STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County
The Honorable Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2013-000373

THE STATE,

Respondent,

v.

DERRICK A. MCILWAIN,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

The trial court correctly denied Appellant's pretrial motion to suppress evidence found in the vehicle in which he was the back seat passenger when officers stopped the car for a traffic violation, discovered prior to completion of the purpose of the traffic stop that Appellant had outstanding warrants, saw a suspicious notebook in plain view while arresting Appellant, and got consent from the driver to search the vehicle.

II.

The trial court properly denied Appellant's motion for directed verdict because the State presented substantial circumstantial evidence to establish guilt.

STATEMENT OF THE CASE

A Lancaster County Grand Jury indicted Appellant for possession with intent to distribute (PWID) cocaine and PWID marijuana. (R.* Indictments.) On February 15, 2013, the Honorable Brooks P. Goldsmith held a pretrial hearing during which he denied Appellant's motion to suppress certain evidence found during a traffic stop. (February 15 Tr.) On February 19, 2013, Appellant and his co-defendant, Matthew Sims, proceeded to trial before a jury and Judge Goldsmith. William Frick, Esquire, represented Appellant, and Mark Grier, Esquire, represented Sims. Solicitor Douglas A. Barfield represented the State. The jury found Appellant not guilty on both PWID charges but found him guilty of two lesser-included offenses of possession. (Tr. 240.) Judge Goldsmith sentenced him to eight years' imprisonment for the possession of cocaine charge, one year's imprisonment for the possession of marijuana charge, and five years' imprisonment for a probation violation, to be served concurrently. (February 21 Tr. 17.)

On February 21, 2013, Appellant filed a Notice of Appeal.

STATEMENT OF FACTS

At approximately 6:00 p.m. on October 22, 2011, Lancaster County Sherriff's Office narcotics investigator Tony Bowers noticed a vehicle that had no brake lights. (February 15 Tr. 5, line 15-Tr. 9, line 10; Tr. 49, line 13-Tr. 51, line 11.) He decided not to stop the vehicle because he saw it pull into a driveway and assumed it had made it safely to its destination. (February 15 Tr. 9, line 21-Tr. 10, line1; Tr. 51, line 19-Tr. 52, line 20.) However, he saw the same car again five to ten minutes later and decided to pursue the car because of the non-working brake lights. (February 15 Tr. 10, lines 11-14; Tr. 52, line 21-Tr. 53, line 21.) Investigator Bowers radioed Lieutenant Ryan McLemore to let him know he was going to stop the vehicle. (Tr. 54, lines 1-11.) As he was pursuing the car, he noticed the back passenger, Appellant, look back at him and fumble around in the back seat. (February 15 Tr. 13, lines 16-23; Tr. 59, lines 11-19.)

Bowers stopped the car, took the license and proof of insurance from the driver, and asked the passengers for their names. (February 15 Tr. 14, line 2-Tr. 17, line 15; Tr. 57, line 23-Tr. 59, line 5.) He decided to issue a written warning for the vehicle equipment and as he was walking from the stopped car back to his vehicle to write the ticket, Lt. McLemore arrived. (February 15 Tr. 18, lines 10-22; Tr. 60, lines 1-25.) Bowers told McLemore the names of the occupants of the car, and McLemore told Bowers he thought Appellant was wanted out of the city, meaning there were active charges on him. (February 15 Tr. 19, lines 1-6.) At that point, Bowers ran all three names to check for warrants and found out Appellant had outstanding warrants from

Charlotte Mecklenburg and also the City of Lancaster Police Department.[1] (February 15 Tr. 19, lines 7-21.)

Bowers and McLemore walked up to the stopped car, told Appellant he was wanted, and asked him to get out of the car. (February 15 Tr. 20, lines 6-24.) Bowers arrested Appellant on his outstanding warrants and handcuffed him. (February 15 Tr. 21, lines 6-18.) Bowers noticed a small notebook where Appellant had been sitting that had names and monetary amounts written on it. (February 15 Tr. 22, lines 2-7.) Bowers stated during the suppression hearing that he suspected the notebook was a ledger of drug transactions. (February 15 Tr. 24, lines 9-20.) The driver, Sims, gave Bowers consent to search the car. (February 15 Tr. 25, line 24-Tr. 26, line 1; February 15 Tr. 31, lines 18-22.) Bowers searched the back seat first and found a blue zipper bag containing cocaine and marijuana. (February 15 Tr. 27, lines 8-24.) He also found a black zipper bag containing $60 cash. (February 15 Tr. 28, line 17-Tr. 29, line 7; Tr. 77, lines 1-16.) After gaining consent from Sims to search the rest of the car, Bowers then found two more bags of marijuana, a set of digital scales, and some cash in the front console. (February 15 Tr. 34, line 1-Tr. 37, line 14.)

At the pretrial suppression hearing, Bowers testified regarding the traffic stop, the arrest, and the search. (February 15 Tr. 4-54.) Appellant argued that based on <u>Sikes v. State</u>, 323 S.C. 28, 448 S.E.2d 560 (1994), there was no reason to do the warrant check and, therefore, there was an unreasonable seizure and search. (February 15 Tr. 64, lines 17-20.) The State distinguished <u>Sikes</u> from the case at hand, pointing out that Sikes was

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[1] While the record does not indicate what these outstanding warrants were for, Investigator Bowers testified during the suppression hearing regarding his knowledge of Appellant's having been investigated for illegal drug sales in Lancaster County and having been arrested for drugs. (February 15 Tr. 8, lines 11-22.)

made to sit in a patrol car for twenty minutes while the police ran warrant checks whereas Appellant was not detained when Investigator Bowers ran a warrant check on him. (February 15 Tr. 67, line 7-Tr. 68, line 21.) The trial court gave the following very thorough ruling:

> All right. I'm trying to analyze it one step at a time. The Court finds that the vehicle initially was legally stopped, that the officers did have the right to examine the vehicle's registration and driver's license and therefore could detain everybody in the vehicle while they did that, that the - - as I understand the testimony while the ticket was being written the officers learned that there was an outstanding warrant for the passenger, I think it was reasonable for them to stop the writing of the ticket to go and make the arrest. After making the arrest I find there was an intervening factor or circumstance in that the officers observed the notebook which gave them reasonable suspicion based on their experience that something may have been going on knowing the reasons for the arrest of the backseat passenger, looking at the notebook, seeing the numbers and the side names that they were familiar with, that that gave them reasonable suspicion to continue the detention and to continue the further investigation. So I find that - - I do find this, had there not been that intervening circumstance, that being the notebook, I find that the detention should have ended and there would not have been sufficient reason to continue the detention of the driver. But based on that intervening circumstance that gave the reasonable suspicion to the officers to ask for permission which was given by the defendant to search once they found illegal drugs in the back seat, I think that gave them reasonable suspicion to ask if there might be additional drugs and ask for permission to search the rest of the car. For all of those reasons I find that the motions to suppress for both defendants should be denied.

(February 15 Tr. 73, line 21-Tr. 74, line 25.)

At trial of Appellant and his co-defendant, Matthew Sims, the State presented testimony from Investigator Bowers regarding the traffic stop and the search. (Tr. 46, line 15.) He testified that on the way to his vehicle to write a warning ticket for Sims for

his bad brake lights, Lt. McLemore had arrived on the scene. (Tr. 60, lines 1-25.) He stated that he started the warning ticket but went back to the stopped vehicle to ask Appellant to get out of the car before completing the writing of the ticket. (Tr. 61, lines 6-14.) When asked about the condition of the back seat, Bowers testified there was a jacket lying on the passenger side, the opposite side of the back seat from where Appellant was sitting. (Tr. 71, lines 4-5.) He explained he had noticed a ledger on the seat next to where Appellant had been sitting that contained names and monetary amounts. (Tr. 62, line 7-Tr. 63, line 15.) He testified the names and monetary amounts made him think of illegal drug transactions. (Tr. 69, lines 19-23.) Bowers testified regarding the blue zipper bag containing drugs, which was found in the back seat to the right of where Appellant had been sitting. (Tr. 71, line 2-Tr. 72, line 11; Tr. 74, lines 15-16.) He also recounted how Appellant was looking back at him and fumbling around in the back seat while Bowers was following the car in his attempt to stop it. (Tr. 59, lines 11-19.)

After the State rested, Appellant moved for a directed verdict, arguing the State had not proved actual possession and that the only evidence shown was merely circumstantial but not substantial. (Tr. 148, lines 6-24.) The State argued circumstantial evidence showed the drugs were in the back seat beside Appellant, showing he had knowledge the items were there. (Tr. 149, lines 8-17.) Further, the State pointed out that Bowers did not testify the drugs were covered by the coat that was also in the back seat and noted Bowers' testimony that he observed Appellant fumbling around in the back seat, indicating he may have been trying to do something with the drugs. (Tr. 149, lines 18-25.) The trial court denied Appellant's motion, finding "there is sufficient evidence certainly because of the drugs in the back seat. I also find that the drugs in the console

can be considered because of the drugs found next to him in the back seat as well as the notebook." (Tr. 158, lines 3-7.)

Ultimately, the jury found Appellant not guilty of either PWID charge but found him guilty of the lesser-included possession charges. (Tr. 240.) Judge Goldsmith sentenced him to eight years' imprisonment for the possession of cocaine charge, one year's imprisonment for the possession of marijuana charge, and five years' imprisonment for a probation violation, to be served concurrently. (February 21 Tr. 17.)

ARGUMENTS

I.

The trial court correctly denied Appellant's pretrial motion to suppress evidence found in the vehicle in which he was the back seat passenger when officers stopped the car for a traffic violation, discovered prior to completion of the purpose of the traffic stop that Appellant had outstanding warrants, saw a suspicious notebook in plain view while arresting Appellant, and got consent from the driver to search the vehicle.

Appellant argues the trial court erred in denying his motion to suppress because he was detained beyond the scope and purpose of the traffic stop. He also asserts there was no reasonable suspicion of criminal activity and that a "fishing" expedition occurred where warrants were found. To the contrary, Appellant was not detained beyond the scope of the traffic stop because Investigator Bowers discovered Appellant had outstanding warrants before Bowers had completed writing the warning ticket. Additionally, Bowers based his reasonable suspicion on seeing in plain view a notebook containing names and monetary amounts that appeared to be a drug ledger. Therefore, the trial court correctly denied the motion to suppress.

In criminal cases, the appellate court sits to review errors of law only. State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). In Fourth Amendment search and seizure cases, the appellate court is limited to determining if there is *any* evidence to support the trial court's findings and can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004) (emphasis added); State v. Bowman, 366 S.C. 485, 501, 623 S.E.2d 378, 386 (2005). The appellate court will not reverse merely because it would have reached a different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App.

2009). The reviewing court may conduct its own review of the record to determine whether the trial judge's ruling is supported by the evidence. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002). However, the appellate court *must* affirm the trial court if there is any evidence in the record to support the ruling. State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005) (emphasis added).

"Where probable cause exists to believe that a traffic violation has occurred, the decision to stop the automobile is reasonable per se." State v. Williams, 351 S.C. 591, 598, 571 S.E.2d 703, 707 (Ct. App. 2002) (citing Whren v. United States, 517 U.S. 806, 809-10 (1996)). "During a lawful traffic stop, an officer may request a driver's license and vehicle registration, run a computer check, and issue a citation." State v. Adams, 397 S.C. 481, 725 S.E.2d 523 (Ct. App. 2012) (citation and internal quotation marks omitted).

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. However, "[t]he purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" United States v. Mendenhall, 446 U.S. 544, 553-54 (1980) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976)). "[A]n officer can couple knowledge of prior criminal involvement with more concrete factors in reaching a reasonable suspicion of current criminal activity." U.S. v. Sprinkle, 106 F.3d 613 (4th Cir. 1997).

The Fourth Amendment's exclusionary rule prohibits unreasonable searches and seizures. U.S. Const. amend. IV; see also S.C. Const. art. I, § 10. Any evidence seized as the result of an unreasonable search and seizure must be excluded from trial. State v.

Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). "Generally, a warrantless search is per se unreasonable and thus violative of the Fourth Amendment's prohibition against unreasonable searches and seizures." State v. Bultron, 318 S.C. 323, 331, 457 S.E.2d 616, 621 (Ct. App. 1995). However, a warrantless search may be constitutional if it falls within a recognized exception. Id. at 331-32, 457 S.E.2d at 621. South Carolina courts have recognized several exceptions to the warrant requirement, including: (1) search incident to a lawful arrest; (2) "hot pursuit"; (3) stop and frisk; (4) the automobile exception; (5) the "plain view" doctrine; and (6) consent. State v. Bailey, 276 S.C. 32, 36, 274 S.E.2d 913, 915 (1981). Under the plain view exception, "a law enforcement officer who is lawfully in a position to view [an] object" may seize it. State v. Abdullah, 357 S.C. 344, 352, 592 S.E.2d 344, 349 (Ct. App. 2004). The plain view doctrine applies when "'(1) the initial intrusion which afforded the authorities the plain view was lawful; (2) the discovery of the evidence was inadvertent; and (3) the incriminating [nature of the] evidence was immediately apparent to the seizing authorities.'" Id. at 352-53, 592 S.E.2d at 349 (quoting State v. Culbreath, 300 S.C. 232, 237, 387 S.E.2d 255, 257 (1990)). The United States Supreme Court has eliminated the requirement that the discovery be inadvertent, as long as the seizure meets the other two requirements. Id. at 353 n.5, 592 S.E.2d at 349 n.5 (citing Horton v. California, 496 U.S. 128, 130 (1990)).

Here, one only need look to the trial court's thorough ruling to see that its decision to deny the motion to suppress was correct and must be affirmed. First, the Court found the vehicle initially was legally stopped because the officer had the legal right to stop a car for having non-working brake lights. At that point, the trial court determined the officer had the right to examine the vehicle's registration and driver's license and detain everybody in the vehicle while he did that. See State v. Woodruff, 344

S.C. 537, 549-50, 544 S.E.2d 290, 297 (2001) ("When an officer stops a vehicle for a traffic violation, he may *briefly* detain the vehicle and its occupants while he examines the vehicle registration and the driver's license." (citing Delaware v. Prouse, 440 U.S. 648 (1979))). Further, the trial court found that because Bowers testified that he learned there was an outstanding warrant for Appellant while the ticket was being written, it was reasonable for him to stop the writing of the ticket to go make the arrest. The trial court then stated, "After making the arrest I find there was an intervening factor or circumstance in that the officers observed the notebook which gave them reasonable suspicion based on their experience that something may have been going on knowing the reasons for the arrest of the backseat passenger, looking at the notebook, seeing the numbers and the side names that they were familiar with, that that gave them reasonable suspicion to continue the detention and to continue the further investigation." (February 15 Tr. 74, lines 5-13.) See U.S. v. Sprinkle, 106 F.3d 613 (4th Cir. 1997) ("[A]n officer can couple knowledge of prior criminal involvement with more concrete factors in reaching a reasonable suspicion of current criminal activity."). The trial court determined that the intervening circumstance gave reasonable suspicion to the officers to ask for consent to search the car, which was given by the co-defendant. Moreover, the trial court ruled that once the officers found illegal drugs in the back seat, that gave them reasonable suspicion to ask if there might be additional drugs and ask for consent to search the rest of the car. Finally, the trial court stated, "For all of those reasons I find that the motions to suppress for both defendants should be denied." (February 15 Tr. 74, lines 24- 25.)

Appellant argues the detention of Appellant went beyond the scope of the traffic stop, resulting in an unreasonable seizure and search. He repeatedly asserts the purpose of the traffic stop, to write a warning ticket for brake lights, was complete and had ended.

(App. Br. 4, 7, 8.) However, Bowers' testimony made clear he had actually not completed writing the ticket at the time Lt. McLemore informed him of Appellant's outstanding warrants, which Bowers then confirmed through a computer check. (February 15 Tr. 18, lines 10-22; February 15 Tr. 19, lines 1-21.) Thus, the reason for prolonging the traffic stop was to arrest Appellant after Bowers confirmed he did indeed have warrants. Accordingly, Appellant's assertion that the brake/tail light activity had been resolved, thereby rendering the extended/second detention and search unlawful, is without merit. (App. Br. 4.) Similarly, his contentions that "the initial undertaking regarding the traffic stop (non-operating brake/tail lights) was complete in purpose and Officer Bowers had no new suspicion of criminal activity" and that "Officer Bowers' purpose for the traffic stop was complete, but **then** Officer McLemore arrived suggesting that there were warrants out on appellant" misconstrue the facts on record. (App. Br. 7-8.) (emphasis added.) Bowers not only had suspicion of criminal activity, he had actual confirmation of this criminal activity as soon as he checked his computer and discovered Appellant indeed had outstanding warrants.

Appellant also argues "that although the scope of the stop may be enlarged, the scope and duration of the seizure must be strictly tied to and justified by the circumstances which rendered its initial undertaking proper," citing State v. Morris, 395 S.C. 600, 720 S.E.2d 468 (2011) and Sikes v. State, 323 S.C. 28, 448 S.E.2d 560 (1994). (App. Br. 5.) In State v. Provet, 405 S.C. 101, 747 S.E.2d 453 (2013), our Supreme Court took the opportunity to correct State v. Rivera's [2] suggestion "that police questioning must have some relationship to the purpose of the stop in order to withstand Fourth Amendment scrutiny." Provet, 405 S.C. at 110, 747 S.E.2d at 458. Further, the

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[2] 384 S.C. 356, 682 S.E.2d 307 (Ct. App. 2009).

Supreme Court clarified that Rivera's suggestion "that shifting the conversation to another topic marks the end of the lawful seizure even though the citation has not been issued, regardless whether such off-topic conversation measurably extends the duration of the initial seizure" was also incorrect. Id. at 110, 747 S.E.2d at 458. The Court based its clarification in Provet on recent Fourth Amendment precedent from the United States Supreme Court and went so far as to state, "To the extent other South Carolina cases contain similar language, we note that language has likewise been superseded." Id. at 111, 747 S.E.2d at 458.

South Carolina appellate courts have held that the detainment of an individual after a traffic stop may occur if supported by reasonable suspicion. See State v. Butler, 353 S.C. 383, 577 S.E.2d 498 (Ct. App. 2003) ("A police officer may stop and briefly detain and question a person for investigative purposes, without treading upon his Fourth Amendment rights, when the officer has a reasonable suspicion supported by articulable facts, short of probable cause for arrest, that the person is involved in criminal activity. In determining whether reasonable suspicion exists, the circumstances must be considered as a whole, and if the officer's suspicions are confirmed or further aroused, the stop may be prolonged and the scope enlarged."). Here, as soon as McLemore informed Bowers that Appellant had outstanding warrants, Bowers had reasonable suspicion that at least one person in the car was involved in criminal activity. That circumstance, combined with the confirmation of those warrants discovered while conducting the long-held right of an officer to run a computer check while in the process of issuing a citation, were certainly sufficient to establish reasonable suspicion. Thus, the traffic stop was not impermissibly extended and the drugs were not seized in violation of the Fourth Amendment.

II.

The trial court properly denied Appellant's motion for directed verdict because the State presented substantial circumstantial evidence to establish guilt.

Appellant argues the trial court erred in denying Appellant's motion for directed verdict because he was merely present and was not in actual or constructive possession of the drugs seized during the traffic stop. Specifically, Appellant maintains no evidence was presented to establish either actual or constructive possession because Appellant was merely a passenger in the back seat of the vehicle. On the contrary, the State provided evidence that Appellant was in the back seat with the bags of drugs on the seat right beside him and they were not hidden from view. Thus, Appellant was in constructive possession by being in the position to have dominion or control, or the right to exercise dominion or control, over the drugs and the trial court properly denied the directed verdict motion.

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). When reviewing a denial of a directed verdict, an appellate court views the evidence and all reasonable inferences in the light most favorable to the State. Id. "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must find the case was properly submitted to the jury." Id. at 292-93, 625 S.E.2d at 648. The trial court should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty. State v. Hernandez, 382 S.C. 620, 625-26, 677 S.E.2d 603, 605-06 (2009). A defendant is entitled to a directed verdict when the State

fails to produce evidence of the offense charged. State v. Ladner, 373 S.C. 103, 120, 644 S.E.2d 684, 693 (2007).

"Constructive possession can be established by circumstantial as well as direct evidence, and possession may be shared." State v. Hudson, 277 S.C. 200, 202, 284 S.E.2d 773, 775 (1981). Constructive possession is proven by showing the accused has dominion and control, or the right to exercise dominion and control, over the contraband. Id. at 202, 284 S.E.2d at 774-75. Acts, declarations, or conduct of the accused may create an inference that the accused knew of the existence of the contraband. State v. Mollison, 319 S.C. 41, 45, 459 S.E.2d 88, 91 (Ct. App. 1995). "The proper charge on constructive possession is to instruct the jury that the defendant's knowledge and possession may be inferred if the substance was found on premises under his control." State v. Adams, 291 S.C. 132, 135, 352 S.E.2d 483, 486 (1987).

Appellant argues no evidence establishes Appellant had any possessory control of the drugs found in the car. He cites State v. Heath, 370 S.C. 326, 635 S.E.2d 18 (2006), in which the Supreme Court reversed Heath's conviction. In Heath, the Court found that because the defendant lived with his mother, but his mother owned the house, the State had failed to present evidence that he could exercise dominion and control over the crack cocaine that was found in a recycling bin outside the home. Id. at 330, 635 S.E.2d at 19. The Court emphasized the difference between a right to access an area where drugs are found and actual dominion and control of the drugs. Id.

Heath can be distinguished from the case sub judice. There, evidence was presented showing the defendant's mother owned the home rather than the defendant. Furthermore, the drugs at issue were found in a recycling bin outside the home. Here, the evidence presented demonstrated that Appellant was the sole passenger in the back seat

of the car, sitting right beside the bags containing drugs that were clearly out in the open. The drugs were certainly within his reach and, thus, it was established that he had dominion and control, or the right to exercise dominion and control. "Where contraband materials are found on premises under the control of the accused, this fact in and of itself gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury." State v. Muhammed, 338 S.C. 22, 26-27, 524 S.E.2d 637, 639 (Ct. App. 1999) (citing Hudson, 277 S.C. at 203, 284 S.E.2d at 775).

The trial court also was able to consider Bowers' testimony of Appellant's looking behind him and fumbling around in the back seat after he saw Bowers pursuing the car to conduct the traffic stop. See State v. Mollison, 319 S.C. 41, 45, 459 S.E.2d 88, 91 (Ct. App. 1995) ("Acts, declarations, or conduct of the accused may create an inference that the accused knew of the existence of the contraband.").

Appellant cites several cases to support its argument that the State did not show Appellant had constructive possession. However, each case can be distinguished from the case at hand. First, in State v. Pradubsri, 403 S.C. 270, 743 S.E.2d 98 (2013), the Supreme Court found insufficient evidence existed to prove the defendant was in constructive possession of drugs that were found on his girlfriend. Here, the drugs were found on the car seat next to where Appellant was sitting, not on another person. Further, in State v. Jackson, 395 S.C. 250, 717 S.E.2d 609 (2011), the Supreme Court found insufficient evidence of constructive possession when the drugs were found under the center console and were not visible. Here, the drugs that were found in the back seat would have to have been visible to Appellant while he was in the car based on where they were found. Similarly, in State v. Brown, 267 S.C.311, 227 S.E.2d 674 (1976), the Court focused on the fact that the front seat passenger could not have seen or known about an

opaque bag of marijuana found on the rear floorboard of the vehicle, which is inapplicable to this case where the drugs were in full view right beside where Appellant was sitting. Finally, Appellant cites State v. Hernandez, 382 620, 677 S.E.2d 603 (2009), in which the Court held the evidence was insufficient to sustain the denial of a directed verdict because the defendants had no knowledge of the drugs in the trailer they were following. Again, in this case, Appellant was seated in the back seat next to the bags of drugs, allowing an inference to the jury that he had knowledge the drugs were there and possessed the right to exercise dominion or control over them. Accordingly, sufficient evidence existed of constructive possession to withstand a directed verdict motion and submit the case to the jury.

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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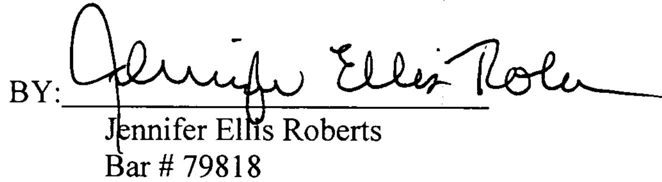
DOUGLAS A. BARFIELD, JR.
Solicitor, Sixth Judicial Circuit



BY:______________________
Jennifer Ellis Roberts
Bar # 79818

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

January 16, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

JAN 16 2014

SC Court of Appeals

Appeal from Lancaster County
The Honorable Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2013-000373

THE STATE,

Respondent,

v.

DERRICK A. MCILWAIN,

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) Trial Transcript dated February 19-20, 2013 pp. 157-58, pp. 212-31.

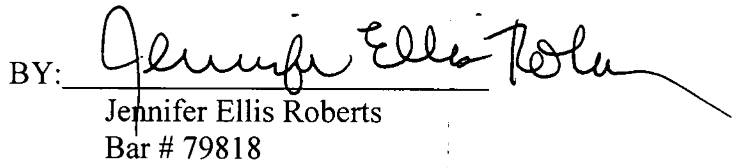
To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers.

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

ALAN WILSON
Attorney General

JENNIFER ELLIS ROBERTS
Assistant Attorney General

DOUGLAS A. BARFIELD, JR.
Solicitor, Sixth Judicial Circuit

BY: 

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THE STATE,

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DERRICK A. MCILWAIN,

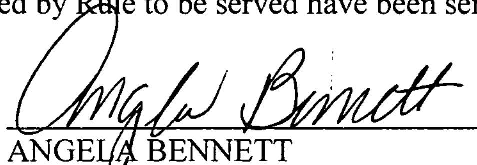
Appellant.

PROOF OF SERVICE

I, Angela Bennett, 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
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 16th day of January, 2014.



ANGELA BENNETT
Administrative Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
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ALAN WILSON
ATTORNEY GENERAL

January 16, 2014

Wanda H. Carter, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

RE: State v. Derrick A. McIlwain
Appellate Case No. 2013-000373

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,

Jennifer Ellis Roberts
Assistant Attorney General
Bar # 79818

JER/ab
Enclosures

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

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SC Court of Appeals

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