

STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Horry County
The Honorable Steven H. John, Circuit Court Judge

Opinion No. 2014-MO-020 (S.C. Sup. Ct. filed 6/18/2014)
Appellate Case No. 2011-199609

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THE STATE OF SOUTH CAROLINA,

RESPONDENT, **S.C. Supreme Court**

v.

ERIC DANTZLER,

PETITIONER.

PETITION FOR REHEARING

On June 18, 2014, this Court reversed Petitioner's conviction for trafficking in cocaine, concluding that the trial judge erred by denying Petitioner's directed verdict motion. Specifically, this Court found that, although the "knowledge" element was not in dispute, there was insufficient evidence that Petitioner had a right to exercise dominion and control over the cocaine. The State submits that this Court overlooked or misapprehended the points discussed below.

I. This Court Overlooked the Language in S.C. Code § 44-53-370(e)

Petitioner was charged with a violation of § 44-53-370(e)(2)(A). Subsection (e) states as follows:

Any person who knowingly sells, manufactures, cultivates, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, cultivate, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession **or who knowingly attempts to become in actual or constructive possession** of . . . [various quantities of drugs] (emphasis added).

The language emphasized above makes it clear that the State can establish a violation of this section by proving that a defendant knowingly *attempted* to become in actual or constructive possession of drugs, even if the State does not prove the defendant was knowingly “in actual or constructive possession” of the drugs. In Petitioner’s case, this Court specifically recognized that the evidence presented left no doubt about Petitioner’s knowledge of the drugs, with this Court acknowledging that Petitioner’s “flight demonstrates evidence of guilty knowledge and intent” and stating that “Petitioner does not contend that he lacked knowledge.” State v. Dantzler, Op. No. 2014-MO-020 (S.C. Sup. Ct. filed June 18, 2014), p. 3 of 10. This Court also acknowledged in its opinion that Petitioner made “attempts to control the disposition of the vehicle.” Dantzler Opinion, p. 7 of 10. Thus, based on Petitioner’s knowledge of the drugs and his concerted attempts to take control of the vehicle containing the drugs, the evidence supported that Petitioner “knowingly attempt[ed] to become in actual or constructive possession” of the drugs. At the very *least*, the evidence created a jury question on the issue. Although the State raised this issue at oral argument, this Court overlooked this point and instead decided the case solely based on the constructive possession issue. Respectfully, the State submits that this Court should grant its petition for rehearing and affirm the conviction due to the substantial circumstantial evidence supporting that Petitioner knowingly attempted to become in actual or constructive possession of the cocaine.

This Court is authorized to affirm a conviction based upon any ground appearing in the record. See Rule 220(c), SCACR. In this case, the “knowingly attempted” language discussed above is contained in Petitioner’s indictment and was specifically charged to the jury. (See R. p. 182, lines 10-11; p. 204). There was testimony supporting that Petitioner knowingly attempted to come into possession of the cocaine. (See R. p. 4, line 22 – p. 5,

line 1; p. 35, lines 18-21; p. 36, lines 11-23; p. 48, lines 18-25; p. 63, lines 21-25; see especially p. 65, lines 8-18 & p. 72, lines 3-20; p. 81, line 17 – p. 82, line 1; p. 88, lines 17-25; p. 95, lines 17-22; p. 104, line 25 – p. 105, line 8; p. 106, lines 21-25; p. 125, lines 16-24). Notably, in denying the directed verdict motion, the trial judge specifically mentioned Petitioner’s attempts to exercise control over the vehicle. (See R. p. 175, line 22 – p. 176, line 3).

For those reasons, the State respectfully urges this Court to address this additional sustaining ground because it would truly be a travesty of justice to reverse Petitioner’s conviction when the conviction was entirely proper based upon the evidence supporting Petitioner’s knowing attempts to possess the cocaine, a ground that was fleshed out in the trial below and was properly before the jury. See I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (“It is within the appellate court’s discretion whether to address any additional sustaining grounds.”). The denial of the directed verdict motion was proper based upon Petitioner’s knowing attempts to possess the cocaine even assuming it was error to deny the motion based upon constructive possession. See Securities and Exchange Com. v. Chenery Corp., 318 U.S. 80, 88 (1943) (the decision of a lower court must be affirmed if the result is correct even where the lower court relied upon a wrong ground or gave a wrong reason). Therefore, the State implores this Court to overturn its June 18, 2014 opinion and affirm the denial of Petitioner’s directed verdict motion due to the substantial circumstantial evidence supporting that Petitioner knowingly attempted to come into possession of the cocaine.

II. This Court Erred in Finding Insufficient Evidence of Petitioner’s Right to Exercise Dominion or Control over the Cocaine

The State also respectfully submits that this Court erred in concluding that there was insufficient evidence that Petitioner had the right to exercise dominion and control

over the cocaine. When reviewing a denial of a directed verdict, this Court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Brandt, 393 S.C. 526, 542, 713 S.E.2d 591, 599 (2011). In a drug case, a directed verdict should not be granted even where there is evidence that more than one person had the right to exercise control over the drugs because constructive possession may be shared by two or more persons. See, e.g., State v. Halyard, 274 S.C. 397, 400, 264 S.E.2d 841, 842 (1980); State v. Hudson, 277 S.C. 200, 202, 284 S.E.2d 773, 775 (1981). Finally, and most significantly, at the directed verdict stage, a trial judge is **not** required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis. State v. Ballenger, 322 S.C. 196, 199, 470 S.E.2d 851, 853 (1996); see also State v. Littlejohn, 228 S.C. 324, 328, 89 S.E.2d 924, 926 (1955) (“It must be remembered, too, that there is one test by which circumstantial evidence is to be measured by the jury in its deliberations, and quite another by which it is to be measured by the trial judge in his consideration of the accused’s motion for a directed verdict.”).

The primary evidence constituting substantial circumstantial evidence of Petitioner’s guilt is as follows:

- (1) the guilty knowledge established by Petitioner’s headlong flight (and subsequent disappearance) at the precise moment the officer opened the glove box;
- (2) the close relationship between Petitioner and the driver of the vehicle who physically possessed the key to the glove box, and the fact that the couple had been in shared possession of the vehicle over an extended period of time;
- (3) Petitioner’s close proximity to both the drugs and the key to the glove box considered alongside the fact that he was seated beside his girlfriend who possessed the key to the glove box; and
- (4) Petitioner’s repeated attempts to come into possession of the vehicle by trying to convince police to allow him to be responsible for the car rather than having the car towed.

The State respectfully submits that this Court overlooked the significance of the factors supporting that Petitioner had the right to exercise dominion and control over the drugs. Specifically, this Court (1) failed to appreciate the full probative value of the circumstances of Petitioner's flight, (2) erroneously conflated "right" to exercise dominion and control with "legal right," and (3) placed undue significance on the fact that Petitioner did not have physical possession of the key to the glove box at the time of the stop.

Petitioner's Flight Revealed Consciousness of Guilt

First, the State submits that this Court failed to appreciate the probative value of the circumstances of Petitioner's flight in this case. Petitioner's headlong flight and subsequent disappearance did not only demonstrate his knowledge; it also demonstrated that Petitioner *consciously felt guilty* about the drugs. See State v. Pagan, 369 S.C. 201, 209, 631 S.E.2d 262, 266 (2006) ("Flight from prosecution is admissible as guilt.") (citations omitted); State v. Thompson, 278 S.C. 1, 10-11, 292 S.E.2d 581, 587 (1982), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (attempts to run away are evidence of guilty knowledge and intent and are admissible to prove a defendant tried to avoid apprehension); State v. Freely, 105 S.C. 243, 250, 89 S.E. 643, 645 (1916) ("The flight of one charged with crime has always been held to be some evidence tending to prove guilt. Solomon wrote as a proverb the 'wicked flee when no man pursueth;' and Shakespeare made guilty Hamlet to soliloquize that 'conscience does make cowards of us all.' "); State v. McDowell, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976) ("As a general rule, any guilty act, conduct, or statements on the part of the accused are admissible as some evidence of consciousness of guilt."); State v. Williams, 350 S.C. 172, 175-76, 564 S.E.2d 688, 690-91 n7 (Ct. App. 2002) (noting that unexplained flight, concealment, and analogous conduct is admissible as evidence of consciousness of guilt

because it is to be supposed that a person who is innocent and conscious of that fact would flee) (citations omitted); see also State v. Crawford, 362 S.C. 627, 635, 608 S.E.2d 886, 890 (Ct.App.2005); State v. Ballenger, 322 S.C. 196, 200, 470 S.E.2d 851, 854 (1996); State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999); Town of Hartsville v. Munger, 93 S.C. 527, 77 S.E. 219 (1913); State v. Brownlee, 318 S.C. 34, 455 S.E.2d 704 (Ct.App.1995); State v. Grant, 275 S.C. 404, 407, 272 S.E.2d 169, 171 (1980); State v. Davis, 354 S.C. 348, 580 S.E.2d 778 (Ct.App.2003). This Court overlooked the well-established case law holding that flight shows consciousness of guilt.

Consciousness of guilt is significant because one can reasonably infer that the *reason* Petitioner felt guilty was because the drugs belonged to him and were under his control. Therefore, his flight served as evidence of his right to exercise dominion and control *in addition to* revealing his knowledge of the substance. In its Opinion, this Court stated that “mere presence, even before the incident leading to the discovery of the contraband, will not support the denial of a directed verdict motion.” Dantzier Opinion, p. 8 of 10. However, the circumstances of Petitioner’s flight in this case *directly contradict* the notion that he was merely present, because headlong flight is the exact opposite of being merely present. See Illinois v. Wardlow, 528 U.S. 119, 125 (2000) (unprovoked flight is the exact opposite of going about one's business). In sum, this Court overlooked and failed to appreciate that both knowledge **and** the right to exercise dominion and control could be inferred from the singular fact of Petitioner’s flight in this case.

“Right” to Exercise Dominion or Control

Second, this Court’s opinion clearly misconstrued the “right to exercise dominion and control” element. This Court found that the fact that law enforcement officers thwarted Petitioner’s attempts to control the vehicle “cuts against the proposition that

Petitioner had a right to control this vehicle.” Dantzer Opinion, p. 7 of 10. This Court further stated, “[i]f Petitioner did, in fact, have a right to exercise control over this vehicle, then presumably, the officers would have permitted him to designate someone else to drive the car.” Id. Respectfully, the Court’s conclusions in this regard are flawed.

This Court overlooked the fact that the “right” to exercise dominion or control does not refer to a “legal” right; obviously no one has a legal right to possess illegal contraband. Instead, the “right” to exercise dominion or control simply means the power or ability to control.¹ See State v. Kimbrell, 294 S.C. 51, 54, 362 S.E.2d 630, 631 (1987) (“In order to prove possession of contraband, the State must prove that a defendant has “both the power and intent to control its disposition or use.”); State v. Goldsmith, 301 S.C. 463, 466, 392 S.E.2d 787, 788 (1990) (possession “is imputed to one who has the power and intent to control the disposition or use of contraband”). Law enforcement officers’ behavior and conduct cannot be a factor in whether or not a person, prior to the involvement of the police, had the right or power to control the disposition of an object. Law enforcement officers’ subjective judgments about a person’s legal right to control something have nothing to do with whether or not that person actually had the power or ability to control the object prior to encountering the police.² In that vein, the operative time period for when a defendant has the “right” to control contraband is prior to police involvement, not afterwards.

¹ Note that recent cases discussing possession of contraband typically state that constructive possession occurs when a defendant has “dominion and control” or the “right to exercise dominion and control” over the contraband, coupled with knowledge of the substance. See, e.g., State v. Heath, 370 S.C. 326, 329, 635 S.E.2d 18, 19 (2006). However, the “power” to control the contraband is synonymous with the “right to exercise dominion and control,” and the “intent” to control encompasses the “knowledge” element.

² An obvious problem with this would be that law enforcement officers are not infallible and could make erroneous judgments about a person’s legal right to control something.

Perhaps due to this Court's erroneous conflation of "legal right" with the power or ability to control, this Court overlooked the fact that a defendant's subjective belief that he has the power or ability to control the contraband is strong evidence that he did in fact have such power, particularly where his knowledge of the presence of the contraband is clear. Here, Petitioner clearly *believed* he had the power to control the vehicle and the cocaine inside it because he repeatedly tried to convince officers to allow him to be responsible for the vehicle. As Chief Justice Toal aptly pointed out in her dissent, Petitioner's conduct after his girlfriend was arrested demonstrated his "apparent authority" over the vehicle and its contents. Dantzler Opinion, p. 10 of 10 (Toal, C.J., dissenting). The majority opinion improperly discounted the evidence supporting Petitioner's apparent authority over the vehicle because it erroneously focused on the officers' conduct rather than on Petitioner's own conduct.

Possession of Glove Box Key

Finally, the State submits that this Court placed undue emphasis on the fact that the police never observed Petitioner in actual physical possession of the key to the locked glove box. Initially, the State submits that actual physical possession of the glove box key should not be a prerequisite to a conviction because this would create a safe haven for people who knowingly transport drugs. Drug dealers could set up operations where their drugs are placed inside a car's glove box and the key is shipped directly to the ultimate recipient of the drugs. The "drug mule" who knowingly transports the drugs by driving the car from the drug dealer to the recipient could never be convicted of trafficking drugs

because he or she never physically possessed the key to the glove box.³ Surely such an absurd result must be avoided.

In Appellant's case, the fact that the glove box was locked at the time the vehicle was stopped and the key to it was on the ring of keys in the ignition should not insulate Petitioner from criminal liability where other circumstances indicated Petitioner had the power and ability to control the entire vehicle and its contents. Again, Petitioner and his girlfriend, the person having physical custody of the key to the glove box at the time the car was stopped, had been together for an extended period of time and had been observed together in that very vehicle on several occasions. These facts make this case distinguishable from State v. Brown, cited by this Court in its opinion, because in Brown there was no evidence of "any special relation" between the defendant and the driver and no evidence the defendant "was a close friend of the driver." Brown, 267 S.C. 311, 315-16, 227 S.E.2d 674, 676 (1976). Further, when the special relationship is considered alongside Petitioner's apparent authority over the vehicle, as discussed above, the consciousness of guilt illustrated by Petitioner's headlong flight, and Petitioner's close proximity to the key in his girlfriend's physical possession, there is a reasonable inference to be drawn that both Petitioner and his girlfriend were in shared possession of the key to the glove box. In the State's view, considering the circumstances present in this case, it strains credulity to suggest that the lock on the glove box served as any impediment to Petitioner's access to the cocaine.

CONCLUSION

In sum, there was evidence presented supporting that Petitioner had the power to control the disposition or use of the cocaine. When coupled with the clear evidence of

³ Similarly, a valet key would allow a "drug mule" to drive the car but not access locked areas such as a glove box or trunk.

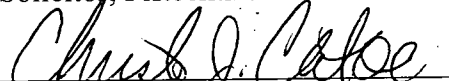
Petitioner's knowledge of the substance, a jury question was created on the issue of constructive possession. Notably, even if the evidence suggested that Petitioner only had the right or power to possess the cocaine temporarily while his girlfriend was in police custody, this was still sufficient to support a conviction. See Kimbrell, 294 S.C. at 54, 362 S.E.2d at 631 (evidence was sufficient to sustain conviction where the evidence reflected that the defendant had the power and intent to control the drugs during the time her ex-husband, the drug dealer, was outside of the house). Furthermore, the unique combination of circumstances at play in this case, and particularly Petitioner's headlong flight at the precise moment the glove box was opened and his conduct establishing his apparent authority over the vehicle, distinguish this case from the cases cited by this Court in its opinion. Accordingly, for all of the reasons discussed above, the State respectfully requests that this Court grant its Petition for Rehearing, overturn its June 18, 2014 opinion, and affirm Petitioner's conviction.

Respectfully submitted,

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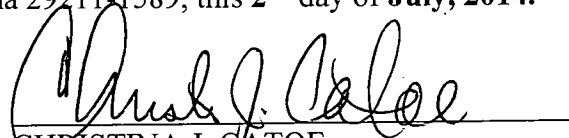
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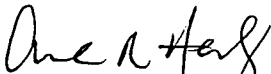
The undersigned hereby certifies that a copy of the State's **Petition for Rehearing** in the above-referenced matter has been served upon **Kathrine H. Hudgins**, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **2nd** day of **July, 2014**.



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SWORN to before me this **2nd** day of July, 2014.



Notary Public for South Carolina

My Commission Expires:

7/18/2017