

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

FEB 26 2014

Court of Appeals

Appeal from Greenville County

C. Victor Pyle, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DOMINQUE J. SHUMATE,

APPELLANT

APPELLATE CASE NO. 2012-212057

FINAL BRIEF OF APPELLANT

KATHRINE H. HUDGINS
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 ISSUES ON APPEAL.....	4
STATEMENT OF THE CASE	5
STATEMENT OF FACTS.....	6
STANDARDS OF REVIEW.....	9
ARGUMENT.....	10
CONCLUSION.....	20

TABLE OF AUTHORITIES

Cases

<u>Goldsmith v. Witkowski</u> , 981 F.2d 697 (4 th Cir. 1994).....	16
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S.Ct. 2781 61 L.Ed.2d 560 (1979).....	16
<u>State v. Adams</u> , 291 S.C. 132, 352 S.E.2d 483 (1987).....	16
<u>State v. Baccus</u> , 367 S.C. 41, 50, 625 S.E.2d 216 (2006).....	12
<u>State v. Barksdale</u> , 311 S.C. 210, 428 S.E.2d 498 (Ct.App.1993).....	8
<u>State v. Bellamy</u> , 336 S.C. 140, 519 S.E.2d 347(1999)	11
<u>State v. Brockman</u> , 339 S.C. 57, 528 S.E.2d 661 (2000)	8
<u>State v. Dupree</u> , 354 S.C. 676, 583 S.E.2d 437(Ct.App.2003).....	12
<u>State v. Halyard</u> , 274 S.C. 397, 264 S.E.2d 841 (1980)	15
<u>State v. Hernandez</u> , 382 S.C. 620, 677 S.E.2d 603 (2009).....	16
<u>State v. Hudson</u> , 277 S.C. 200, 284 S.E.2d 773 (1981).....	16
<u>State v. Jackson</u> , 395, S.C. 250, 717 S.E.2d 609 (Ct.App. 2011).....	16
<u>State v. Kelsey</u> , 331 S.C. 50, 502 S.E.2d 63 (1998)	8
<u>State v. King</u> , 349 S.C. 142, 561 S.E.2d 640(Ct.App.2002).....	11
<u>State v. Morgan</u> , 282 S.C. 409, 319 S.E. 2d 335 (1984).....	8
<u>State v. Philpot</u> , 317 S.C. 458, 454 S.E.2d 905 (Ct. App. 1995).....	11
<u>State v. Poindexter</u> , 314 S.C. 490, 431 S.E.2d 254 (1993).....	8
<u>State v. Quattlebaum</u> , 338 S.C. 441, 527 S.E.2d 105 (2000)	8
<u>State v. Schrock</u> , 283 S.C. 129, 322 S.E. 2d 450 (1984)	9
<u>State v. Smith</u> , 301 S.C. 371, 392 S.E.2d 182 (1990)	8, 11
<u>State v. Stanley</u> , 365 S.C. 24, 615 S.E.2d 455 (Ct.App.2005).....	16

State v. Thompson, 363 S.C. 192, 609 S.E.2d 556 (Ct.App.2005)..... 8,12

State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007) 14

State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997) 11

Constitutional Provisions

S.C. Code § 17-13-140..... 9, 11, 14

S.C. Code § 44-53-375..... 18

STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in refusing to suppress evidence found pursuant to a search warrant lacking probable cause where the search warrant was issued for the second mobile home on the right based on a controlled purchase by a confidential informant but a statement from the confidential informant states that the buy was made from the first trailer on the left and the return to the search warrant was not made to the judge who issued the search warrant, in violation of the statute?
2. Did the trial court err in refusing to direct verdicts of acquittal when the appellant was merely present in a trailer where drugs and a weapon were found pursuant to a search warrant?
3. Did the trial court err in refusing to direct a verdict of acquittal for the distribution of crack cocaine charge, where the evidence relied upon by the State for the distribution charge was residue found in a microwave, razorblades and tupperware, the indictment fails to allege the manufacture of crack cocaine and the jury returned a verdict of guilty of trafficking crack for the crack found inside the trailer?

STATEMENT OF THE CASE

In February of 2012, the Greenville County Grand Jury indicted Shumate for trafficking cocaine base, possession of a weapon during the commission of a violent crime, possession with intent to distribute a controlled substance, distribution of cocaine base and possession with intent to distribute cocaine, indictments #2011-GS-23- 1733, 1734, 1735, 1736. On May 15, 2012, Shumate and his co-defendant, Andrew Burnside, proceeded to jury trial before the Honorable C. Victor Pyle. Susannah Ross represented Shumate at trial. Scott Robinson represented the co-defendant Burnside. Lisa Bentley prosecuted the case. The jury returned verdicts of guilty for trafficking and the weapons charge, distribution of cocaine base and the lesser included offenses of possession of a controlled substance and possession of cocaine. Judge Pyle sentenced Shumate to 15 years for trafficking, 5 years concurrent for the weapons charge, 1 year concurrent for possession of a controlled substance, 5 years concurrent for the distribution and 1 year concurrent of possession of cocaine. A timely notice of intent to appeal was served on May 17, 2012. This appeal follows.

STATEMENT OF FACTS

Deputy Jacob Walters with the Greenville County Sheriff's Department testified that based on an earlier purchase by a confidential informant he obtained a search warrant for a trailer located at 120 Old Bleachtry Road, lot 7. R. pp. 26-30. On November 19, 2010, Deputy Walter and other members of the sheriff's department executed the search warrant on a trailer. Appellant, Shumate and co-defendant Burnside were inside the trailer at the time of the search. The confidential informant did not identify either Shumate or Burnside as the person who sold the drugs earlier. Deputy Walter admitted that there was no evidence that Shumate sold the drugs to the confidential informant. R. p. 40, lines 2-20.

Officer Patrick Swift with the Greenville County Sheriff's Department testified that he found Appellant Shumate in the bathroom of the trailer and it appeared that he had just flushed something down the toilet. R. p. 49, lines 4-11. Officer Swift testified that there was an Uno playing card floating in the toilet. R. p. 52, lines 10-15. No drugs were found in the bathroom or on Appellant Shumate. After securing Appellant, Officer Swift searched the kitchen. Swift stood on a chair and stood on the counter and in the space at the top found a Tupperware container with two Uno cards and eight pieces of white rock like substance. R. p. 55, lines 4-14. The substance tested positive for .90 grams of crack. R. p. 142, line 23 – p. 143, lines 1-5. Officer Swift searched a bedroom and found a coat with a white rock like substance in the pocket. R. p. 58, lines 24 – p. 59, lines 1-8. This substance tested positive for 10.42 grams of crack. R. p. 143, lines 13-15. Officer Swift found a digital scale on a shelf in a small room with a water heater. R. p. 60, lines 15-25.

Deputy Justin Lanford with the Greenville County Sheriff's Department testified that an additional amount of crack cocaine was found on a hotel room key on the kitchen

counter. R. p. 108, line 18 – p. 109, lines 1-21. This substance testified positive for .68 grams of crack cocaine. R. p. 143, lines 8-10. Deputy Lanford testified that a handgun was found near the crack. R. p. 110, lines 9-14. Deputy Lanford testified that he found both powder and crack cocaine in an oven mitt above the stove. R. p. 111, lines 11-13; p. 114, lines 10-18. These items tested positive for 6.39 grams of crack cocaine and 2.92 grams of powder cocaine. R. p. 143, lines 5-13. Deputy Lanford testified that he found an Altoids container with razors inside. R. p. 112, lines 22-25. The deputy also found several pills in the kitchen cabinets. R. p. 111, lines 8-11. James Armstrong, the chemist from the Greenville County Department of Public Safety testified that four green tablets were indicated to be diazepam, two blue and four yellow tablets were indicated to be alprazolam, both schedule four controlled substances. The chemist also testified that one white tablet indicated to be hydrocodone, a schedule three controlled substance. R. p. 146, lines 19-25. Deputy Lanford also testified that the microwave tested positive for cocaine. R. p. 115, lines 3-13. The chemist testified that a microwave plate tested positive for cocaine base. R. p. 148, lines 2-21.

Master Deputy Brown testified that he found the co-defendant in a back bedroom partially under the bed. R. p. 92, lines 15 – 24. On cross examination Brown admitted that he did not have anything to tie the items found in the trailer to either appellant or the co-defendant. R. p. 102, line 14 – p. 103, line 2. Brown opined that the trailer was used primarily for the distribution of narcotics based on several factors including the fact that the door was barricaded and there was surveillance equipment. R. pp. 96-100.

Deputy Walters confirmed that the trailer on lot 7 was not owned by either Appellant Shumate or the co-defendant. Walters confirmed that the trailer had been rented by a Mr.

Drummond. R. p. 42, lines 4-21. Jerry Drummond was called as a witness by the State. Drummond testified that he rented the trailer as a bachelor's pad. R. pp. 123-124. Drummond testified that he and Burnside were close friends and he and Appellant Shumate were like cousins. R. p. 121, line 19 – p. 122, lines 1-13. Drummond testified that the co-defendant would come over from time to time, bring females and spend the night. R. p. 124, lines 18-24. Drummond testified that Appellant Shumate did not stay at the trailer, but he would visit. R. p. 124, line 25 – p. 125, lines 1-3. Most of the bills for the trailer were split up among Drummond, appellant, the co-defendant, and a few more people. R. p. 125, line 20 – p. 126, lines 1-3. Drummond said he moved out of the trailer about two weeks before November 3, 2010, because he was incarcerated for violating the habitual offender act. R. p. 126, lines 4-11. He said that he sold crack cocaine to appellant and the co-defendant in the past. R. p. 130, line 23 – p. 131, line 2.

The State presented no forensic evidence linking either Appellant Shumate or the co-defendant to the items found inside the trailer. There was no evidence that the prior sale to the confidential informant was made by Shumate or the co-defendant. There was no evidence that Appellant was anything other than a guest at the trailer.

STANDARDS OF REVIEW

An appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000). A deferential standard of review likewise applies in the context of a Fourth Amendment challenge to a trial court's fact driven determination of probable cause. State v. Brockman, 339 S.C. 57, 65-66, 528 S.E.2d 661, 665-666 (2000) "(holding that whether a search warrant violated the parameters of the Fourth Amendment depends on "a number of antecedent determinations, each of which is inherently fact specific" and "entails an inquiry into the totality of the circumstances" and the appellate court must affirm if there is "any evidence" to support the ruling)." State v. Thompson, 363 S.C. 192, 199, 609 S.E.2d 556, 560 (Ct.App. 2005).

On a motion for a directed verdict in a criminal case, the trial court is concerned with the existence or non-existence of evidence, not its weight. State v. Morgan, 282 S.C. 409, 319 S.E. 2d 335 (1984); State v. Barksdale, 311 S.C. 210, 428 S.E.2d 498 (Ct.App.1993). The motion should be granted if the evidence merely raises a suspicion of the defendant's guilt. Barksdale, 428 S.E.2d at 501. "In reviewing the denial of a motion for a directed verdict, this court must view the evidence in the light most favorable to the State, and if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, we must find that the case was properly submitted to the jury." State v. Smith, 359 S.C. 481, 490, 597 S.E.2d 888, 893 (Ct.App.2004) (citing State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998)). On appeal from the denial of a motion for directed verdict, this court must view the evidence

in a light most favorable to the State. State v. Schrock, 283 S.C. 129, 322 S.E. 2d 450 (1984).

ARGUMENTS

1. The trial court erred in refusing to suppress evidence found pursuant to a search warrant lacking probable cause where the search warrant was issued for the second mobile home on the right based on a controlled purchase by a confidential informant but a statement from the confidential informant states that the buy was made from the first trailer on the left and the return to the search warrant was not made to the judge who issued the search warrant, in violation of the statute.

Prior to trial Appellant challenged the search warrant because the return was not made to the Judge who issued the search warrant in violation of S.C. Code §17-13-140. The return was made to Judge Cagle but the search warrant was issued by Judge Fisher. R. p. 8, lines 14-25; Search warrant and return, R. 226-231. The State, relying on State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007), argued that the error was simply procedural requiring a showing of prejudice in order to require suppression. R. p. 12, lines 8-21. The State argued that appellant failed to show prejudice. R. p. 12, lines 8-9. The judge denied the motion to suppress. R. p. 12, lines 22.

Appellant then challenged the affidavit in support of the search warrant as lacking in probable cause. R. p. 12, line 23 – p. 13, line 1. Appellant argued that the affidavit was not sufficiently specific because the address listed, 120 Old Bleachery Road Greenville, SC 29617, contained possibly as many as nine separate similar looking trailers. R. p. 13, line 5 – p. 14, line 1. While the affidavit contains coordinates and a description, the affidavit does not reference a lot number. Affidavit, R. p. 227-228. Appellant additionally argued that the affidavit in support of the search warrant failed to establish the reliability of the

confidential informant. R. p. 14, lines 18-23. The judge again denied the motion to suppress. R. p. 14, lines 24-25.

After the first two State's witnesses testified, it became apparent that the State had failed to disclose a statement made by the confidential informant who was used as the basis for obtaining the search warrant. Appellant requested a copy of the statement made by the confidential informant. R. p. 79, lines 4-20. A copy of the statement with the informant's name redacted was provided to Appellant. R. p. 79, line 21 – p. 80, lines 1-6. After reading the statement, appellant noted to the trial judge that the trailer listed in the affidavit in support of the search warrant was different from the trailer mentioned in the informant's statement. R. p. 80, lines 7-22. The search warrant was issued for, entering the trailer park from Edwards Street, the second mobile home on the **right** but in the statement the informant stated, "I went to the second trailer on the **left** when coming off of Edwards St. I was turned down by a black male named 'Blac.' He told me he didn't have any and to move the car. Inv. Woodall then moved the vehicle. I then went to the first trailer on the **left**. This trailer is in the middle of the complex. I knocked on the door and a black male opened the door and let me in. I told him I needed \$20 and he handed me two crack rocks." (Bold added) (Affidavit, R. pp 227-228 Court's Exhibit #1, Witness statement, R. p. 225. The trial judge stated, "I'll make this a part of the record for purposes of appeal. I'm not going any further with it." R. p. 80, lines 23-25. Appellant renewed the challenge to the search warrant and was again denied. R. p. 142, lines 16-17; R. p. 144, line 25; p. 147, line 20; p. 163, lines 8-17. The trial judge erred in failing to suppress items found pursuant to a defective search warrant.

The search warrant in the present case is defective in two ways. First, the search warrant lacks specificity to establish probable cause to enter the trailer on lot number 7. The affidavit in support of the search warrant fails to mention lot number seven. The search warrant was based on a buy from the first trailer on the left but issued for the second trailer on the right. Second, the warrant was defective because it was not returned to the issuing judge in violation of S.C. Code §17-13-140.

S.C. Code §17-13-140 requires that a search warrant “shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record.” Oral testimony may also be used in this State to supplement a search warrant affidavit which is facially insufficient to establish probable cause. State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997).

The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause. Mere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient.

State v. Philpot, 317 S.C. 458, 454 S.E.2d 905, 907 (Ct. App. 1995), citing State v. Smith, 301 S.C. 371, 392 S.E.2d 182 (1990).

A magistrate may issue a search warrant only upon a finding of probable cause. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). “This determination requires the magistrate to make a practical, common-sense decision of whether, given the totality of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying the information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.” State v. King, 349 S.C. 142, 150, 561 S.E.2d 640, 644 (Ct.App.2002). “The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of

probable cause. The magistrate should determine probable cause based on all of the information available to the magistrate at the time the warrant was issued.” State v. Dupree, 354 S.C. 676, 684, 583 S.E.2d 437, 441 (Ct.App.2003) (citations omitted).

In terms of a court's review of the magistrate's decision, “[t]he duty of the reviewing court is to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed.” State v. Baccus, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006). “In reviewing the validity of a warrant, an appellate court may consider only information brought to the magistrate's attention.” State v. Thompson, 363 S.C. 192, 200, 609 S.E.2d 556, 560 (Ct.App.2005).

There was no testimony that the affidavit in the present case was supplemented by oral testimony. The affiant in the affidavit, Deputy Jacob Walters with the Greenville County Sheriff's Department, describes the premises to be searched as:

120 Old Bleachery Road Greenville, SC, 29617 the center of the residence being 34.87538 N 082.42224 W coordinates is a single wide mobile home with brown wood siding, with a white in color wooden porch with tan underpinning. The residence has no visible numbers on the residence. Entering the trailer park from Edwards Street the residence is the second mobile home on the right. To include any persons, vehicles, trash receptacles present and directly related to the listed reference.

Affidavit, R. p. 227-228.

The affidavit in support of the search warrant was not sufficient to provide the magistrate with a substantial basis for which to find probable cause to issue a search warrant for the trailer on lot number seven. During trial Deputy Walters testified that the search warrant was executed on lot number seven. R. p. 31, lines 2-20. The affidavit, however, never mentions lot number seven.

The State argued that the search warrant was sufficiently specific and stated, "We do have a map to demonstrate that Lot 7 is the second mobile home on the right from Edwards Street. In addition, it goes the longitude and latitude of this trailer and the confidential informant's buy was from this particular trailer. So there were four search warrants issued pursuant to four different CI buys. This search warrant was for the CI buy from Lot 7 which is the second mobile home on the right from Edwards Street and this specifically stated on the warrant." R. p. 14, lines 8-17. The affidavit lists the premise to be searched as the second mobile home on the right. Again, there is no mention of lot 7 in the affidavit.

In the affidavit in support of the search warrant the affiant states the reason for the search as:

A Confidential Informant, while working under the direct control and supervision of the Sheriff's office Directed Patrol Unit made a controlled purchase of a substance that field tested positive for cocaine based substance crack for Twenty Dollars in U.S. Cash Currency. This informant was under audio and physical surveillance during the entire operation and gave a written statement as to the activities that transpired at 120 Old Bleachery Road Greenville, SC, 29617. The informant was searched prior to and after the purchase with no illegal contraband found on their person. Based on the Affiant's experience and knowledge it is believed that upon the execution of this warrant more illegal drugs/narcotics will be discovered.

Affidavit, R. pp.227-228.

The search warrant was sought based on a controlled purchase by the confidential informant from the second trailer on the right. According to the statement of the confidential informant, however, the controlled purchase was made from the first trailer on the left. The affidavit in the present case does not provide sufficient specificity for the magistrate to determine that probable cause existed to search the trailer on lot 7. The

search warrant violates the requirements of S.C. Code §17-13-140 and violates the Fourth Amendment of the United States Constitution as well as Article I, Section 10 of the South Carolina Constitution. The good faith exception should not apply because the officer provided the magistrate with erroneous or incomplete information.

S.C. Code §17-13-140 provides, in part:

In the case of a warrant issued by a magistrate or a judge of a court of record, it shall be directed to any peace officer having jurisdiction in the county where issued, including members of the South Carolina Law Enforcement Division, and shall be returnable to the issuing magistrate. In case of a warrant issued by a judge of a court of record, it shall be returnable to a magistrate having jurisdiction of the area where the property is located or the person to be searched is found. If any warrant is issued by any municipal judicial officer to municipal police officers, the return shall be made to the issuing municipal judicial officer.

The State conceded that the return was not made to the issuing judge but argued that this was merely a procedural error that does not require suppression unless there is prejudice. First, this is not a ministerial requirement as the 10 day requirement discussed in State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007). The judge issuing the search warrant fulfills his role as a detached and neutral judge in accepting the return and verifying that the items seized were seized in compliance with the search warrant issued. This is not simply a ministerial task. The erroneous information in regard to where the confidential informant purchased drugs combined with the statutory violation of not making the return to the issuing judge require suppression of the items found pursuant to the defective search warrant.

2. The trial court erred in refusing to direct verdicts of acquittal when the appellant was merely present in a trailer where drugs and a weapon were found pursuant to a search warrant.

As argued above in issue one, Appellant submits that the drugs and gun should have been suppressed based on a defective search warrant. Alternatively, the judge should have directed verdicts of acquittal on all charges. At the close of the State's case, Appellant moved for directed verdicts of acquittal arguing that mere suspicion was not sufficient. R. p. 163, lines 8-17. The judge denied the motion. R. p. 163, lines 18-19. The judge erred. The State's case against Appellant was based on the fact that he was found inside the trailer where drugs and a weapon were found. When officers entered the trailer, they found Appellant in a bathroom. There were no drugs found in the bathroom or on Appellant's person. Drugs were found in the kitchen, inside cabinets, above the counter, in an oven mitt and in a bedroom in a coat pocket. The State did not connect the coat in the bedroom to Appellant. A gun and a small amount of crack, .68 grams, were found on the kitchen counter. While Jerry Drummond testified that Appellant contributed money toward utility bills at the trailer, the State failed to present any evidence that Appellant was anything more than an occasional guest at the trailer.

In State v. Halyard, 274 S.C. 397, 400, 264 S.E.2d 841, 842 (1980) the Court wrote, "This court has repeatedly recognized that a conviction for possession of contraband drugs requires proof of actual or constructive possession, coupled with knowledge of the presence of the drugs. To prove constructive possession the State must show a defendant had dominion and control, or the right to exercise dominion and control over the substance. Such possession may be established by circumstantial as well as

direct evidence.” 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).

In State v. Jackson, 395, S.C. 250, 255, 717 S.E.2d 609, 611-612 (Ct.App. 2011)(cert denied March 6, 2013) the South Carolina Court of Appeals wrote:

“Conviction of possession of [illegal drugs] requires proof of possession—either actual or constructive, coupled with knowledge of its presence. Actual possession occurs when the drugs are found to be in the actual physical custody of the person charged with possession. To prove constructive possession, the State must show a defendant had dominion and control, or the right to exercise dominion and control, over the [drugs]. 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, 774–75 (1981). “Possession requires more than mere presence.” State v. Stanley, 365 S.C. 24, 43, 615 S.E.2d 455, 465 (Ct.App.2005). “In drug cases, the element of knowledge is seldom established through direct evidence, but may be proven circumstantially.” State v. Hernandez, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009). “Knowledge can be proven by the 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 substances.” Id.

Knowledge of the drugs alone, however, is not sufficient to prove constructive possession. In Goldsmith v. Witkowski, 981 F.2d 697, 701 (4th Cir. 1994) the Fourth Circuit Court of Appeals wrote:

Under South Carolina law, the mere presence of a person in an area containing drugs, absent evidence of his dominion and control over them, is insufficient to prove his possession of the drugs. State v. Tabory, 260 S.C. 355, 196 S.E.2d 111, 113 (1973). Again, even presence coupled with knowledge of the drugs is insufficient to sustain a possession conviction; the State must also prove dominion and control. See Kimbrell, 362 S.E.2d at 631. Even if this were not state law, the due process protections of Jackson¹, in our view, would require the invalidation of convictions based solely on evidence of mere presence, as was established in this case.

¹ Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 61 L.Ed.2d 560 (1979).

Appellant was merely present in the trailer. The State failed to prove that Appellant exercised dominion and control over the drugs and gun found inside the trailer. Other than the .68 grams of crack and the gun in plain sight on the kitchen counter, the State failed to prove that Appellant had knowledge of the other drug amounts found in a coat pocket, inside cabinets, above counters and inside an oven mitt. The trial court erred in refusing to direct verdicts of acquittal.

3. The trial court erred in refusing to direct a verdict of acquittal for the distribution of crack cocaine charge, where the evidence relied upon by the State for the distribution of crack charge was residue found in a microwave, razorblades and tupperware, the indictment fails to allege the manufacture of crack cocaine and the jury returned a verdict of guilty of trafficking crack for the crack found inside the trailer.

Alternatively and without conceding the issues raised in arguments one and two, the trial judge should have directed a verdict of acquittal for the distribution charge because there was no evidence of a distribution separate from the trafficking charge. After the jury returned with the verdicts, Appellant renewed all previously made motions and specifically argued that the distribution charge and the trafficking charge encompass the same action. R. p. 205, lines 8-16. The State argued, "The distribution manufacturing charge of crack cocaine stems from the evidence of their manufacturing the crack cocaine in the microwave, the tupperware, the razor blades with the intent to therefore distribute." R. p. 206, lines 2-6. The trial judge denied the motion. The trial judge erred. The indictment fails to allege the manufacture of crack cocaine.

The indictment for distribution of cocaine base reads, "That DOMINIQUE JARARD SHUMATE did in Greenville County, on or about the 18th day of November, 2010, distribute, dispense, deliver, or aid, abet, or conspire to distribute, dispense or deliver

to an undercover operative a quantity of Cocaine Base (Crack Cocaine), a controlled substance, such distribution not having been authorized by law. This is in violation of §44-53-375 of the South Carolina Code of laws (1976) as amended.”

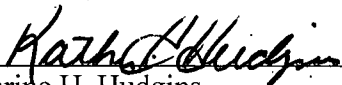
The State presented no evidence of a distribution and specifically stated at trial that no charges were made as a result of the CI buy. R. p. 79, lines 10-12. As discussed in issue one, the CI buy was intended to be the basis of the search warrant rather than a basis for a substantive charge. Appellant was also charged with trafficking in crack cocaine. Any evidence of an intent to distribute based on weight was subsumed by the trafficking charge.

The indictment alleges a distribution of crack cocaine and the State failed to present evidence of a distribution of crack cocaine. The judge should have directed a verdict of acquittal. Even if the indictment can somehow be read to include a manufacturing charge based on the reference to S.C. Code §44-53-375, there was no evidence that Appellant manufactured the crack cocaine. The State failed to connect the Appellant to any of the items forming the State’s basis for the manufacturing charge, the microwave, the tupperware and the razorblades. The judge erred in refusing to direct a verdict of acquittal for the distribution of crack charge.

CONCLUSION

Based on the argument presented is issue one, the convictions and sentences should be reversed and the cases remanded for a new trial. Based on the argument presented in issue two, the convictions should be reversed. Based on the argument presented is issue three, the conviction for distribution of cocaine base should be reversed.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of February, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

C. Victor Pyle, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

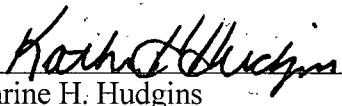
DOMINQUE J. SHUMATE,

APPELLANT

APPELLATE CASE NO. 2012-212057

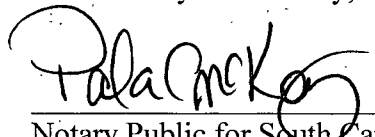
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Julie Kate Keeney, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 26th day of February, 2014.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 26th day of February, 2014.


Notary Public for South Carolina
My Commission Expires: July 24, 2022

RECEIVED

FEB 26 2014

SC Court of Appeals

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."

February 26th, 2014


Kathrine H. Hudgins
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

RECEIVED
FEB 26 2014
SC Court of Appeals