ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

C. Victor Pyle Jr., Circuit Court Judge

Opinion No. 2014-UP-410.C. Ct. App. filed 11/19/2014)
2011- GS-23-1733-1736

DOMINIQUE SHUMATE

PETITIONER

V.

STATE OF SOUTH CAROLINA

RESPONDENT

APPELLATE CASE NO. 2015-000388

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

INDEX

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 12/17/2014.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in finding the that trial court did not err in refusing to suppress evidence found pursuant to a search warrant lacking probable cause where the search warrant was issued for the second mobile home on the right based on a controlled purchase by a confidential informant but a statement from the confidential informant states that the buy was made from the first trailer on the left and the return to the search warrant was not made to the judge who issued the search warrant, in violation of the statute?

2. Did the Court of Appeals err in finding that the trial court did not err in refusing to direct verdicts of acquittal when the appellant was merely present in a trailer where drugs and a weapon were found pursuant to a search warrant?

3. Did the Court of Appeals err in finding that the trial court did not err in refusing to direct a verdict of acquittal for the distribution of crack cocaine charge, where the evidence relied upon by the State for the distribution charge was manufacturing based on residue found in a microwave, razorblades and Tupperware, the indictment fails to allege the manufacture of crack cocaine and the jury returned a verdict of guilty of trafficking crack for the crack found inside the trailer?

STATEMENT OF THE CASE

In February of 2012, the Greenville County Grand Jury indicted Shumate for trafficking cocaine base, possession of a weapon during the commission of a violent crime, possession with intent to distribute a controlled substance, distribution of cocaine base and possession with intent to distribute cocaine, indictments #2011-GS-23- 1733, 1734, 1735, 1736. On May 15, 2012, Shumate and his co-defendant, Andrew Burnside, proceeded to jury trial before the Honorable C. Victor Pyle. Susannah Ross represented Shumate at trial. Scott Robinson represented the co-defendant Burnside. Lisa Bentley prosecuted the case. The jury returned verdicts of guilty for trafficking and the weapons charge, distribution of cocaine base and the lesser included offenses of possession of a controlled substance and possession of cocaine. Judge Pyle sentenced Shumate to 15 years for trafficking, 5 years concurrent for the weapons charge, 1 year concurrent for possession of a controlled substance, 5 years concurrent for the distribution and 1 year concurrent of possession of cocaine. A timely notice of intent to appeal was served on May 17, 2012.

The direct appeal was perfected and on October 7, 2014, a three judge panel of the South Carolina Court of Appeals heard oral argument. On November 19, 2014, in an unpublished opinion, the Court of Appeals affirmed the convictions and sentences. State v. Shumate, Op. No. 2014-UP-410 (S.C.Ct.App. Filed November 19, 2014). On November 25, 2014, petitioner filed a timely petition for rehearing. On December 17, 2014, the petition for rehearing was denied. Neither counsel for petitioner nor counsel for the State, however, received a copy of the order denying the petition for rehearing. On February 17, 2015, the remittitur issued. On February 19, 2015, counsel filed a motion to recall the remittitur. On March 3, 2015, the remittitur was recalled. This petition for writ of certiorari follows.

STATEMENT OF FACTS

Deputy Jacob Walters with the Greenville County Sheriff's Department testified that based on an earlier purchase by a confidential informant he obtained a search warrant for a trailer located at 120 Old Bleachtry Road, lot 7. R. pp. 26-30. On November 19, 2010, Deputy Walter and other members of the sheriff's department executed the search warrant on a trailer. Petitioner, Shumate and co-defendant Burnside were inside the trailer at the time of the search. The confidential informant did not identify either Shumate or Burnside as the person who sold the drugs earlier. Deputy Walter admitted that there was no evidence that Shumate sold the drugs to the confidential informant. R. p. 40, lines 2-20.

Officer Patrick Swift with the Greenville County Sheriff's Department testified that he found Petitioner Shumate in the bathroom of the trailer and it appeared that he had just flushed something down the toilet. R. p. 49, lines 4-11. Officer Swift testified that there was an Uno playing card floating in the toilet. R. p. 52, lines 10-15. No drugs were found in the bathroom or on Appellant Shumate. After securing Petitioner, Officer Swift searched the kitchen. Swift stood on a chair and stood on the counter and in the space at the top found a Tupperwear container with two Uno cards and eight pieces of white rock like substance. R. p. 55, lines 4-14. The substance tested positive for .90 grams of crack. R. p. 142, line 23 – p. 143, lines 1-5. Officer Swift searched a bedroom and found a coat with a white rock like substance in the pocket. R. p. 58, lines 24 – p. 59, lines 1-8. This substance tested positive for 10.42 grams of crack. R. p. 143, lines 13-15. Officer Swift found a digital scale on a shelf in a small room with a water heater. R. p. 60, lines 15-25.

Deputy Justin Lanford with the Greenville County Sheriff's Department testified that an additional amount of crack cocaine was found on a hotel room key on the kitchen counter. R. p. 108, line 18 – p. 109, lines 1-21. This substance testified positive for .68 grams of crack cocaine.

R. p. 143, lines 8-10. Deputy Lanford testified that a handgun was found near the crack. R. p. 110, lines 9-14. Deputy Lanford testified that he found both powder and crack cocaine in an oven mitt above the stove. R. p.111, lines 11-13; p.114, lines 10-18. These items tested positive for 6.39 grams of crack cocaine and 2.92 grams of powder cocaine. R. p. 143, lines 5-13. Deputy Lanford testified that he found an Altoids container with razors inside. R. p. 112, lines 22-25. The deputy also found several pills in the kitchen cabinets. R. p. 111, lines 8-11. James Armstrong, the chemist from the Greenville County Department of Public Safety testified that four green tablets were indicated to be diazepam, two blue and four yellow tablets were indicated to be alprazolam, both schedule four controlled substances. The chemist also testified that one white tablet indicated to be hydrocodone, a schedule three controlled substance. R. p. 146, lines 19-25. Deputy Lanford also testified that the microwave tested positive for cocaine. R. p. 115, lines 3-13. The chemist testified that a mircrowave plate tested positive for cocaine base. R. p. 148, lines 2-21.

Master Deputy Brown testified that he found the co-defendant in a back bedroom partially under the bed. R. p. 92, lines 15 – 24. On cross examination Brown admitted that he did not have anything to tie the items found in the trailer to either Petitioner or the co-defendant. R. p. 102, line 14 – p. 103, line 2. Brown opined that the trailer was used primarily for the distribution of narcotics based on several factors including the fact that the door was barricaded and there was surveillance equipment. R. pp. 96-100.

Deputy Walters confirmed that the trailer on lot 7 was not owned by either Petitioner Shumate or the co-defendant. Walters confirmed that the trailer had been rented by a Mr. Drummond. R. p. 42, lines 4-21. Jerry Drummond was called as a witness by the State. Drummond testified that he rented the trailer as a bachelor's pad. R. pp. 123-124. Drummond testified that he and Burnside were close friends and he and Petitioner Shumate were like cousins.

R. p. 121, line 19 – p. 122, lines 1-13. Drummond testified that the co-defendant would come over from time to time, bring females and spend the night. R. p. 124, lines 18-24. Drummond testified that Petitioner Shumate did not stay at the trailer, but he would visit. R. p. 124, line 25 – p. 125, lines 1-3. Most of the bills for the trailer were split up among Drummond, Petitioner, the co-defendant, and a few more people. R. p. 125, line 20 – p. 126, lines 1-3. Drummond said he moved out of the trailer about two weeks before November 3, 2010, because he was incarcerated for violating the habitual offender act. R. p. 126, lines 4-11. He said that he sold crack cocaine to Petitioner and the co-defendant in the past. R. p. 130, line 23 – p. 131, line 2.

The State presented no forensic evidence linking either Petitioner Shumate or the co-defendant to the items found inside the trailer. There was no evidence that the prior sale to the confidential informant was made by Shumate or the co-defendant.

STANDARDS OF REVIEW

An appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000). A deferential standard of review likewise applies in the context of a Fourth Amendment challenge to a trial court's fact driven determination of probable cause. State v. Brockman, 339 S.C. 57, 65-66, 528 S.E.2d 661, 665-666 (2000) "(holding that whether a search warrant violated the parameters of the Fourth Amendment depends on "a number of antecedent determinations, each of which is inherently fact specific' and "entails an inquiry into the totality of the circumstances' and the appellate court must affirm if there is "any evidence" to support the ruling)." State v. Thompson, 363 S.C. 192, 199,609 S.E.2d 556, 560 (Ct.App. 2005).

On a motion for a directed verdict in a criminal case, the trial court is concerned with the existence or non-existence of evidence, not its weight. State v. Morgan, 282 S.C. 409, 319 S.E. 2d 335 (1984); State v. Barksdale, 311 S.C. 210, 428 S.E.2d 498 (Ct.App.1993). The motion should be granted if the evidence merely raises a suspicion of the defendant's guilt. Barksdale, 428 S.E.2d at 501. "In reviewing the denial of a motion for a directed verdict, this court must view the evidence in the light most favorable to the State, and if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, we must find that the case was properly submitted to the jury." State v. Smith, 359 S.C. 481, 490, 597 S.E.2d 888, 893 (Ct.App.2004) (citing State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998)). On appeal from the denial of a motion for directed verdict, this court must view the evidence in a light most favorable to the State. State v. Schrock, 283 S.C. 129, 322 S.E. 2d 450 (1984).

ARGUMENTS

1. The Court of Appeals erred in finding the that trial court did not err in refusing to suppress evidence found pursuant to a search warrant lacking probable cause where the search warrant was issued for the second mobile home on the right based on a controlled purchase by a confidential informant but a statement from the confidential informant states that the buy was made from the first trailer on the left and the return to the search warrant was not made to the judge who issued the search warrant, in violation of the statute.

Prior to trial Petitioner challenged the search warrant because the return was not made to the Judge who issued the search warrant in violation of S.C. Code §17-13-140. The return was made to Judge Cagle but the search warrant was issued by Judge Fisher. R. p. 8, lines 14-25; Search warrant and return, R. pp. 226-231. The State, relying on State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007), argued that the error was simply procedural requiring a showing of prejudice in order to require suppression. R. p. 12, lines 8-21. The State argued that appellant failed to show prejudice. R. p. 12, lines 8-9. The judge denied the motion to suppress. R. p. 12, lines 22.

Petitioner then challenged the affidavit in support of the search warrant as lacking in probable cause. R. p. 12, line 23 – p. 13, 14, line 1. Petitioner argued that the affidavit was not sufficiently specific because the address listed, 120 Old Bleachery Road Greenville, SC 29617, contained possibly as many as nine separate similar looking trailers. R. p. 13, line 5 –p. 14, line 1. While the affidavit contains coordinates and a description, the affidavit does not reference a lot number. Affidavit, R. p.227-228. Petitioner additionally 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 judge again denied the motion to suppress. R. p. 14, lines 24-25.

After the first two State's witnesses testified, it became apparent that the State had failed to disclose a statement made by the confidential informant who was used as the basis for obtaining the

search warrant. Petitioner requested a copy of the statement made by the confidential informant. R. p. 79, lines 4-20. A copy of the statement with the informant's name redacted was provided to Petitioner. R. p. 79, line 21 – p. 80, lines 1-6. After reading the statement, Petitioner noted to the trial judge that the trailer listed in the affidavit in support of the search warrant was different from the trailer mentioned in the informant's statement. R. p. 80, lines 7-22. The search warrant was issued for, entering the trailer park from Edwards Street, the second mobile home on the **right** but in the statement the informant stated, "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) (Affidavit, R. pp 227-228 Court's Exhibit #1, Witness statement, R. p. 225. The trial judge stated, "I'll make this a part of the record for purposes of appeal. I'm not going any further with it." R. p. 80, lines 23-25. Appellant renewed the challenge to the search warrant and was again denied. R. p. 142, lines 16-17; R. p. 144, line 25; p. 147, line 20; p. 163, lines 8-17. The trial judge erred in failing to suppress items found pursuant to a defective search warrant.

The search warrant in the present case is defective in two ways. First, the search warrant lacks specificity to establish probable cause to enter the trailer on lot number 7. The affidavit in support of the search warrant fails to mention lot number seven. The search warrant was based on a buy from the first trailer on the left but issued for the second trailer on the right. Second, the warrant was defective because it was not returned to the issuing judge in violation of S.C. Code §17-13-140.

S.C. Code §17-13-140 requires that a search warrant "shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record." Oral testimony may also be used in this State to supplement a search warrant affidavit which is facially insufficient to establish probable cause. State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997).

> The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause. Mere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient.

State v. Philpot, 317 S.C. 458, 454 S.E.2d 905, 907 (Ct. App. 1995), citing State v. Smith, 301 S.C. 371, 392 S.E.2d 182 (1990).

A magistrate may issue a search warrant only upon a finding of probable cause. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). "This determination requires the magistrate to make a practical, common-sense decision of whether, given the totality of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying the information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." State v. King, 349 S.C. 142, 150, 561 S.E.2d 640, 644 (Ct.App.2002). "The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause. The magistrate should determine probable cause based on all of the information available to the magistrate at the time the warrant was issued." State v. Dupree, 354 S.C. 676, 684, 583 S.E.2d 437, 441 (Ct.App.2003) (citations omitted).

In terms of a court's review of the magistrate's decision, "[t]he duty of the reviewing court is to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed." State v. Baccus, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006). "In reviewing the

validity of a warrant, an appellate court may consider only information brought to the magistrate's attention." State v. Thompson, 363 S.C. 192, 200, 609 S.E.2d 556, 560 (Ct.App.2005).

There was no testimony that the affidavit in the present case was supplemented by oral testimony. The affiant in the affidavit, Deputy Jacob Walters with the Greenville County Sheriff's Department, describes the premises to be searched as:

> 120 Old Bleachery Road Greenville, SC, 29617 the center of the residence being 34.87538 N 082.42224 W coordinates is a single wide mobile home with brown wood siding, with a white in color wooden porch with tan underpinning. The residence has no visible numbers on the residence. Entering the trailer park from Edwards Street the residence is the second mobile home on the right. To include any persons, vehicles, trash receptacles present and directly related to the listed reference.

Affidavit, R. p. 227-228.

The affidavit in support of the search warrant was not sufficient to provide the magistrate with a substantial basis for which to find probable cause to issue a search warrant for the trailer on lot number seven. During trial Deputy Walters testified that the search warrant was executed on lot number seven. R. p. 31, lines 2-20. The affidavit, however, never mentions lot number seven.

The State argued that the search warrant was sufficiently specific and stated, "We do have a map to demonstrate that Lot 7 is the second mobile home on the right from Edwards Street. In addition, it gives the longitude and latitude of this trailer and the confidential informant's buy was from this particular trailer. So there were four search warrants issued pursuant to four different CI buys. This search warrant was for the CI buy from Lot 7 which is the second mobile home on the right from Edwards Street and this specifically stated on the

warrant." R. p. 14, lines 8-17. The affidavit lists the premise to be searched as the second mobile home on the right. Again, there is no mention of lot 7 in the affidavit.

In the affidavit in support of the search warrant the affiant states the reason for the search as:

> A Confidential Informant, while working under the direct control and supervision of the Sheriff's office Directed Patrol Unit made a controlled purchase of a substance that field tested positive for cocaine based substance crack for Twenty Dollars in U.S. Cash Currency. This informant was under audio and physical surveillance during the entire operation and gave a written statement as to the activities that transpired at 120 Old Bleachery Road Greenville, SC, 29617. The informant was searched prior to and after the purchase with no illegal contraband found on their person. Based on the Affiant's experience and knowledge it is believed that upon the execution of this warrant more illegal drugs/narcotics will be discovered.

Affidavit, R. pp.227-228.

The search warrant was sought based on a controlled purchase by the confidential informant from the second trailer on the right. According to the statement of the confidential informant, however, the controlled purchase was made from the first trailer on the left. The affidavit in the present case does not provide sufficient specificity for the magistrate to determine that probable cause existed to search the trailer on lot 7. The search warrant violates the requirements of S.C. Code §17-13-140 and violates the Fourth Amendment of the United States Constitution as well as Article I, Section 10 of the South Carolina Constitution. The good faith exception should not apply because the officer provided the magistrate with erroneous or incomplete information.

S.C. Code §17-13-140 provides, in part:

> In the case of a warrant issued by a magistrate or a judge of a court of record, it shall be directed to any peace officer having jurisdiction in the county where issued, including members of the South Carolina Law Enforcement Division, and shall be returnable to the issuing magistrate. In case of a warrant issued by a judge

> of a court of record, it shall be returnable to a magistrate having jurisdiction of the area where the property is located or the person to be searched is found. If any warrant is issued by any municipal judicial officer to municipal police officers, the return shall be made to the issuing municipal judicial officer.

The State conceded that the return was not made to the issuing judge but argued that this was merely a procedural error that does not require suppression unless there is prejudice. First, this is not a ministerial requirement as the 10 day requirement discussed in State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007). The judge issuing the search warrant fulfills his role as a detached and neutral judge in accepting the return and verifying that the items seized were seized in compliance with the search warrant issued. This is not simply a ministerial task. The erroneous information in regard to where the confidential informant purchased drugs combined with the statutory violation of not making the return to the issuing judge require suppression of the items found pursuant to the defective search warrant.

The Court of Appeals found that the search warrant provided sufficient probable cause writing:

> As to Shumate's argument the trial court erred in failing to suppress evidence seized pursuant to a search warrant that allegedly lacked probable cause: State v. Bellamy, 336 S.C. 140, 145, 519 S.E.2d 347, 349 (1999) (finding an affidavit in support of a search warrant was sufficient despite being weak on the element of the reliability of the informant because of a "strong showing of specificity, first-hand observation, and partial corroboration"); State v. Dupree, 354 S.C. 676, 691, 583 S.E.2d 437, 445 (Ct. App. 2003) (holding "if a controlled buy is properly conducted, the controlled buy alone can provide facts sufficient to establish probable cause for a search warrant"); id. at 685, 583 S.E.2d at 442 ("The magistrate's task in determining whether to issue a search warrant is to make a practical, common sense decision concerning whether, under the totality of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in the particular place to be searched.").

State v. Shumate, Op. No. 2014-UP-410 (S.C.Ct.App. Filed November 19, 2014).

The Court of Appeals' reliance on State v. Bellamy, 336 S.C. 140, 145, 519 S.E.2d 347, 349 (1999) is misplaced as the main challenge to the search warrant in Bellamy was to the reliability of the confidential informant. In Bellamy 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.

The Court of Appeals' 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.

2. The Court of Appeals erred in finding that the trial court did not err in refusing to direct verdicts of acquittal when the appellant was merely present in a trailer where drugs and a weapon were found pursuant to a search warrant.

As argued above in issue one, Petitioner submits that the drugs and gun should have been suppressed based on a defective search warrant. Alternatively, the judge should have directed verdicts of acquittal on all charges. At the close of the State's case, Petitioner moved for directed verdicts of acquittal arguing that mere suspicion was not sufficient. R. p. 163, lines 8-17. The judge denied the motion. R. p. 163, lines 18-19. The judge erred. The State's case against Appellant 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.

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

Petitioner 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.

The Court of Appeal found that the trial court properly denied the motion for directed verdicts of acquittal based on mere presence writing:

> As to Shumate's argument the trial court erred in failing to direct a verdict of acquittal for the distribution charge based on his mere presence: State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006) ("When reviewing a denial of a directed verdict, [an appellate court] views the evidence and all reasonable inferences in the light most favorable to the [S]tate."); State v. Hudson, 277 S.C. 200, 202, 284 S.E.2d 773, 774 (1981) ("Conviction of possession of [illegal drugs] requires proof of possession–either actual or constructive, coupled with knowledge of its presence."); id. at 202, 284 S.E.2d at 774-75 ("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. Shumate, Op. No. 2014-UP-410 (S.C.Ct.App. Filed November 19, 2014).

The Court of Appeals 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. Viewing the evidence and all reasonable inferences in the light most favorable to the State, the state failed to prove actual or constructive possession. The State proved that drugs were found in a trailer where Petitioner was merely present. Mere suspicion is not sufficient. The trial judge erred in refusing to direct verdicts of acquittal.

3. The Court of Appeals erred in finding that the trial court did not err in refusing to direct a verdict of acquittal for the distribution of crack cocaine charge, where the evidence relied upon by the State for the distribution charge was manufacturing based on residue found in a microwave, razorblades and Tupperware, the indictment fails to allege the manufacture of crack cocaine and the jury returned a verdict of guilty of trafficking crack for the crack found inside the trailer.

Alternatively and without conceding the issues raised in arguments one and two, the trial judge should have directed a verdict of acquittal for the distribution charge because there was no evidence of a distribution separate from the trafficking charge. After the jury returned with the verdicts, Petitioner 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 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.

The Court of Appeals found that the trial judge properly denied the motion for a directed verdict of acquittal for the distribution charge writing:

> As to Shumate's argument the trial court erred in failing to direct a verdict of acquittal on the distribution charge: State v. Follin, 352 S.C. 235, 258, 573 S.E.2d 812, 824 (Ct. App. 2002) ("A motion for [judgment notwithstanding the verdict (JNOV)] is a civil trial motion, and thus it is improper for a party to move for JNOV in a criminal trial."); State v. Kennerly, 331 S.C. 442, 455, 503 S.E.2d 214, 221 (Ct. App. 1998) ("In reviewing a denial of directed verdict, issues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review.").

State v. Shumate, Op. No. 2014-UP-410 (S.C.Ct.App. Filed November 19, 2014).

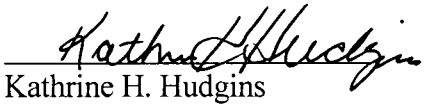
The Court of Appeals overlooked the fact that while counsel erroneously referred to the motion as a judgment notwithstanding the verdict, the motion was a renewal of the directed verdict motion made at the close of the State's case. While not specifically raised when the initial motion for a directed 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.

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.

CONCLUSION

Based on the above arguments, the petition for writ of certiorari should be granted to allow further briefing on the issues.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER.

This 23rd day of March, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

C. Victor Pyle Jr., Circuit Court Judge

Opinion No. 2014-UP-410.C. Ct. App. filed 11/19/2014)
2011- GS-23-1733-1736

DOMINIQUE SHUMATE

PETITIONER

V.

STATE OF SOUTH CAROLINA

RESPONDENT

APPELLATE CASE NO. 2015-000388

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Julie Kate Keeney, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201and the S.C. Court of Appeals this 23rd day of March, 2015.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 23rd day
of March, 2015.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021