that The Defendant knowingly sold, manufactured, delivered, purchased, brought into this state, provided financial assistance or otherwise aided, abetted, attempted or conspired to sell, manufacture, deliver, purchase or bring into this state, was normally in actual or constructive possession or knowingly attempted to become in actual possession or knowingly attempted to become in actual or constructive possession of methamphetamine.
>
> Knowingly means with knowledge, consciously, not accidentally. Actual possession means that the methamphetamine was in actual physical custody of the defendant. Constructive possession means that [t]he Defendant had dominion or control or the right to exercise dominion or control of either the methamphetamine itself or the property on which the methamphetamine was found. Mere presence at the scene where the drugs were found is not enough to prove possession. Two or more persons may have joint possession of a drug. And [t]he State must, also, prove beyond a reasonable doubt that the amount of the methamphetamine was between 28 and 100-grams.

(June 24, 2024 Tr. p. 269, line 1 – p. 270, line 1). While the instruction includes knowingly in actual or constructive possession language, the instruction fails to include the language included in the Stewart case that the State must prove beyond a reasonable doubt the defendant had knowledge of, power over, and the intent to control the disposition or use of the drugs involved. Without the language the charge failed to adequately convey the knowledge element required for constructive possession.

The erroneous constructive possession charge was prejudicial in this case where the bulk of the methamphetamine was found in an outbuilding. Appellant's sister, Heather Oliver, testified at trial that in February of 2018, she lived at the residence with Appellant and their father. (June 24, 2024, Tr. p. 189, lines 5-25). Ms. Oliver testified that their father lived in the outbuilding. She also testified that her father had a drug problem with meth specifically. (June 24, 2024, Tr. p. 191, lines 1-25). The jury should have been instructed that the State had to prove that Appellant had knowledge of, power over, and the intent to control the disposition or use of the methamphetamine found in the outbuilding. Only then could the jury have properly considered who had constructive possession of the methamphetamine found in the outbuilding.

CONCLUSION

Based on the above arguments this Court should reverse the convictions and remand for a new trial.



Kathrine H. Hudgins
Senior Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of February, 2026.