STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

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JUL 21 2014

S.C. Supreme Court

THE STATE,

Petitioner,

vs.

TRAVAS D. JONES,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON APPEAL

The Court of Appeals erred in reversing the conviction and sentence for an issue that was not raised in the statement of issues and not raised at trial. If Respondent requested the offending language be removed from the jury instructions, the trial court would likely have complied with the request. Further, any error from the instruction was not prejudicial and harmless beyond a reasonable doubt.

STATEMENT OF THE CASE

Appellant Travas Jones was indicted for trafficking over ten grams of crack cocaine, possession with intent to distribute cocaine, and possession of a weapon during a crime of violence. A jury found Jones guilty as charged after trial on April 4-6, 2012, over which the Honorable R. Knox McMahon presided. On May 7, 2012, Judge McMahon sentenced Jones to concurrent terms of eighteen years' imprisonment for each drug conviction and five years' imprisonment for the weapons charge.

Jones appealed his conviction and sentence. On appeal, Jones raised the following argument in his sole statement of issue:

> 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 The Court of Appeals reversed the conviction and sentence on a separate ground in an unpublished opinion. State v. Travas D. Jones, No. 2014-UP-180 (S.C. Ct. App., filed April 30, 2014). The State filed a petition for rehearing on May 12, 2014, and Jones answered with a return to the petition for rehearing. The Court of Appeals denied the State's petition by order filed June 19, 2014. This petition for writ of certiorari follows.

STATEMENT OF FACTS

Jones' arrest and conviction came about after Officer Edward Pereira did some surveillance on a house based on a report from a concerned neighbor. The neighbor [Neighbor] happened to be a Columbia Police Department Officer who observed heavy vehicular traffic at Jones' residence during all hours of the day. People would arrive in vehicles, go inside the residence, and leave after a few minutes. Neighbor, a law enforcement officer, was experienced in making drug cases and doing surveillance, so she was suspicious that the residence was a drug house. She did not have a take-home patrol car and was not wearing a uniform at work then because she was on light duty. She had seen Jones at the house before and talked with him about his dog that he kept in the yard at the house. Concerned by what she observed, she called Officer Pereira. ROA. pp. 104-112.

Officer Edward Pereira testified that he started surveillance after he received the tip from Neighbor. He observed a vehicle pull up to the house, the person enter, and then leave again within minutes. A vehicle in the drive way was registered to Bernice Pearson, Jones' mother. Pereira conducted a trash pull and found loose tobacco and residual amounts of a leafy green substance he submitted for testing. Pereira did his second trash pull on November 7 and found leafy green substances again. Additionally, he found Swisher cigars, which are often used to make marijuana cigarettes by taking the tobacco out of the cigar and substituting the marijuana. He also found a piece of paper with names and numbers. Periera obtained a search warrant which led to narcotics and drug paraphernalia being seized at the house. Jones was present at the house when the search was executed and he was arrested. An arrest warrant was issued for his brother, Theyatti Glover. ROA. pp. 30-47. When Jones was arrested, he had $670 in cash in a

wad in his pants. ROA. pp. 162-163.

Officer Caleb Thomas testified that the search warrant was executed on November 15 and he found Jones playing cards at a table with others. There was a bag of crack cocaine and a bag of powder cocaine behind a heater. Individually packaged rocks of cocaine and a bag of cocaine were found in the kitchen drawer. Also in the drawer were two digital scales. A Pyrex measuring cup was found, which Officer Thomas testified was commonly used to cook powder cocaine into crack cocaine. ROA. pp. 77-86; see ROA. pp. 141-144 (Officer Evan Antley's testimony that he observed Thomas open the drawer to find two crack cookies, a bag of powder cocaine, a playing card, and digital scales); ROA. pp. 208-209 (results of the forensic analysis identifying the powder and rocks to determine they were powder cocaine and crack cocaine).

Willie Glover, Jones' stepdad, testified on behalf of Jones that he put the drugs in the kitchen drawer, but that the drugs behind the heater were not his. He claimed he was carrying them for a friend. ROA. pp. 220-225. Victoria Walker also testified for Jones and claimed Jones lived with her until November 2, 2011.

Ricky Williams is the property owner of the house where the Cayce Public Safety Officers executed the search warrant. He entered into a lease agreement with Bernice Pearson on June 25, 2011. However, from the start, Jones was at the house and paid the rent. Willaims was familiar with Jones from the start and assumed he was living there. Jones moved in November 2, 2011, and his name was added to the lease on November 15, 2011. ROA. pp. 120-125.

A gun was found in the middle of the mattress in one of the bedrooms. Also in the same bedroom was a Lexington County Medical Center folder with Jones' name on it. ROA. pp. 129-135.

ARGUMENT

The Court of Appeals erred in reversing the conviction and sentence for an issue that was not raised in the statement of issues and not raised at trial. If Respondent requested the offending language be removed from the jury instructions, the trial court would likely have complied with the request. Further, any error from the instruction was not prejudicial and harmless beyond a reasonable doubt.

The Court of Appeals reversed Jones' convictions and sentences becasue the trial court 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 on appeal, this Court found this instruction improper in State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480 (2013). However, the Court of Appeals erred because (1) the issue was not properly raised by Jones to the Court of Appeals 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.

Jones 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 Jones in his brief set forth the following Statement of Issue:

> 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 Appellant 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 for which the Court of Appeals reversed the conviction and sentence

"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).

"Every ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to grope in the dark to ascertain the precise point at issue." Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) (also citing Rule 208(b)(1)(B) and affirming the Court of Appeals decision because petitioner's statement of the issue resulted in the Court of Appeals having to "grope in the dark" to ascertain the issue raised) (quotation marks and citation omitted) *quoted in* Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 643 (2011).

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

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

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, the Court of Appeals 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 Jones' brief to Cheeks does not occur until the fifth page of argument. Final Br. of App. p. 9. Jones then comments that defense counsel's request to charge did not contain the same language, but Jones 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 Court of Appeals' failure to address Rule 208 in its opinion rewarded Jones for making an end-run around Jones' error preservation issues.

The issue was never raised to the trial court.

Undeniably, Jones never requested that the trial court remove the "strong evidence" language from the trial court's instruction. "An issue that was not preserved

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.

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 Jones' 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). Jones 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 Jones had control over the contraband based on the abundant evidence that Jones 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 Jones' 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 Jones 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 Jones had actual knowledge. Instead, actual knowledge was proved by circumstantial evidence based on Jones' 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, this Court should grant the petition for writ of certiorari, reverse the Court of Appeals opinion, and affirm Respondent's convictions and sentences.

Respectfully submitted,

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The Honorable R. Knox McMahon, Presiding Judge

Appellate Case No: 2012-211992

THE STATE,

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PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Petition For Writ of Certiorari on respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney, LaNelle C. Durant, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211.

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

This 21st day of July, 2014.

Ellen R. DuBois

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