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THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

DOMINQUE J. SHUMATE,

APPELLANT

Appellate Case No. 2012-212057

Appeal from Greenville County

C. Victor Pyle, Jr., Circuit Court Judge

Opinion No. 2014-UP-410

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SC Court of Appeals

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Dominique J. Shumate petitions the Court for rehearing. First, counsel respectfully submits that the Court misapprehended Petitioner's argument that the search warrant lacked probable cause to search the trailer on lot number 7. The police executed a search warrant on the trailer located on lot number 7. (R. p. 31, lines 7-20). The search warrant was based on a controlled purchase by a confidential informant at a mobile home park located at 120 Old Bleachery Road in Greenville, South Carolina. (R. p. 227). The mobile home park contained possibly as many as nine separate similar looking trailers. (R. p. 13, line 5 –p. 14, line 1). The affidavit in support of the search warrant does not reference lot number 7. (R. p. 225).

The affidavit in support of the search warrant specifically states that the trailer to be searched is, "Entering the trailer park from Edwards Street the residence is the **second** mobile home on the **right**." (bold added) (R. p. 227). The confidential informant, however, in a written statement provided the following information, "I went to the **second** trailer on the **left** when coming off of Edwards St. I was turned down by a black male named 'Blac.' He told me he didn't have any and to move the car. Inv. Woodall then moved the vehicle. I then went to the **first** trailer on the **left**. This trailer is in the middle of the complex. I knocked on the door and a black male opened the door and let me in. I told him I needed $20 and he handed me two crack rocks." (Bold added) (Court's Exhibit #1, Witness statement, R. p. 225). The confidential informant did not identify Petitioner Shumate as the person who sold the drugs earlier. (R. p. 40, lines 2-20).

The search warrant in the present case lacked probable cause because the location of the controlled buy is not clear. While Petitioner initially argued that the affidavit in support of the search warrant failed to establish the reliability of the confidential informant, (R. p. 14, lines 18-23), the focus of the challenge changed when the State finally disclosed the statement by the confidential informant that the controlled buy was made from the first trailer on the left. The affidavit in support of the search warrant states the controlled buy was made from the second trailer on the right. Counsel respectfully submits that this Court's reliance on <u>State v. Bellamy</u>, 336 S.C. 140, 145, 519 S.E.2d 347, 349 (1999) is misplaced as the main challenge to the search warrant in <u>Bellamy</u> was to the reliability of the confidential informant. In <u>Bellamy</u> the Court wrote, "Although the affidavit is weak on the element of the reliability of the informant, this deficiency is compensated for by the strong showing of specificity, first-hand observation, and partial corroboration." 336 S.C. at 145, 519 S.E.2d at 349. The affidavit in the present case is weak on the element of the reliability of the informant and the deficiency is **not** compensated by a showing of specificity. Based on

the statement by the informant, it is unclear in which trailer the controlled buy was made. The magistrate lacked probable cause to issue a search warrant for the trailer on lot number seven.

Counsel respectfully submits that this Court's reliance on State v. Dupree, 354 S.C. 676, 583 S.E.2d 437 (Ct.App. 2003) is also misplaced. The affidavit in the Dupree case contained the following information, "location to be searched is Bobby Dove's Trailer Park off 1711 Percival, Lot # 10." In contrast, the affidavit in the present case omits the lot number. Based on the statement from the informant and the fact that the affidavit does not include a lot number, it is unclear where the controlled buy was made, distinguishing the present case from Dupree. The affidavit in support of the search warrant fails to include sufficiently specific details about the location of the controlled buy. The magistrate lacked probable cause to issue a search warrant for the trailer on lot number seven.

Second, in regard to the trial court's refusal to direct verdicts of acquittal based on Petitioner's mere presence, counsel respectfully submits that the Court overlooked the fact that the State failed to prove that Petitioner exercised dominion and control over the drugs and weapon found in the searched trailer. The State's case against Petitioner was based on the fact that he was found inside the trailer where drugs and a weapon were found. When officers entered the trailer, they found Appellant in a bathroom. There were no drugs found in the bathroom or on Appellant's person. Drugs were found in the kitchen, inside cabinets, above the counter, in an oven mitt and in a bedroom in a coat pocket. The State did not connect the coat in the bedroom to Appellant. A gun and a small amount of crack, .68 grams, were found on the kitchen counter. While Jerry Drummond testified that Appellant contributed money toward utility bills at the trailer, the State failed to present any evidence that Appellant was anything more than an occasional guest at the trailer.

In State v. Halyard, 274 S.C. 397, 400, 264 S.E.2d 841, 842 (1980) the Court wrote, "This court has repeatedly recognized that a conviction for possession of contraband drugs requires proof of actual or constructive possession, coupled with knowledge of the presence of the drugs. To prove constructive possession the State must show a defendant had dominion and control, or the right to exercise dominion and control over the substance. Such possession may be established by circumstantial as well as direct evidence." The defendant's knowledge and possession may be inferred if the substance was found on premises under his control. State v. Adams, 291 S.C. 132, 135, 352 S.E.2d 483, 486 (1987).

In State v. Jackson, 395, S.C. 250, 255, 717 S.E.2d 609, 611-612 (Ct.App. 2011)(cert denied March 6, 2013) the South Carolina Court of Appeals wrote:

> "Conviction of possession of [illegal drugs] requires proof of possession-either actual or constructive, coupled with knowledge of its presence. Actual possession occurs when the drugs are found to be in the actual physical custody of the person charged with possession. To prove constructive possession, the State must show a defendant had dominion and control, or the right to exercise dominion and control, over the [drugs]. Constructive possession can be established by circumstantial as well as direct evidence, and possession may be shared." State v. Hudson, 277 S.C. 200, 202, 284 S.E.2d 773, 774–75 (1981). "Possession requires more than mere presence." State v. Stanley, 365 S.C. 24, 43, 615 S.E.2d 455, 465 (Ct.App.2005). "In drug cases, the element of knowledge is seldom established through direct evidence, but may be proven circumstantially." State v. Hernandez, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009). "Knowledge can be proven by the evidence of acts, declarations, or conduct of the accused from which the inference may be drawn that the accused knew of the existence of the prohibited substances." Id.

Knowledge of the drugs alone, however, is not sufficient to prove constructive possession. In Goldsmith v. Witkowski, 981 F.2d 697, 701 (4th Cir. 1994) the Fourth Circuit Court of Appeals wrote:

> Under South Carolina law, the mere presence of a person in an area containing drugs, absent evidence of his dominion and control over them, is insufficient to prove his possession of the drugs. State v. Tabory, 260 S.C. 355, 196 S.E.2d 111,

> 113 (1973). Again, even presence coupled with knowledge of the drugs is insufficient to sustain a possession conviction; the State must also prove dominion and control. See Kimbrell, 362 S.E.2d at 631. Even if this were not state law, the due process protections of Jackson[1], in our view, would require the invalidation of convictions based solely on evidence of mere presence, as was established in this case.

Appellant was merely present in the trailer. The State failed to prove that Appellant exercised dominion and control over the drugs and gun found inside the trailer. Other than the .68 grams of crack and the gun in plain sight on the kitchen counter, the State failed to prove that Appellant had knowledge of the other drug amounts found in a coat pocket, inside cabinets, above counters and inside an oven mitt. The trial court erred in refusing to direct verdicts of acquittal.

Third, as to the trial judge's refusal to direct a verdict of acquittal on the distribution charge when the state failed to present evidence of a distribution, counsel respectfully submits that this Court overlooked the fact that while counsel erroneously referred to the motion as a judgment notwithstanding the verdict, the motion was a renewal of the directed verdict motion made at the close of the State's case. While not specifically raised when the initial motion for a directed verdict was made, the issue was raised to the trial court when counsel renewed the directed verdict motion. The trial court had an opportunity to rule on the issue. The issue is preserved for appellate review.

After the jury returned with the verdicts, Appellant renewed all previously made motions and specifically argued that the distribution charge and the trafficking charge encompass the same action. R. p. 205, lines 8-16. The State argued, "The distribution manufacturing charge of crack cocaine stems from the evidence of their manufacturing the crack cocaine in the microwave, the tupperware, the razor blades with the intent to therefore distribute." (R. p. 206, lines 2-6). The trial

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[1] Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 61 L.Ed.2d 560 (1979).

judge denied the motion. The trial judge erred. The indictment fails to allege the manufacture of crack cocaine.

The indictment for distribution of cocaine base reads, "That DOMINIQUE JARARD SHUMATE did in Greenville County, on or about the 18th day of November, 2010, distribute, dispense, deliver, or aid, abet, or conspire to distribute, dispense or deliver to an undercover operative a quantity of Cocaine Base (Crack Cocaine), a controlled substance, such distribution not having been authorized by law. This is in violation of §44-53-375 of the South Carolina Code of laws (1976) as amended."

The State presented no evidence of a distribution and specifically stated at trial that no charges were made as a result of the CI buy. (R. p. 79, lines 10-12). As discussed in issue one, the CI buy was intended to be the basis of the search warrant rather than a basis for a substantive charge. Appellant was also charged with trafficking in crack cocaine. Any evidence of an intent to distribute based on weight was subsumed by the trafficking charge.

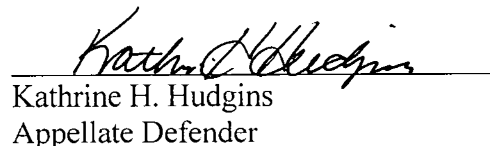
The indictment alleges a distribution of crack cocaine and the State failed to present evidence of a distribution of crack cocaine. The judge should have directed a verdict of acquittal. Even if the indictment can somehow be read to include a manufacturing charge based on the reference to S.C. Code §44-53-375, there was no evidence that Appellant manufactured the crack cocaine. The State failed to connect the Appellant to any of the items forming the State's basis for the manufacturing charge, the microwave, the tupperware and the razorblades. The judge erred in refusing to direct a verdict of acquittal for the distribution of crack charge when trial counsel raised the issue after the jury returned verdicts.

Additionally, Rule 19 S.C.Crim.P. provides, "On motion of the defendant or on its own motion, the court shall direct a verdict in the defendant's favor on any offense charged in the

indictment after the evidence on either side is closed, if there is a failure of competent evidence tending to prove the charge in the indictment. In ruling on the motion, the trial judge shall consider only the existence or non-existence of the evidence and not the weight." The motion, while incorrectly referred to a JNOV, was a timely made renewal of the motion for a directed verdict on the distribution charge. The judge erred in refusing to direct a verdict of acquittal on the distribution charge when the state failed to present evidence of a distribution.

For all of the above reasons, Petitioner respectfully seeks rehearing and upon rehearing asks this Court to reverse the sentences and convictions and remand for the entry of a judgments for acquittal based on mere presence and the State's failure to prove a distribution of cocaine base. Alternatively, counsel asks this Court to reverse and remand for a new trial based on the fact that the affidavit in support of the search warrant lacked probable cause to serch the trailer located on lot #77.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

This 25th day of November, 2014.

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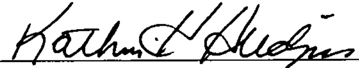
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Mary S. Williams, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 1st day of December, 2014.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 1st day of December, 2014.

(L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021 .