

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appellate Case No. 2012-213383

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SC COURT OF APPEALS

The State,

Respondent,

v.

Benjamin J. Newman,

Appellant.

Appeal from Lexington County
Alexander S. Macaulay, Circuit Court Judge
Case Nos. 2011-GS-32-2259, 2011-GS-32-2261

PETITION FOR REHEARING

TARA DAWN SHURLING
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ATTORNEY FOR APPELLANT.

NOW COMES the Appellant in the above-captioned action, acting by and through undersigned counsel, seeking rehearing on this Court's unpublished opinion in this matter. *State v. Benjamin J. Newman, Opinion No. 2014-UP-034 (S.C. Ct. App. Filed January 29, 2014)*. Pursuant to *Rules 221(a) and 219, SCACR*, the Appellant petitions for rehearing on the ground that certain issues of material fact or law have either been overlooked or misapprehended by the Court in the opinion in question. In support of this position, the Appellant would show unto this Honorable Court the following:

Issue 1.

The Trial Court erred when it denied the Appellant's Motion to Suppress the drug evidence obtained as a result of an unlawful search.

The Appellant would respectfully note that the opinion of this Court appears to have overlooked or misapprehended material facts which supported his Motion to Suppress the drug evidence in his case. The testimony was that a team of officers entered the residence in question after audio surveillance of a drug transaction with the Appellant, a confidential informant and undercover police officer. According to the testimony adduced at trial, the Appellant ran out of the back door as the SWAT team entered the residence. R. p. 202, ll. 2-15. Despite seeing the Appellant go out the back door of the residence, the record below indicates that the CI, the undercover agent and some members of the SWAT team remained inside the residence for fifteen – twenty minutes while they waited for a search warrant for this residence. R. p. 39, ll. 10-22. It was during this time period when officers allegedly observed the drugs in question in plain view. The Appellant would respectfully submit that once the residence was checked for any immediate threat to the officers at the scene, law enforcement had no authority to remain inside this residence pending their receipt of a search warrant. Agent Paige Barnes testified that she observed the cocaine in this case in an open book bag after

looking near the counter where she had been told the cocaine was located. Her testimony reflects that they waited inside the house for approximately thirty minutes before the search warrant arrived. R. p. 293, l. 21- R. p. 298, l. 24. In addition, the audio recording of this operation documented a conversation between law enforcement officers at the scene in which it was stated that “officers were searching around for cocaine prior to the search warrant being there.” R. p. 247, ll. 5-7. This recording was entered in its entirety during the pre-trial hearing on the Appellant’s Motion to Suppress. It was marked and introduced as Court’s Exhibit No. 7. R. p. 42, ll. 5-24.

Based on all the foregoing, the Appellant would respectfully ask this Court rehear the issue of whether or not the lower court erred in failing to suppress the drug evidence in this case.

ISSUE II

The Trial Court erred in failing to grant the Appellant’s Motion for a Directed Verdict on the charge of Trafficking in Cocaine, 400 grams or more.

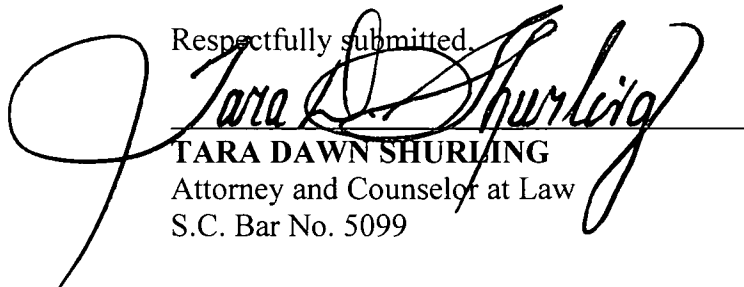
The record below indicates that a confidential informant and an undercover agent set up a drug transaction with the Appellant in the course of which he exchanged a quantity of cocaine for a quantity of marijuana. In this monitored drug transaction, Agent Carver testified that the Appellant was suppose to trade twenty-five ounces of cocaine for fifty pounds of marijuana, but added two extra ounces. R. p. 199, ll. 4-17. His testimony in fact establishes that the cocaine was ultimately found in a book bag that had been brought to the residence by law enforcement carrying the marijuana for this drug transaction. Thus, the Appellant would respectfully submit that the evidence conclusively establishes that the transfer of the cocaine for the marijuana had already taken place prior to the raid of law enforcement on this residence. Therefore, according to the evidence introduced by the State, the law enforcement agents involved in this drug

transaction had taken physical custody of the cocaine prior to the Appellant's arrest. For that reason, the Appellant would respectfully submit a directed verdict of acquittal should have been granted on the cocaine charge. On the facts of this case, the cocaine in question was, according to the State's own evidence, used as currency to purchase the marijuana traded for it. The Appellant would respectfully submits that all the evidence in this case indicates that the only cocaine involved in this transaction was clearly under the exclusive dominion and control of the law enforcement agents who had taken possession of the cocaine in question. There being no evidence of any other cocaine being in the Appellant's possession, the Motion for Directed Verdict on that charge should have been granted. For these reasons, the Appellant respectfully asks this Honorable Court to rehear the issue of whether or not he was entitled to a directed verdict of acquittal on the charge of trafficking in cocaine.

CONCLUSION

For all the reasons set forth above, the Appellant now asks for rehearing on these issues.

Respectfully submitted,



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ATTORNEY FOR APPELLANT

This 24th day of February, 2014.

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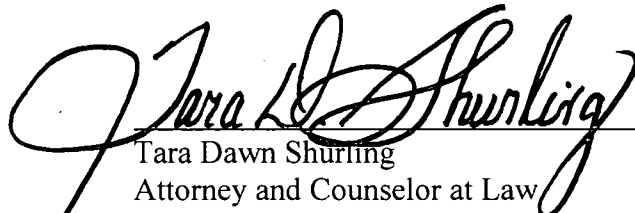
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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Appellant's Petition for Rehearing in the above-entitled case have been served upon opposing counsel, Jennifer Ellis Roberts, Assistant Deputy Attorney General, P O Box 11549, Columbia, SC 29211, by depositing in the U.S. Mail, postage prepaid, postage prepaid, this 24th day of February, 2014.


Tara Dawn Shurling
Attorney and Counselor at Law
S.C. Bar No. 5099
February 24, 2014