STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County
R. Knox McMahon, Circuit Court Judge

THE STATE,

Respondent,

vs.

TRAVAS D. JONES,

Appellant.

PETITION FOR REHEARING

Pursuant to SCACR Rules 221 and 224, the State of South Carolina respectfully asks for rehearing on the following points that this Court may have overlooked or misapprehended it its decision:

This Court found the trial court erred when it instructed the jury: "Actual knowledge of the presence of the crack cocaine is strong evidence of the defendant's intent to control its disposition or use." R. p. 288, lines 20-23. Subsequent to the trial of this case, but prior to briefing in this court, the Supreme Court found this instruction was improper in State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480 (2013). However, this Court should not reverse Appellant's conviction and sentence because (1) the issue was not properly raised to this Court as it was not contained in the statement of issues; (2) the issue was not raised to the trial court; and (3) the instruction was not prejudicial and therefore constitutes harmless error under the facts of the present case.

The complaint was not raised in Appellant's Statement of Issues.

Appellant did not raise the Cheeks issue in his statement of issues and made short reference to the issue in the last pages of his brief. The issue raised by Appellant in his brief set forth the following Statement of Issues:

> The trial court erred in denying Jones' request that the jury charge on constructive possession contain the language that proof of possession of an item requires more than proof of control over the premises where the item is found.

Final Br. of App. p. 5. The statement of issue is not a complaint about the trial court's instruction on "actual knowledge." Instead it is a complaint about the trial court's instruction on whether "control over the premises" is sufficient to prove constructive possession of the contraband. That is a completely separate legal question than the one addressed by this Court.

This Court has previously stated, "In order for an issue to be properly presented for appeal, the appellant's brief must set forth the issue in the statement of issues on appeal." State v. Culbreath, 377 S.C. 326, 332, 659 S.E.2d 268, 271 (Ct. App. 2008) (quoting Lengehans v. Smith, 347 S.C. 348, 352, 554 S.E.2d 681, 683 (Ct. App. 2001)).[1] Under Rule 208(b)(1)(B), SCACR, the Brief of Appellant shall contain:

> A statement of each of the issues presented for review. The statement shall be concise and direct as to each issue, and may be stated in question form. Broad general statements may be disregarded by the appellate court. **Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.**

(Emphasis added).

In Culbreath, also a drug prosecution, Culbreath, in his statement of issues, raised a complaint about testimony by Gaines concerning previous drug dealings with

1 The State cited Culbreath for this exact proposition in its brief. Final Br. of Resp. p. 4, n. 1.

Culbreath. However, in the body of his brief, Culbreath complained about the prosecution's phrasing of a question to Gaines. This Court found: "While Culbreath's appellate brief recounts the question asked by the solicitor, the legal argument presented applies only to the statements made by Gaines." Id., 377 S.C. at 332, 659 S.E.2d at 271.

Similarly, this Court strictly applied the rule in the prosecution of a special education student for assaulting a school safety resource officer. State v. Moses, 390 S.C. 502, 524, 702 S.E.2d 395, 407 n.8 (Ct. App. 2010). The Court found that Moses' argument regarding the introduction of bad character evidence should not be reviewed because "[w]hile this argument appears in Moses' brief, we note it is not mentioned in the issues on appeal." Id.[2]

An exception to application of Rule 208(b)(1)(B) exists when the issue is reasonably clear from the appellant's argument. Eubank v. Eubank, 347 S.C. 367, 555 S.E.2d 413 (Ct. App. 2001). That is not the case here. Reference in Appellant's brief to Cheeks does not occur until the fifth page of argument. Final Br. of App. p. 9. Appellant then comments that defense counsel's request to charge did not contain the same language, but Appellant does not mention whether or not defense counsel asked that the offending language be removed from the trial court's instruction. Id. at p. 10.

As Culbreath concluded: "It is error for the appellate court to consider an issue not properly raised to it." Culbreath, 377 S.C. at 332, 659 S.E.2d at 271. The rule applied to Mr. Culbreath and Mr. Moses should also be applied to Appellant. It is far from clear that Appellant was raising this argument, although it is clear Appellant is avoiding the problem that the issue was never raised to the trial court. This Court's failure to address Rule 208 in its opinion rewards Appellant for making an end-run

2 Further, separate issues should be set forth and argued separately. State v. Burroughs, 328 S.C. 489, 492, S.E.2d 408 (Ct. App. 1997). Of course, Appellant could have raised the issue separately, but that would serve to highlight the failure to preserve the issue at trial.

around Appellant's error preservation issues.

The issue was never raised to the trial court.

Undeniably, Appellant never requested that the trial court remove the "strong evidence" language from the trial court's instruction. "An issue that was not preserved for review should not be addressed by the Court of Appeals, and the court's opinion should be vacated to the extent it addressed an issue that was not preserved." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). The issue actually raised by trial counsel is well-stated in Appellant's statement of issue, as quoted above. However, trial counsel never asked for the trial court to remove the "strong evidence" language from the instruction. In fact, trial counsel never argued the instruction was improper. In order to preserve for review an alleged error in admitting evidence, the objection must sufficiently bring into focus the precise nature of the alleged error so the error may be understood by the trial judge. State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001). The party may not argue one ground at trial and another on appeal. Id.

"Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373 628 S.E.2d 902, 919 (Ct. App. 2006). An objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error. State v. Byers, 392 S.C. 438, 446, 710 S.E.2d 55, 59 (2011). "[I]t is the responsibility of trial counsel to preserve issues for appellate review." Jackson v. Speed, 326 S.C. 289, 306 S.E.2d 750, 759 (1997); see also, Johnson v. Lloyd, Op. No. 27383 (S.C. Sup.Ct. filed April 23, 2014) (finding appellate court error in addressing the merits of the case where the issue clearly was not preserved for review). Appellant never argued that the issue was raised below in

his brief and avoided highlighting that problem by not even raising the argument in the statement of issues.

Counsel's objection was based on his worry that the jury would conclude Appellant had control over the contraband based on the abundant evidence that Appellant had control over the premises. R. p. 235, lines 17-21. The following exchange occurred:

> Court: My charge has: Constructive possession means the defendant had dominion and control or the right to exercise dominion and control over the crack itself or the property on which the crack was found.
>
> Then I go to mere presence which means he could have control over the property but he could still be merely present at the scene where the drugs were found. It's not enough to prove possession.
>
> Prosecution: There is nothing in there as far as knowledge?
>
> Court: Actual knowledge of the presence of the crack is strong evidence of the defendant's intent to control its disposition or sue.
>
> Prosecution: That seems to cover what Mr. Floyd is saying.
>
> Defense counsel: The problem I have kind of with it is if you take that little phrase in there, it's almost saying if they prove he controlled the property then he controlled the drugs. It seems to say that in that charge.
>
> Court: Well, I was reading State versus Ballinger straight out of this case. Proof of constructive possession requires a showing that the accused had dominion and control over either the drugs or the premises upon which the drugs were found, as well as knowledge of the presence of the drugs. Mere presence in that area where drugs is found does not constitute constructive possession.
>
> Defense counsel: I appreciate that, Your Honor. I still think it seems to indicate that if they believe [Appellant] was the person in control of the property through the lease, that instruction seems to say that's pretty much it.

R. p. 236 , line 4 – p. 237, line 12.

In other words, trial counsel was concerned that the jury would assume guilty knowledge from the abundant evidence of Appellant's control of the premises where the contraband was found. In contrast, the apparent danger of the "strong evidence" instruction is that a jury will find guilt based on knowledge alone even if proof of control of the contraband is lacking. Trial counsel was focused on the opposite problem from the concern presented in Cheeks which explains the objection he made at trial instead of an objection to the "strong evidence" instruction.

There is a substantial chance that the trial court would have complied with a request to remove the "strong evidence" language if defense counsel asked. At trial, defense counsel complained that the original proposed constructive possession instruction implied "mere ownership of the place where it was found creates an inference." R. p. 235, lines 3-5. The trial court complied with defense counsel's request and removed that language. R. p. 235. Had Appellant asked, the offending language likely would have been removed by the trial court, perhaps without objection from the State. See Stephens v. CSX Transportation, Inc., 400 S.C. 503, 735 S.E.2d 505 (Ct. App. 2012) (finding "[b]ecause Stephens did not present this argument to the trial court, the court was not given the opportunity to exercise its discretion as to that argument, and the argument is not preserved for appeal."); State v. Sosebee, 284 S.C. 411, 413, 326 S.E.2d 654, 655 (1985) (finding "[n]o objection was made to either of these alleged errors nor was a motion for a new trial made such that the judge might have an opportunity to correct a mistake if there be such."); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724-25 (2000) ("Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. . . It prevents a party from keeping an ace card up his sleeve – intentionally **or**

by chance – in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.") (Emphasis added, citations omitted).

Any error is harmless.

In Cheeks, the concern was that the instruction would undermine the mere presence instruction. However, the Supreme Court found the error harmless because Cheeks was found by law enforcement in the act of cooking crack cocaine. Cheeks, supra. In the instant case, there was no direct evidence presented that Appellant had actual knowledge. Instead, actual knowledge was proved by circumstantial evidence based on Appellant's control of the premises. Any error was harmless based on the relation of the instruction to the facts of the case. The "materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Thompson, 352 S.C. 552, 575 S.E.2d 77, 83 (2003).

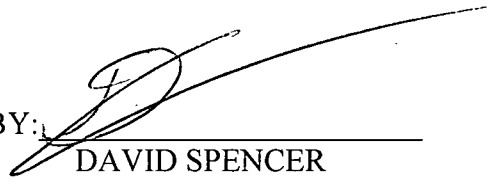
CONCLUSION

For all of the foregoing reasons, the State would respectfully request this Court to grant this petition for rehearing, address the error preservation issues, find the issue was not properly raised on appeal and not properly preserved for review, and affirm the conviction and sentence.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General



BY: _____
DAVID SPENCER

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

ATTORNEYS FOR RESPONDENT

May 12, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Lexington County
Honorable R.Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

vs.

TRAVAS D. JONES,

APPELLANT.

PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the State's Petition for Rehearing on Appellant's Attorney by depositing a copy of the same in the United States mail, postage prepaid, addressed to Lanelle C. Durant, Esquire, Appellate Defender, SC Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 12th day of May, 2014.

Norma Bigbee
Administrative Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL

May 12, 2014

VIA HAND DELIVERY
The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: **State of South Carolina v. Travas D. Jones**
Appellate Case No: 2012-211992

Dear Ms. Kitchings:

Enclosed please find the Original and one (1) copy of the State's Petition for Rehearing in the above case.

Sincerely,

David Spencer
Senior Assistant Attorney General
Bar No: 68571

DS/nb

Enclosures

cc: Lanelle C. Durant, Esquire
Trisha Allen