STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

R. Knox McMahon, Circuit Court Judge

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AUG - 7 2014

S.C. Supreme Court

THE STATE,

PETITIONER,

V.

TRAVAS D. JONES,

RESPONDENT

APPELLATE CASE NO. 2014-001563

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals was correct in reversing Respondent's convictions because the jury charge on constructive possession failed to advise the jury that proof of possession requires more than proof of control over the premises where an item is found?

STATEMENT OF THE CASE

On January 9, 2012, the Lexington County Grand Jury indicted Travas D. Jones on the charges of trafficking crack cocaine more than ten grams but less than twenty-eight grams, possession with intent to distribute cocaine (PWID), and possession of a weapon during a crime of violence. On April 4-6, 2012, Jones proceeded to trial before the Honorable R. Knox McMahon and a jury. Jones was represented by Wayne Floyd, and the state was represented by Charles William Whetstone and Christopher Dale Scott. The jury found Jones guilty as indicted. On May 7, 2012, Judge McMahon held a hearing for sentencing. The judge sentenced Jones to eighteen years on the trafficking crack cocaine and PWID cocaine as second offenses, and to five years on the possession of a weapon charge. All sentences were to run concurrently. Jones appealed his convictions and sentences. The Court of Appeals reversed the convictions and sentences on April 30, 2014. State v. Jones, No. 2014-UP-180 (Ct. App. filed April 30, 2014). The state filed a petition for rehearing on May 12, 2014, and Jones filed a return on May 20, 2104. The Court of Appeals denied the state's petition on June 19, 2014. The state then filed a petition for a writ of certiorari on July 21, 2014. This return to the petition follows.

STATEMENT OF FACTS

Travas Jones and his half-brother, Theyatti Glover, lived in a rented house in the Twelfth Street area in Cayce. Both of their names were on the lease. R. 10, ll. 20 – R. 12, ll. 24; R. 121, ll. 5 – 25.

In September 2009, Jennifer Meador, who lived next door to Jones, called the police to report that she believed there was drug activity at Jones' house. She reported that there was heavy vehicle traffic next door all hours of the day and night. Cars would stop, a person would go inside for about two minutes and return to the car which then drove away. R. 104, ll. 13 – 24; R. 105, ll. 25 – R. 107, ll. 23.

The police then began a surveillance of the house in September 2011 following Ms. Meadors' call. R. 23, ll. 15 – 18; R. 24, ll. 5 – 9; R. 25, ll. 12 – 22; R. 27, ll. 20 – R. 28, ll. 25. On November 10, 2011, Detective Ed Pereira obtained a search warrant for Jones' address. R. 42, ll. 22 – R. 43, ll. 1. On November 14, 2011, Detective Pereira along with several other officers executed the search warrant on Jones' house. R. 43, ll. 2 – R. 44, ll. 25.

When the police entered the house, they found one black male standing outside and five people inside the house sitting arounda table playing cards. R. 44, ll. 8 – R. 46, ll. 1; R. 72, ll. 14 – 24; R. 77, ll. 7 – R. 78, ll. 25. None of the five people had drugs on their person, but drugs were found at different places in the house as well as one Hi-Point .40 caliber handgun, digital scales, green leafy substance, and other drug paraphernalia. The crack cocaine was twenty-eight grams, and the cocaine was two grams. Appellant Travas Jones along with Bradley West and Theyatti Glover, were charged with trafficking crack cocaine and possession of cocaine. Jones was also charged with the possession of a weapon during a crime of violence. Glover was not at the house at the time, but warrants were issued for him. R. 46, ll. 14 – 48, ll. 5; R. 100, ll. 5 – 13.

Officer Thomas helped search the house during the execution of the search warrant. The police found a gun under a mattress in the first bedroom which also had paperwork with Jones' name on it. A bag of crack and a bag of cocaine were found behind the heater in the main room. R. 72, ll. 14 – 24; R. 76, ll. 4 – 23; R. 79, ll. 11 – R.81, ll. 24. Officer Caleb searched the kitchen where he found in a drawer several plastic bags with crack cocaine and cocaine. R. 81, ll. 20 – R. 82, ll. 16.

Willie Glover, stepfather to Jones and father to Theyatti Glover, testified that he had been at the house on the morning of the incident. He put the gun under the mattress and put the crack cocaine in the kitchen drawer. Jones did not know Glover had these items nor that Glover left them in his house. R. 220, ll. 1 – R. 221, ll. 13.

Glover was holding the gun and drugs for a friend of his. Glover needed to go to the store to get beer, and stayed longer than he expected. When he returned, he saw the police cars and did not stop. R. 221, ll. 1 – R. 222, ll. 8.

Defense counsel asked for a dismissal of the charge against Jones based on Willie Glover's testimony which the judge denied. The judge said the jury could still find Jones guilty of constructive possession. The judge said this was a case of constructive possession and mere presence. R. 230, ll. 2 – R. 231, ll. 25. The judge had Willie Glover arrested outside the presence of the jury. R. 229, l. 16 – 23.

Defense counsel submitted a request for a jury charge on constructive possession. R. 233, ll. 6-11. The judge later told the attorneys what his constructive possession charge will be. The judge stated his charge was:

> Constructive possession means that the defendant had the dominion and control or the right to exercise dominion and control over either the crack cocaine or the property on which the crack cocaine was found. Mere presence at the scene where the drugs were found is not enough to prove possession. **Actual knowledge of the presence of the crack cocaine is strong evidence**

> **of the defendant's intent to control its disposition.** The defendant's knowledge and possession may be inferred the defendant's intent to control when a substance is found on the property under the defendant's control; however, the inference is simply an evidentiary fact to be taken into consideration by you along with the other evidence in the case and to be given the weight you decide it should. Two or more persons may have possession of a drug.

R. 233, ll. 6 – R. 234, ll. 9. [Emphasis added]

Defense counsel requested the judge to include the language that "proof of possession of an item requires more than proof of control over the premises where the item is found." R. 235, ll. 1 – R. 236, ll. 19. The judge said he took the charge from the case of State v. Ballenger, 322 S.C. 196, 470 S.E.2d 355 (Ct. App. 1995) which provided that constructive possession required dominion and control over either the drugs or the premises where the drugs were found *as well as knowledge of the presence of the drugs*. R. 236, ll. 20 – R. 237, ll. 7.

Defense counsel argued that it still seemed to indicate that if the jury believed Travas Jones was the person in control of the property through the lease, that jury instruction seemed to say that was all that was necessary to convict him. The judge disagreed and denied his request. Counsel asked that his objection be noted for the record. R. 237, ll. 1 – 22.

Later during the discussion of jury charges, defense counsel again argued against the constructive possession charge. He argued that if the jury read the instruction literally, the jury could believe that if Jones was just present there, he might not be guilty. But if he owned the premises, then he had to be guilty. R. 238, ll. 20 – R. 239, ll. 14.

There followed a lengthy discussion of the charge. The judge finally said he was "sticking' with his charge, but that defense counsel was protected on the record. R. 239, ll. 15 – R. 244, ll. 22.

The judge instructed the jury with the charge as he stated initially above. R. 288, ll. 10 – R. 289, ll. 5. Defense counsel objected to the jury charge on constructive possession. The judge again told him he was protected on the record. R. 295, ll. 24 – R. 296, ll. 297, ll. 4.

During deliberations, the jury sent the judge a note asking if the gun had to be in direct possession or in his dominion of the premises of the house to be considered in his possession. The judge said he would charge the jury again on constructive possession. R. 297, ll. 9 – R. 298, ll. 5.

Defense counsel objected stating this was the issue he had been concerned about with the judge's charge on constructive possession. Counsel argued again that the jury seemed to believe that if Jones was in control of the property, then he was responsible for everything on the premises. Counsel asked the judge to incorporate into the constructive possession charge the language he had requested earlier that mere ownership of the premises or control of the premises was not sufficient in and of itself for possession. R. 298, ll. 1 – 18. The judge recharged the same language in his constructive possession charge. R. 303, ll. 23 – R. 304, ll. 18. Defense counsel objected again after the recharge. R. 306, ll. 15 – R. 307, ll. 17.

After the verdict, defense counsel moved for a new trial based on his motions and objections. He renewed his objection to the court's refusal to charge his requested charge on constructive possession. The judge denied the motion. R. 309, ll. 1 – R. 310, ll. 25.

ARGUMENT

The Court of Appeals was correct in reversing Respondent's convictions because the jury charge on constructive possession failed to advise the jury that proof of possession requires more than proof of control over the premises where an item is found.

The Court of Appeals correctly relied on State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480 (2013) in ruling that a jury instruction that "actual knowledge of the presence of a drug is strong evidence of intent to control its disposition or use" is improper as an expression of the judge's view of the weight of certain evidence, and the "bench is to no longer use the instruction." The trial judge in Jones' case used the very same instruction in his charge to the jury on constructive possession which was in error. The trial judge told the jury: "Actual knowledge of the presence of the crack cocaine is strong evidence of the defendant's intent to control its disposition." R. 233, ll. 6 – R. 234, ll. 9.

The Court also correctly found that this error was not harmless relying on Taylor v. State, 312 S.C. 179, 183, 439 S.E.2d 820, 822 (1993).

The state argues in its petition for rehearing that this complaint was not raised in Appellant's Statement of Issues. This is in error because the issue was clearly included in the statement of issues because the statement involved the jury charge request that had the same purpose as the issue in State v. Cheeks, *supra.* Defense counsel, on the other hand, submitted a request to charge that was free of error. Defense counsel's Request to Charge #2 provided:

> Proof of possession of an item requires more than proof of control over the premises where the item was found or control over the vehicle in which the item was found. It is also necessary to show that Defendant knew of the item and that Defendant had dominion and control over the item or had the right to exercise dominion and control over it and show that the defendant had the intent to control the disposition and use of the item.

R. 233, ll. 6-11.

In State v. Lemire, 406 S.C. 558, 753 S.E.2d 247 (Ct. App. 2013), the Court of Appeals held that when a jury charge is inadequate as given, a party must request further instructions or object on the grounds of incompleteness to preserve the issue for appellate review. Defense counsel did.

The state also argued that the issue was never raised to the trial court. This is in error as seen by the jury instruction requested by defense counsel which charge very obviously omits the erroneous language as stated in State v. Cheeks, *supra.* By its omission, defense counsel was clearly raising the issue. At R. 236, ll. 4 – 24, defense counsel is shown responding to the erroneous language. The trial judge and counsel stated:

> **Mr. Scott:** 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 use.
>
> .....
>
> **Mr. Floyd:** The problem I have kind of with it is if you take that little phrase in there, its almost saying if they prove he controlled the property, then he controlled the drugs. It seems to say that in that charge.

R. 236, ll. 13 – 24.

At the time of Jones' trial, State v. Cheeks, id. had not been decided. Counsel did not have the benefit of that ruling but still had the foresight to understand the prejudicial and harmful effect of that language. Cheeks, id. would still apply to Jones' case pursuant to Griffith v. Kentucky, 479 U.S. 314 (1987) which held that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases pending on direct review.

The state's third argument was that the error was harmless. The error was not harmless as the Supreme Court held in Taylor v. State, *supra.* The Supreme Court wrote: "While there was sufficient evidence from which the jury could have inferred the defendant's intent to distribute the cocaine and marijuana, we cannot say beyond a reasonable doubt the jury did not base its verdict on the erroneous jury charge."

In Lowry v. State, 376 S.C. 499, 657 S.E.2d 760 (2008), the Supreme Court held that a jury instruction violates due process if it is reasonably likely that the jury understood the charge to create a mandatory presumption requiring it to infer an element of the offense if the state proved certain predicate facts, thereby relieving the state's burden of proof on an element of the offense. The Court also wrote that when conducting a harmless error analysis, in order to conclude that the error did not contribute to the verdict, the court must find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.

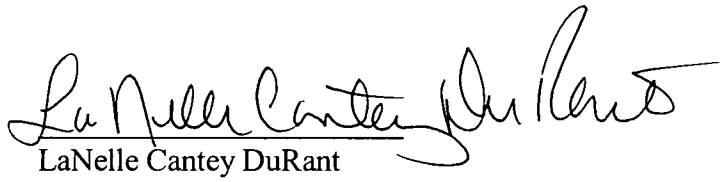
There were no acts or evidence that Jones had knowledge of the presence of the drugs in his home. The only evidence linking him to the drugs was the rental lease. The state did not prove that he had knowledge of the drugs. The judge used the language in his charge that the Supreme Court has instructed judges not to use. This way prejudicial to Jones.

In State v. Williams, 400 S.C. 308, 733 S.E.2d 605 (Ct. App. 2012), the Court also wrote that when reviewing the circuit court's refusal to deliver a requested jury charge, the appellate court must consider the evidence in a light most favorable to the defendant.

CONCLUSION

Based on the above, the state's petition for a writ of certiorari should be denied, and the decision of the Court of Appeals affirmed. Respondent's convictions and sentences should be reversed, and his case remanded for a new trial.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 7th day of August, 2014

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THE STATE,

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CERTIFICATE OF SERVICE

I certify that a true copy of the return to petition for writ of certiorari in this case have been served on David Spencer, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Travas D. Jones #305010, McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 7th day of August, 2014.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 7th day
of August, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.