

THE STATE OF SOUTH CAROLINA

 ORIGINAL

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

DAVID VICE,

APPELLANT

Appeal from Williamsburg County

Clifton Newman, Circuit Court Judge

Opinion No. 2014-UP-103

PETITION FOR REHEARING

RECEIVED

MAR 27 2014

SC Court of Appeals

Pursuant to Rules 221 and 224 of the South Carolina Appellate Court Rules, the undersigned counsel would petition for rehearing in the above titled case because this Court did not address the merits of the erroneous “actual knowledge/strong evidence” jury charge issue raised on appeal on the ground that it was unpreserved when it was clear that counsel’s objection to this erroneous charge as a comment on the facts was a proper objection since the Cheeks Court found this charge to be an improper remark on the judge’s view of the weight of the evidence, which in turn constituted the equivalent of a charge on the facts. In support of this position, the undersigned counsel would submit the following information.

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

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

Appellant neither testified at trial nor presented no witnesses or exhibits in his defense.

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

The Court: the defendant is charged with possession with intent to distribute marijuana. The State must prove beyond a reasonable doubt that the defendant possessed marijuana with the intent to distribute it. To prove possession, the State must prove beyond a reasonable doubt that the defendant had both the power and the intent to control the disposition or use of the marijuana.

Mere presence at the scene where the drugs were found is not enough to prove possession. Actual knowledge of the presence of the marijuana is strong evidence of the defendant's intent to control its disposition or use. The defendant's knowledge and possession may be inferred when a substance is found on the property under the defendant's control. However, this inference is simply an evidentiary fact to be taken into consideration by you along with the other evidence in this case and to be given the weight you decide it should have. Distribute means to deliver rather than administering or dispensing a – or dispensing a drug. Intent may be shown by acts and conduct of the defendant and other circumstances from which you may naturally and reasonably infer intent. R. 107, l. 2 – R. 108, l. 5.

3.) On appeal, the issue raised was whether the trial judge erred in charging the jury that “actual knowledge of the presence of marijuana is strong evidence of the defendant's intent to control its disposition or use” because this negated the mere presence charge, and constituted a comment on the weight of the evidence, and also denied the jurors the prerogative to draw permissive inferences when deciding issues of intent and possession in connection with both of the drug offenses for which appellant was on trial. Final Brief of Appellant at p. 8.

4.) In the appellate brief, the undersigned counsel argued that this “actual knowledge/strong evidence” charge given in the case was reversible error based on the following rationale:

In State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480 (2013), the Court addressed the propriety of a charge instructing the jury that “actual knowledge of the presence of marijuana is strong evidence of the defendant's intent to control its disposition or use,” and held that such a charge denied the jurors of their prerogative to draw whatever inferences they chose to do so from the actual knowledge of the presence of drugs in connection with issues of “intent” and “possession” and on the actual knowledge of the presence of drugs issue, and that this charge negated the mere presence charge and converted a permissive evidentiary inference (on the actual knowledge of drugs) into a mandatory proposition of law that they must follow. Thus, this jury charge violated appellant's right to due process via the Fourteenth Amendment to the United States Constitution. Final Brief of Appellant at p. 9.

5.) In the respondent's appellate brief on appeal, defense counsel's objection to this charge was presented in its brief as taken from the record as follows:

Counsel: I have an objection to where you mentioned – you used the term inferred for property under which the defendant controls as far as possession. Your Honor, I just – just for the record on appeal, I just object and say that's a comment on the facts, as well about comments on a verdict that speaks the truth. Final Brief of Respondent at p 8.

6.) However, the respondent's cite to the objection was taken out of context therein excluding the entire text of the objection in the record before and after the words "I have an objection." A review of the entire objection clearly established proper error preservation on this issue and the trial judge's follow up to the objection proved proper error preservation as well. For example, prior to the objection text above, defense counsel stated as follows:

Counsel: Your Honor...to protect the record on appeal...I have an objection to where you mentioned... R. 111, l. 25 – p. 112, l. 1.

7.) Then, in response to counsel's objection, the trial judge responded as follows :

Trial Judge: I guess you're leaning on that most recent opinion (presumably Cheeks).

Counsel: I am.

Trial Judge: The Court...came out and commented...but I don't think that...I don't think it reaches to reaches to every word says...that I followed a script pretty close. R. 112, lines 9-15.

8.) Note further that trial counsel referred twice to the "record on appeal" in connection with his objection. Moreover, the objection language "inferred from the property under which the defendant controls as far as possession" was clearly paraphrased in reference to an objection to the language in the instruction that charged "actual knowledge of the presence of the marijuana is

strong evidence of the defendant's intent to control its disposition or use [and] the defendant's knowledge and possession may be inferred when a substance is found on the property under the defendant's control," which was jury charge language that had been condemned and struck down in Cheeks.

9.) The respondent made the error preservation argument in its brief of respondent as follows:

At no time did Appellant object to the "strong evidence" language that was found improper in Cheeks. His objection was to another portion of the charge regarding the inference the jury can make from Appellant's control of the property. As a result, the issue is clearly not preserved for review on appeal. See State v. Stahlnecker, 386 S.C. 609, 690 S.E. 2nd 565, 570 (2010) ("For an issue to be properly preserved it has to be raised to and ruled on by the trial court."); State v. Haselden, 353 S.C. 190, 196, 577 S.E. 2nd 445, 448 (2003) (holding a defendant may not argue one ground at trial and another on appeal). Brief of Respondent at p.9.

10.) The Court of Appeals did not review the Cheeks issue on appeal based on the view that it was unpreserved per the following opinion holding:

As to whether the trial court erred in charging the jury: State v. Dunbar, 356 S.C. 138, 142, 587 S.E. 2nd 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal."); *id.* at 142, 587 S.E. 2nd at 694 (" A party may not argue one ground at trial and an alternate ground on appeal.").

7.) Clearly, the Court of Appeals overlooked the fact that the Cheeks Court clearly pointed to the error of the "actual knowledge/strong evidence" charge as an impermissible charge on the facts in drug cases. The Court in Cheeks held that the "strong evidence" charge was "improper as an expression of a judge's view of the weight of certain evidence." which was tantamount to a charge on the facts. The Cheeks Court fully addressed this issue as follows:

Actual knowledge [of the possession of drugs] is strong evidence of intent to control its disposition or use"... both improperly weighs the evidence, and that it largely negates the mere presence charge. Simply because certain facts may be considered by the jury as evidence of guilt in a given case where the circumstances warrant, it does not follow that future juries should be charged that these facts are probative of guilt. It is always for the jury to determine the facts, and the inferences that are to be drawn from these facts. Similarly, charging a jury that "actual knowledge of the presence of a drug is strong evidence of intent to control its disposition or use" unduly emphasizes that evidence, and deprives the jury of its prerogative both to draw inferences and to weigh evidence.

Clearly, the Cheeks Court's use of the words "weighs the evidence" translated into words that were tantamount to the rationale that the erroneous jury charge in question was a charge on the facts. Thus, trial counsel's objection as a comment on the facts in the case at bar properly preserved this issue as couched well within the parameters of Cheeks and ruled upon by the trial judge. Hence, there was no incident of raising one issue at trial and arguing another issue on appeal in this instance. The Cheeks issue was raised at trial and the same argued on appeal. As a result, the issue in question was preserved for appellate review by this Court.

WHEREFORE, the undersigned counsel would request a rehearing for a review on the merits of appellant's assignment of error with respect to the "actual knowledge/strong evidence" jury charge given at trial in this case.

Respectfully submitted,


Wanda H. Carter

Deputy Chief Appellate Defender

This 27th day of March, 2014.

STATE OF SOUTH CAROLINA

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Clifton Newman, Circuit Court Judge

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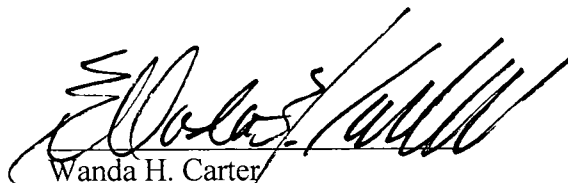
V.

DAVID VICE,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William M. Blicht, Jr., Esquire, this 27th day of March, 2014.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 27th day
of March, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.