STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Victor Pyle, Circuit Court Judge
Appellate Case Tracking No. 2012-212057

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SC Court of Appeals

The State, Respondent,

vs.

Dominique Shumate, Appellant.

RETURN TO PETITION FOR REHEARING

On November 19, 2014, this Court properly affirmed Appellant's conviction and sentence. State v. Shumate, Op. No. 2014-UP-410 (S.C. Ct. App. filed November 19, 2014). The three issues raised by Appellant in his Petition for Rehearing are addressed below.

I. Warrant affidavit provided a sufficient probable cause basis for the issuance of the search warrant.

This Court properly determined Appellant's claims regarding probable cause. Appellant complains that the lot number of the trailer to be searched was not listed. However, the lot number does not appear on the trailer and would not assist a team executing a warrant. The confidential informant (CI) statement is unclear because he does not specifically state where the officer moved the car to before he went to make his purchase. However, he was under surveillance the entire time, and the officer drafted a warrant which makes clear which trailer the CI went to – the second trailer on the right

when entering the mobile home park from Edwards Street (incidentally, lot 7). The officer also supplied very specific GPS coordinates, down to meters, and a physical description of the residence, noting that the trailer bore no numbers on the outside. The officer simply strove to provide a better description of the location than was given by the CI. This court correctly construed the location of the controlled buy is clear when the statement of the CI is taken together with the information provided by officers who observed the buy. This information was presented with specificity in the warrant. (R. p. 227.) This Court properly relied on State v. Bellamy, 336 S.C. 140, 519 S.E.2d 347 (1999) and State v. Dupree, 354 S.C. 676, 583 S.E.2d 437 (Ct. App. 2003), as well as other authorities cited in the State's brief, in finding that the trial court did not err in failing to suppress evidence seized at the trailer based on the purported lack of specificity in the warrant.

II. *The State presented substantial evidence from which the jury could find that Appellant had constructive possession of the controlled substances and weapon.*

Appellant's arguments regarding mere presence are also without merit. This Court's reliance on State v. Weston, 367 S.C. 279, 625 S.E.2d 641 (2006) and State v. Hudson, 277 S.C. 200, 284 S.E.2d 773 (1981) was well placed. The State also submits similarities with State v. Muhammed, 338 S.C. 22, 26, 524 S.E.2d 637, 639 (Ct. App. 1999);

First, Appellant had constructive possession of the controlled substances and handgun. In Hudson, our Supreme Court explained the difference between actual and constructive possession:

> 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.

Id. at 202, 284 S.E.2d at 774-775.

Possession requires more than mere presence. State v. Tabory, 260 S.C. 355, 365, 196 S.E.2d 111, 113 (1973). However, "[w]hen contraband materials are found on premises under the control of the accused, this fact in and of itself gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury." Hudson, 277 S.C. at 203, 284 S.E.2d at 775. A person has possession of a controlled substance within the meaning of the law when he has both the power and the intent to control its disposition or use. State v. Brownlee, 318 S.C. 34, 38, 455 S.E.2d 704, 706 (1995). Indeed, possession of a controlled substance can be inferred from the circumstances of a particular case and can be imputed to a person with both the power and intent to control the disposition and use of the drugs. State v. Brown, 319 S.C. 400, 404, 461 S.E.2d 828, 830 (Ct. App. 1995). "Constructive possession can be established by circumstantial as well as direct evidence, and possession may be shared." Id.; see also Hudson, 277 S.C. at 200, 284 S.E.2d at 773; State v. Brown, 267 S.C. 311, 227 S.E.2d 674 (1976).

Here, substantial evidence was presented establishing Appellant had constructive possession of the controlled substances and the weapon discovered in the trailer. Viewing the evidence in a light most favorable to the State, the State presented testimony establishing Appellant and Burnside were the only two individuals inside the trailer when the police entered to execute the search warrant. They were not simply just inside the

trailer: they were barricaded inside the trailer. Behind the barricade with Appellant and Burnside, the police discovered the following items: (1) a container holding two Uno™ cards and eight pieces of cocaine base on top of the kitchen cabinets; (2) a Glock 40 caliber handgun on the kitchen counter; (3) plastic baggies containing Diazepam, Alprazolam, and Hyrdocodone in the kitchen cabinets; (4) baggies of cocaine and cocaine base inside an oven mitt above the stove; (5) a microwave plate that tested positive for cocaine base residue; (6) $172 in cash on the floor of the living room; (7) a cell phone on the floor of a bedroom; (8) a plastic bag containing cocaine base in the pocket of a coat in the same bedroom; (9) a digital scale typically used to weigh narcotics in a hallway closet; (10) a digital scale typically used to weigh narcotics in the kitchen; and (11) ammunition for an assault rifle in a second bedroom.

In addition, Deputy Swift saw Appellant in the bathroom, standing over the toilet with the toilet running, as if he had just flushed something. Deputy Swift noticed a Uno™ card floating in the toilet. Notably, in the kitchen, the officers found a Tupperware container with Uno™ cards and cocaine base in the container. Clearly, there is an inference here that Appellant was flushing drugs.

Further, Drummond testified he and Appellant were "like cousins." Drummond also testified that they used the trailer like a bachelor pad rather than a residence, and although Appellant did not live in the trailer, he freely visited two or three times a week. Moreover, Appellant and Burnside helped pay the bills for the trailer.

In summary, the evidence supported an inference that Appellant and Burnside had dominion and control of the drugs and weapon found inside the trailer. The trailer was just as much Appellant's trailer as it was Drummond's trailer. Appellant and Burnside's

presence inside the barricaded trailer, along with the installation of security cameras after Drummond moved out of the trailer, demonstrated the trailer was under their control. This fact in and of itself gives rise to an inference of knowledge and possession which was sufficient to submit the case to the jury. See Hudson, 277 S.C. at 203, 284 S.E.2d at 775. Further, the fact the handgun and most of the drugs were found in a common area of the residence helps establish constructive possession. Thus, the issue of Appellant's constructive possession of the controlled substances and weapon was a matter properly left to the jury.

Second, Appellant had knowledge of the controlled substances and handgun. In drug cases, the element of knowledge is seldom established through direct evidence, but may be proven circumstantially. State v. Attardo, 263 S.C. 546, 550, 211 S.E.2d 868, 869 (1975). "The knowledge element may be proved circumstantially by evidence of acts, declarations, or conduct of the accused from which an inference may be drawn that the accused knew of the existence of the prohibited substance. Possession gives rise to an inference of the possessor's knowledge of the character of the substance." Mollison, 319 S.C. at 45, 459 S.E.2d at 91. Knowledge is generally a question for the jury. Attardo, 263 S.C. at 550, 211 S.E.2d at 869.

Our Supreme Court has also stated that a defendant has possession of drugs when he or she "has both the power and intent to control its disposition or use." State v. Kimbrell, 294 S.C. 51, 54, 362 S.E.2d 630, 631 (1987). "[A]ctual knowledge of the presence of the drug is strong evidence of intent to control its disposition or use[;]" therefore, knowledge may be substituted for the intent element. Id.

Further, our Supreme Court has noted that the knowledge element of possession is usually proven by circumstantial evidence, which includes evidence of "acts, declarations, or conduct of the accused form which the inference may be drawn that the accused knew of the existence of the prohibited substances." State v. Hernandez, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009).

In this case, substantial evidence was also presented establishing Appellant had knowledge of the controlled substances and the weapon discovered in the trailer on Lot #7. An expert in street-level narcotic sales testified that based on a variety of factors he believed Lot #7 was used primarily for the distribution of narcotics. He based his opinion on the following factors: 1) the various amounts of cocaine base, cocaine, and prescription pills discovered in the house; 2) plastic bags, a razor blade and other items suggesting packaging for sale; 3) the barricade on the front door; and 4) the presence of security cameras pointing down the front steps. The expert testified it was not typical for narcotics dealers to leave drugs and money in a house unattended with individuals who were simply buyers. Further, Deputy Swift testified he found Appellant standing over a toilet that had just been flushed and saw a Uno™ card, which matched the cards discovered with the cocaine base in the kitchen, floating in the basin. Thus, the issue of Appellant's knowledge of the controlled substances and weapon was a matter properly left to the jury.

Based on the trial testimony and evidence, a finder of fact could reasonably conclude Appellant had constructive possession and knowledge of the controlled substances and the handgun found in the trailer and was therefore guilty of the indicted offenses. This case did not present a complete failure of evidence requiring the grant of a

directed verdict motion. See Nix, 288 S.C. at 496, 343 S.E.2d at 629 ("[U]nless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict must stand absent an error of law."). To the contrary, Appellant's arguments merely go to the weight of the evidence against him rather than the sufficiency of the evidence. Accordingly, based on the existence of substantial circumstantial evidence establishing the "possession" element of the convicted offenses, the trial court properly denied Appellant's directed verdict motion.

III. *Issue of directed verdict for the charge of distribution of cocaine base was not preserved. Even so, the State presented substantial circumstantial evidence that Appellant aided, abetted, or conspired to distribute, cocaine base.*

This Court also correctly affirmed the trial court's denial of directed verdict on the charge of distribution. This court noted that defense counsel only argued that the trafficking and distribution charges were redundant after the jury had returned its verdict. The argument presented on appeal regarding distribution is putatively derived from this objection. However, as this Court found, a motion for judgment notwithstanding the verdict is inappropriate in a criminal matter, and moreover, on appeal, issues not raised to the trial court in support of directed verdict motions are not reserved for appellate review. State v. Follin, 352 S.C. 235, 573 S.E.2d 812 (Ct. App. 2002); State v. Kennerly, 331 S.C. 442, 503 S.E.2d 214 (Ct. App. 1998). At the close of the State's case, Appellant made his motion for directed verdict as follows:

> At this time I would renew all my motions especially this motion regarding the search warrant in light of the statement put into evidence. I would also move for a directed verdict at this time. Mere suspicion is not enough. The charges here are trafficking with intent to distribute. [sic] What you've heard is evidence that these young men were in a house where drugs also were. There is [not]

> evidence that they were actually distributing or selling drugs or manufacturing. Therefore we would move to dismiss at this time.

(R. p. 180, lines 8-17.) After the jury returned its verdict, Appellant's trial counsel argued:

> Judge, I will renew my motion for directed verdict and all my prior motions and objections. **And I will also ask** for a judgment notwithstanding the verdict in this case on the trafficking charge. [Appellant] was charged with felony trafficking and also possession with intent to distribute crack cocaine, I would argue those charges were redundant and encompass the same action, and therefore, I will particular make a motion for those charges.

(R. p. 205) (emphasis added). Thus, Appellant is attempting to improperly bootstrap an argument his defense counsel made after the jury returned its verdict to his directed verdict motion. The fact defense counsel renewed her motion for a directed verdict and stated "[a]nd I will also ask for a judgment notwithstanding the verdict in this case on the trafficking charge" demonstrates that her original directed verdict argument did not encompass the argument Appellant now asserts on appeal. Further, after the verdict, Appellant asked for a judgment notwithstanding the verdict[1] for the trafficking charge. On appeal, Appellant uses defense counsel's judgment notwithstanding the verdict argument regarding trafficking in support of his directed verdict argument regarding distribution. Accordingly, Appellant's argument on appeal is different than the one he made post-trial. See McKissick, 325 S.C. at 344, 479 S.E.2d at 75 ("The same ground argued on appeal must have been argued to the trial judge."); State v. Patterson, 324 S.C.

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[1] "A motion for a JNOV is a civil trial motion, and this it is improper for a party to move for JNOV in a criminal trial." State v. Follin, 352 S.C. 235, 258, 573 S.E.2d 812, 824 (Ct. App. 2002).

5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."); State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal."). Appellant may not raise one ground for directed verdict at trial and another ground on appeal. See State v. Jordan, 255 S.C. 86, 93, 177 S.E.2d 464, 468 (1970) (directed verdict argument was not preserved where the defendant raised different arguments below and did not raise the issue argued on appeal); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (where defendant objected to certain testimony on one ground at trial and raised another ground on appeal, the issue raised on appeal was not preserved); In re Richard D., 388 S.C. 95, 100-101, 693 S.E.2d 447, 450 (Ct. App. 2010) (particular argument in support of directed verdict was not preserved for appellate review where defendant raised different argument below); Freiburger, 366 S.C. 125, 620 S.E.2d 737 (defendant failed to preserve chain of custody issue for appellate review where he raised a different objection to the evidence below); State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) (arguments not raised to or ruled upon by the trial court are not preserved for appellate review, and a defendant may not argue one ground below and another on appeal).

Further, while not directly addressed in the Court's decision, the State maintains, as detailed in its brief, that evidence existed to survive such a challenge even if it had been properly made. Evidence presented at trial showed an ongoing drug operation at the house. Viewing the evidence in the light most favorable to the State, the State presented substantial circumstantial evidence that Appellant aided, abetted, or conspired to distribute cocaine base. The officers found digital scales, razorblades, and packaged

cocaine base in the trailer. Further, the microwave tested positive for cocaine base. Additionally, in Officer Brown's expert opinion, this trailer was being used primarily for the distribution of drugs. According to Officer Brown, the barricade on the front door and the security cameras were common in residences used primarily for the distribution of drugs. The State presented evidence that Appellant was involved in the manufacturing of cocaine base, which was the overt act in furtherance of the conspiracy to distribute the cocaine base. Simply put, the manufacturing of the cocaine base was the first step in the conspiracy to distribute the cocaine base.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Petition for Rehearing be denied, and the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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December 10, 2014

STATE OF SOUTH CAROLINA

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The State, Respondent,

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Dominique Shumate, Appellant.

PROOF OF SERVICE

I, Ellen DuBois, certify that I have served the Return to Petition for Rehearing on Appellant by depositing a copy of same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

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

This 10th day of December, 2014.

Ellen DuBois

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SC Court of Appeals

ALAN WILSON
ATTORNEY GENERAL

December 10, 2014

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

Re: State v. Dominique Shumate,
Appellate Case Tracking No. 2012-212057

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of a Return to Petition for Rehearing along with proof of service for filing in the above-referenced appeal.

Sincerely,

Mary Williams Leddon
Assistant Attorney General

Enclosures
cc: Kathrine Hudgins, Esquire
Victim Services

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