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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Union County

John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LASHAD DEMOND BREWTON,

APPELLANT

APPELLATE CASE NO. 2014-000880

INITIAL BRIEF OF APPELLANT

TIFFANY L. BUTLER
Appellate Defender

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

ATTORNEY FOR APPELLANT

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STATEMENT OF THE CASE

On August 26, 2010, the Union County Grand Jury indicted Appellant for trafficking in more than ten but less than twenty-eight grams of crack cocaine. R.* On December 6, 2011, Appellant and two co-defendants, Randy Crosby and Roderick Pope, proceeded to a jury trial before the Honorable John C. Hayes, III. and a jury. Tr. vol. 1, 1. Joe St. Pierre represented Appellant. Dan Hall and Mark McKinnon represented Crosby, while Doug Brannon represented Pope. John Anthony represented the State. Tr. vol. 1, 1.

After a three day trial, Appellant and his co-defendants were found guilty of the lesser-included offense of possession with intent to distribute crack cocaine. Tr. vol. 3, 346. Judge Hayes sentenced Appellant to ten years' imprisonment suspended to thirty months active time and five years of probation. R.*

ARGUMENT

I. The trial judge erred by denying defense counsel's motion to suppress the scale and money found during a search of the vehicle that Appellant was driving and a search of Appellant and his two co-defendants, where police had no reasonable suspicion to stop the vehicle.

Relevant Facts

On June 24, 2010, Lieutenant John Sherfield of the Union County Sheriff's Department arrested Vincent Harris for selling crack cocaine to a confidential informant. Tr. vol. 1, 50, lines 1-25. While at the jail waiting to be booked in, Harris asked Sergeant James Johnson, who was also at the jail, if there was anything Harris could do to get out of jail on bond because he had to work the next day. Tr. vol. 1, 50, lines 1 – 25. Sgt. Johnson responded that Harris would have to help himself. Harris then offered to have his alleged drug supplier, Pope, bring drugs from Spartanburg County to Union. Tr. vol. 1, 50, lines 1 – 25.

After allowing Harris to use his cell phone to contact Pope, Sgt. Johnson contacted Lt. Sherfield and informed him of Harris' arrangement with Pope to have Pope meet him at the Aunt M's Store in Union with the drugs. Tr. vol. 1, 51 – 52. Sherfield contacted other officers of the Sheriff's Department and arranged for several unmarked police cars to be stationed along Highway 176, which Pope used to drive from Spartanburg to Union. Tr. vol. 1, 52, lines 16 – 23. Uniformed deputies in marked patrol cars were stationed on side roads to be out of view of any drivers on Highway 176. Tr. vol. 1, 52, lines 16 – 23.

Harris informed Sgt. Johnson that Pope would be driving a black Ford Expedition. Tr. vol. 1, 52, lines 8 – 12. After Pope allegedly told Harris that he was driving by the Lighthouse Fish Camp and heading into Union, Harris informed Sgt. Johnson. Tr. vol. 1, 53, lines 3 – 18. Johnson then notified Sgt. Sherfield, who was stationed on Highway 176 along with other officers. Tr. vol.

1, 53, lines 3 – 18. Sheriff David Taylor and Captain James McNeil were also parked on the highway. According to Lt. Sherfield, Captain McNeil informed the officers that he spotted the Ford Expedition at the restaurant. Tr. vol. 1, 53, lines 15 – 18.

Once the Expedition drove into Union County, Sheriff Taylor activated his blue lights and initiated the traffic stop. Tr. vol. 1, 54, lines 3 – 6. Lt. Sherfield and Captain McNeil followed Sheriff Taylor. Tr. vol. 1, 54, lines 3 – 6. The Expedition pulled over into the median. Appellant was the driver, Pope was in the front passenger seat, and Crosby was in the right rear seat. Lt. Sherfield approached the driver side and ordered Appellant to get out. Tr. vol. 1, 54 – 55. After briefly speaking to Appellant, Sherfield handcuffed him and told him he was being "detained." Tr. vol. 1, 55, lines 18 – 20. Pope and Crosby were also ordered to get out of the vehicle. Tr. vol. 1, 55, lines 22 – 23. Sherfield searched the vehicle and found a digital scale with white residue on it under the seat where Crosby was sitting. Sherfield admitted that he did not have consent to search the Expedition. Tr. vol. 1, 55, lines 23 – 25.

Sherfield field tested the white residue, which tested positive for cocaine. Tr. vol. 1, 56, lines 7 – 13. Appellant, Pope, and Crosby were placed under arrest for possession of cocaine. Tr. vol. 1, 56, lines 17 – 18. Lt. Sherfield searched Appellant's person and seized $280 and a cell phone. Pope did not have any money on his person, while Crosby had $570 seized from his person. Tr. vol. 1, 56, line 21 – Tr. vol. 1, 57, line 6. Officers searched the vehicle, but no drugs or weapons were found. There were no drugs found on either defendant. Tr. vol. 1, 57, lines 7 – 9.

After being placed under arrest for the suspected cocaine residue found on the scale, Appellant and Crosby were placed in Corporal Vinson's patrol vehicle and transported to the Union County Jail. Pope was placed in another police car. Tr. vol. 2, 159, lines 3 – 8. Vinson claimed that after removing Appellant and Crosby from his vehicle, he searched under the back seat and

located a plastic bag containing a quantity of suspected crack cocaine where Appellant and Crosby were sitting. Tr. vol. 2, 159, lines 10 – 19. SLED analyzed the substance and concluded it was in fact crack cocaine and weighed 11.5 grams. Tr. vol. 3, 194, lines 7 – 10. The white residue on the scale, field tested as cocaine, was not submitted to SLED for testing. Tr. vol. 1, 88, lines 7 – 9.

Lt. Sherfield admitted that he had never met Harris prior to his arrest on June 24, 2010. Tr. vol. 1, 79, lines 5 – 7. He did not know where Harris lived, nor did he know where Harris worked. Harris had never been used as an informant for the Sheriff's Office. Tr. vol. 1, 81, lines 12 – 20. The phone calls that allegedly occurred between Harris and Pope were not recorded. Tr. vol. 1, 84, lines 11 – 13. Officers made no attempt to investigate Harris or the information he provided alleging Pope was his supplier. Tr. vol. 1, 104 – 105.

Lt. Sherfield also conceded that he had no idea how many people would be in the vehicle and when the Sheriff Taylor initiated the stop by activating his blue lights, the vehicle did not speed up or attempt to flee. Tr. vol. 1, 85, lines 1 – 3. Sherfield acknowledged that the stop and subsequent arrest was made in a low crime area during daylight hours. Tr. vol. 1, 85, lines 12 – 21. He admitted that neither defendant acted nervous or exhibited evasive behavior. Tr. vol. 1, 86, lines 12 – 18. The occupants of the vehicle made no attempt to flee from officers. Tr. vol. 1, 86, lines 22 – 24.

Sgt. Johnson admitted that he only heard Harris' part of the alleged conversation between Harris and Pope. Tr. vol. 1, 142, lines 7 – 13. Johnson did not know whether Pope was actually the person calling Harris' phone. Tr. vol. 1, 142, lines 7 – 13. Like Lt. Sherfield, Johnson did not know anything about Harris and had not met Harris before his arrest on June 24, 2010. Tr. vol. 1, 141, lines 17 – 24. Neither officer verified the information on the license plate of the Ford Expedition. Tr. vol. 2, 153, lines 1 – 14.

Further, neither officer could recall whether guns were drawn on the Ford. However, Captain McNeil admitted that "it very well could've been." Tr. vol. 1, 152, line 1. Captain McNeil also stated that he was actually at the intersection of Highway 150 and Highway 176 in Spartanburg County, which was "probably a mile" away from the Lighthouse Fish Camp. Tr. vol. 2, 152, lines 7 – 14. He admitted that he never saw a black Ford Expedition pass the restaurant. Tr. vol. 2, 152, lines 7 – 14.

Motion to Suppress

Prior to trial, defense counsel for Appellant moved to suppress the scale found in the Ford Expedition, money found on Appellant and Crosby, and the drugs found in Corporal Vinson's patrol car. Tr. vol. 1, 45. Counsel for co-defendants Roderick Pope and Randy Crosby also joined in the motion to suppress. Tr. vol. 1, 43.

Defense counsel for Appellant argued that there was no "reasonable suspicion" to stop the black Ford Expedition, no "probable cause" to search the vehicle, and no probable cause to arrest the defendants. Tr. vol. 1, 158, lines 1 – 25. Counsel explained that there "may have been guns drawn on the defendants right at the moment of the stop" and the police "immediately pulled [Appellant] and the other two de-defendants out of the vehicle and handcuffed them." Tr. vol. 1, 158, lines 1 – 25. Counsel expounded on the fact that there was no search warrant for the vehicle and the police "didn't even ask for consent to search." Tr. vol. 1, 159, lines 1 – 13.

Defense counsel also argued that the police did not determine the "credibility and the veracity of . . . Harris," which is a factor in determining whether reasonable suspicion existed. Tr. vol. 1, 159, lines 11 – 19. Counsel explained that the digital scale and the money found on Appellant and Crosby are all "fruit of the poisonous tree" because of the arrest that was "unlawful and violative (sic) of the fourth amendment." Tr. vol. 1, 160, lines 1 – 11.

Judge Hayes denied counsel's motion. The trial judge acknowledged that "the ice here is thin," but it was "thick enough to support the arrest, the stop first, then the search, then the arrest." Tr. vol. 2, 7, lines 10 – 14. The judge also acknowledged that Harris' "reliability [had] not been established." Tr. vol. 2, 8, lines 1 – 3. In looking at the totality of the circumstances, the judge determined that because Harris told the police he had been contacted by someone, the vehicle in question was passing the Lighthouse Fish Camp, and Captain McNeil confirmed that the vehicle matching Harris' description passed the Lighthouse, that was enough to create probable cause for the stop. Tr. vol. 2, 8, lines 3 – 25.

The trial judge also found that Appellant and his co-defendants were not arrested, but were detained when they were taken out of the car and handcuffed. Tr. vol. 2, 9, lines 2 – 4. The judge considered the validity of the search was determined by whether or not the automobile exception applied. Tr. vol. 2, 9, lines 9 – 14. He determined that because of the "exigency of the circumstances," the police had probable cause to stop the Ford Expedition. Tr. vol. 2, 9, lines 15 – 24.

Captain McNeil did not testify during the suppression hearing. However, during his trial testimony, McNeil admitted that he did not see the vehicle and was actually a mile away, at the intersection of Highway 150 and Highway 176. Tr. Vol. 2, 152. Counsel for all three defendants renewed their motion to suppress based on this testimony, which differed from Sherfield's account of the traffic stop during the suppression hearing. Tr. Vol. 2, 177. Again, Judge Hayes denied the motion to suppress.

Discussion

The trial judge erred by denying defense counsel's motion to suppress the scale and money found during a search of the vehicle that Appellant was driving and a search of Appellant and his two co-defendants. The police had no reasonable suspicion to stop the vehicle. The stop was based on information given to police by an unreliable drug dealer whose information was not corroborated by officers. The drug dealer only offered the information to get a lower bond to get out of jail

The Fourth Amendment to the United States Constitution ensures "the right of the people to be secure. . . [from] unreasonable searches and seizures." U.S. Const. amend. IV. The "temporary detention" of individuals during an automobile stop by police constitute a "seizure" within the meaning of the Fourth Amendment. Whren v. United States, 517 U.S. 806, 809 (1996). Generally, "the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." State v. Butler, 343 S.C. 198, 201, 539 S.E.2d 414, 416 (Ct. App. 2000). However, if an officer has reasonable suspicion that the occupants of an automobile are involved in criminal activity, the officer may stop and briefly detain them. Id.; Knight v. State, 325 S.E.2d 535 (1985). See also State v. Nelson, 336 S.C. 186, 192, 519 S.E.2d 786, 789 (1999) (quoting Berkemer v. McCarty, 468 U.S. 420, 439 (1984)) ("'[A] policeman who lacks probable cause but whose observations lead him reasonably to suspect that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to investigate the circumstances that provoke that suspicion.'").

Reasonable suspicion requires "a particularized and objective basis that would lead one to suspect another of criminal activity." United States v. Cortez, 449 U.S. 411, 417 (1981); State v. Lesley, 486 S.E.2d 276 (Ct. App. 1997). A court must consider "the totality of the circumstances – the whole picture" when determining whether reasonable suspicion exists. Cortez, 449 U.S. at 417.

See State v. Woodruff, 344 S.C. 537, 546, 544 S.E.2d 290, 295 (Ct. App. 2001) ("The term 'reasonable suspicion' requires a particularized and objective basis that would lead one to suspect another of criminal activity. In determining whether reasonable suspicion exists, the whole picture must be considered."). Reasonable suspicion "entails. . . something more than an inchoate and unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause" Butler, 343 S.C. at 202, 539 S.E.2d at 416.

Here, officers had no reasonable suspicion to stop the defendant's vehicle. Officers had never met or heard of Harris. Officers conducted no investigation to determine whether Harris' allegation that Pope was a drug supplier was true and reliable. Each officer that testified admitted that Highway 176 was not a high crime area and the stop occurred during daylight hours. There was no testimony of any traffic violations and no citations were given to Appellant, the driver.

Appellant did not try to flee once the blue lights were initiated. Appellant and his co-defendants did not exhibit any evasive behavior or gave any indication that they were engaged in any criminal activity.

Other than the claim made by an unreliable drug dealer with a motive to get out of jail, there was absolutely no evidence that Appellant and his co-defendants had committed or were about to commit a crime. See Butler, 343 S.C. at 202, 539 S.E.2d at 416 ("The burden is on the State to articulate facts sufficient to support reasonable suspicion to stop an automobile.").

II. The trial judge erred by denying defense counsel's motion to suppress the scale and money found during the search of the vehicle that Appellant was driving and a search of Appellant and his two co-defendants, where police had no probable cause to believe that the vehicle contained evidence of criminal activity and there were no exigent circumstances to justify the search without a warrant.

Relevant Facts

See Relevant Facts, supra.

Discussion

"[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967); State v. Bailey, 274 S.E.2d 913 (1981). The automobile exception to the search warrant requirement allows police officers to conduct a warrantless search of an automobile when the officers have probable cause to believe the automobile contains evidence of criminal activity. Carroll v. United States, 267 U.S. 132, 153 (1925). The bases for the exception are (1) the ready mobility of automobiles and the potential that evidence may be lost or destroyed before a warrant is obtained and (2) the lessened expectation of privacy in motor vehicles which are subject to government regulation. State v. Cox, 290 S.C. 489, 491, 351 S.E.2d 570, 571 (1986); State v. Peters, 271 S.C. 498, 501, 248 S.E.2d 475, 477 (1978).

"[U]nder the automobile exception, probable cause alone is sufficient to justify a warrantless search." Id. at 492, 351 S.E.2d at 571-72. There is no separate exigency requirement. Maryland v. Dyson, 527 U.S. 465, 467 (1999). The standard for probable cause to conduct a warrantless search of an automobile is "no less stringent" than the standard for obtaining a warrant. Peters, 271 S.C. at

502, 248 S.E.2d at 477. Probable cause requires "a justifiable determination, based upon the totality of the circumstances and in view of all the evidence available to law enforcement officials at the time of the search, that there exists a practical, nontechnical probability that a crime is being committed or has been committed and incriminating evidence is involved." State v. Bultron, 318 S.C. 323, 332, 457 S.E.2d 616, 621 (Ct. App. 1995) (citing State v. Adams, 291 S.C. 132, 352 S.E.2d 483 (1987)).

In State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007), the S.C. Supreme Court addressed the issue of whether probable cause supported a warrantless search of an automobile. In Weaver, officers developed the defendant as a murder suspect at the scene of the crime. Officers learned that the defendant had been driving a green Jeep around the time of the murder. Id. at 320, 649 S.E.2d at 482. When officers located the Jeep, it smelled of bleach and the interior was wet. The Court concluded that to the officers, it seemed apparent there had been an attempt to destroy evidence in the Jeep. Id. Because the Jeep was connected to the suspect and the murder investigation led officers to the fact that evidence may be found in the Jeep, the Court found that there was probable cause to search without warrant. Id.

To determine whether probable cause existed as a result of information given to law enforcement from a confidential informant, the reliability and credibility of the confidential informant need to be examined. Illinois v. Gates, 462 U.S. 213, 230 – 235 (1983); State v. Johnson, 302 S.C. 243, 247 – 248, 395 S.E.2d 167, 169 – 170 (1990). No one factor is necessary or sufficient to establish probable cause. Rather, probable cause is determined by the totality of the circumstances where "[a] deficiency in one [factor] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." Gates, 462 U.S. at 230 – 235.

Specifically,

> "[i]f, for example, a particular informant is known for the unusual reliability of his predictions of certain types of criminal activities in a locality, his failure, in a particular case, to thoroughly set forth the basis of his knowledge surely should not serve as an absolute bar to a finding of probable cause based on his tip. . . . Likewise, if an unquestionably honest citizen comes forward with a report of criminal activity – which if fabricated would subject him to criminal liability – we have found rigorous scrutiny of the basis of his knowledge unnecessary. . . . Conversely, even if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case."

Id.

Here, officers had no probable cause to believe that the Ford Expedition contained any evidence of criminal activity. Officers failed to investigate and confirm Harris' assertion that Pope was his drug supplier and that Pope would meet Harris to deliver drugs. Appellant and his co-defendants did not exhibit evasive behavior or try to flee from police. Captain McNeil even admitted that Appellant was willing to talk to him when he was ordered out of the car. Instead of confirming Harris' allegation that Pope was transporting drugs from Spartanburg to Union, officers took his word and immediately handcuffed Appellant, Crosby, and Pope and searched the vehicle.

Lt. Sherfield admitted that the area where the vehicle was stopped was not a high crime area and it was during daylight hours. There was no testimony of any smell of drugs as officers approached the Ford Expedition. The only information that officers had was claim made by someone who had just been arrested for distributing drugs only hours before. The information was from an individual officers had never met before and who was never established as reliable.

III. The trial judge erred by denying defense counsel's motion to suppress the drugs found in Corporal Vinson's patrol car, where there was an incomplete chain of custody because the officer attached an affidavit to the drugs sent to SLED, which falsely stated where the drugs had been recovered.

Relevant Facts

Lt. Sherfield completed an affidavit to attach to the evidence bag containing the drugs found in Corporal Vinson's patrol car that was sent to SLED. Tr. vol. 1, 110 – 111. On the affidavit, Sherfield stated that he recovered the crack cocaine from Appellant, Pope, and Crosby. Tr. vol. 1, 110 – 111. However, Corporal Vinson asserted that he discovered the crack cocaine underneath the seat in his patrol car. After finding the crack, Vinson gave the drugs to Sherfield, who submitted it to SLED for analysis.

Willie Smith, the SLED analyst explained that if he had known the affidavit was false, he would not have tested the drugs. Tr. vol. 3, 206, lines 14 – 17. He stated that he would have sent the evidence back to the law enforcement agency "and let them know there was a problem with their chain of custody." Tr. vol. 3, 206, lines 14 – 17.

Discussion

A party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable. State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007). Where an analyzed substance has passed through several hands, "the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis." State v. Taylor, 360 S.C. 18, 22 – 23, 598 S.E.2d 735, 737 (Ct. App. 2004). A sufficient foundation "trac[es] the chain-of-custody of the item with sufficient completeness to render it

reasonably probable that the original item has neither been exchanged with another nor been contaminated or tampered with." State v. Glenn, 328 S.C. 300, 492 S.E.2d 393, 395 (1997).

Here, Lt. Sherfield provided false information on the affidavit attached to the bag of cocaine sent to SLED. Sherfield wrote that he took the crack cocaine from Appellant and his co-defendants in the traffic stop, which is completely false. Corporal Vinson testified that he found the crack cocaine under the back seat of his patrol car after removing Appellant and Crosby.

At the time the SLED analyst received the drugs for testing, the first "link" in the chain had not been established. One officer claimed to have found the crack cocaine in his patrol car, while another officer signed a sworn statement asserting that he recovered the crack cocaine from the three defendants. Further, the SLED analyst explained that if he had known the affidavit was false, thereby rendering the chain of custody problematic, he would have sent the drugs back to the law enforcement agency without testing them.

IV. The trial judge erred by denying defense counsel's motion for a directed verdict of acquittal, where there was no direct or substantial circumstantial evidence that Appellant had actual or constructive possession of the drugs found in Corporal Vinson's patrol car or that Appellant had knowledge that drugs were in the black Ford Expedition that Appellant was driving but did not own.

Charge

To prove trafficking in cocaine base the State must show "[a] person who knowingly sells, manufactures, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of ten grams or more of . . . cocaine base." S.C. Code Ann. § 44-53-375 (C) (1976).

Possession of [drugs] requires "proof of possession-either actual or constructive, coupled with knowledge of its presence." State v. Hudson, 277 S.C. 200, 202, 284 S.E.2d 773, 774 (1981). "Actual possession" occurs when the drugs are found to be in the actual physical custody of the person charged with possession. State v. Ballenger, 322 S.C. 196, 199, 470 S.E.2d 851, 854 (1996) To prove "constructive possession," the State must show that the person charged had dominion and control or right to exercise dominion and control over the drugs or the place where the drugs were found. State v. Lane, 271 S.C. 68, 73, 245 S.E.2d 114, 116 (1978); State v. Ellis, 263 S.C. 12, 22, 207 S.E.2d 408, 413 (1974). Mere presence where drugs are found is not enough to prove possession. State v. Stanley, 365 S.C. 24, 43, 615 S.E.2d 455, 465 (Ct. App. 2005).

Whether a defendant had 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 substance." State v. Hernandez, 382 S.C. 620, 624 S.E.2d 603, 605 (2009).

Relevant Facts

After ordering Appellant and his co-defendants out of the Ford Expedition and placing them in handcuffs, officers searched the vehicle, but found no drugs. Tr. vol. 1, 57, lines 7 – 9. There were no drugs found on either defendant. Tr. vol. 1, 57, lines 7 – 9. The digital scale was found in the back underneath the seat.

After being placed under arrest for the suspected cocaine residue found on the scale, Appellant and Crosby were placed in Corporal Vinson's patrol vehicle and transported to the Union County Jail. Pope was placed in another police car. Tr. vol. 2, 159, lines 3 – 8. Vinson claimed that after removing Appellant and Crosby from his vehicle, he searched under the back seat where Appellant and Crosby were sitting and located a plastic bag containing a quantity of suspected crack cocaine. Tr. vol. 2, 159, lines 10 – 19.

Vinson asserted that he searched his car before placing Appellant and Crosby inside. Tr. vol. 3, 167. Vinson described that fact that he "found the crack on the passenger side on the back . . .under the seat." Tr. vol. 3, 166 – 167. However, Vinson admitted that Appellant and Crosby were both in handcuffs and that he did not "notice either of them moving about in the seat kind of strangely." Tr. vol. 3, 167. Vinson stated that Crosby had been sitting in the spot where the crack cocaine was found. Tr. vol. 3, 160, lines 7 – 9.

Motion for Directed Verdict of Acquittal

At the close of the State's case, defense counsel moved for a directed verdict of acquittal on the charge of trafficking in crack cocaine. Tr. vol. 3, 236. Counsel argued that Appellant "made no

declarations, did not act suspiciously, did not flee and therefore, did not exhibit any tendency to show he knew that he was involved" in any type of drug activity." Tr. vol. 3, 238, lines 2 – 5.

Counsel explained that Appellant did not own the car and was merely acting as a "taxi driver or chauffeur" for Pope. Tr. vol. 3, 238, lines 5 – 7. Counsel emphasized Lt. Sherfield's testimony that there were no movements by Appellant and "no contraband found within his reach, no contraband found on his person." Tr. vol. 3, 241, lines 3 – 7. Further, the State presented "no evidence" that Appellant had knowledge "of anything underneath the seat in someone else's [patrol] car." Tr. vol. 3, 244, lines 21 – 23.

Judge Hayes denied counsel's motion. The judge found that "there is direct evidence and substantial circumstantial evidence from which the jury could return a verdict as to Mr. Brewton." Tr. vol. 3, 244, lines 7 – 11.

Discussion

The trial judge erred by denying defense counsel's motion for a directed verdict of acquittal. There was no direct or substantial circumstantial evidence that Appellant had actual or constructive possession of the drugs found in Corporal Vinson's patrol car. There was no evidence that Appellant had knowledge that drugs were in the black Ford Expedition that Appellant was driving but did not own.

A criminal defendant is entitled to a directed verdict when the State fails to present evidence of the offense charged. State v. McCombs, 368 S.C. 489, 493, 629 S.E.2d 361, 362-63 (2006); State v. Cherry, 361 S.C. 588, 593, 606 S.E.2d 475, 478 (2004); State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). When reviewing the trial judge's denial of a directed verdict, an appellate court must review the evidence presented at trial in the light most favorable to the State. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. Buckmon, 347 S.C. 316, 321, 555

S.E.2d 402, 404 (2001). Where the State relies "exclusively" on circumstantial evidence, such evidence must be "substantial" before the judge submits the case to a jury. State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2001). When the evidence merely raises a suspicion that the defendant is guilty, the trial judge should grant a directed verdict motion. State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001).

See State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011) (holding that the trial court should have granted a directed verdict of acquittal on the charge of murder where there was no direct evidence linking defendant to the crime scene or items from the victim's house found in a burn pile on defendant's mother's property, there was no testimony that defendant had control over the burn pile, and blood found on defendant's pants could not be matched to the victim's DNA.); State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2011) (holding that the circumstantial evidence presented by the State did not tend to prove defendant's guilt of burglary, larceny, and conspiracy, where the only evidence presented was that defendant was with the burglars in the stolen car less than ninety minutes after the burglary, defendant fled from law enforcement, and defendant asked an uninvolved person to lie for him.); State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000) (Evidence that car resembling the one in defendant's possession was parked at the victim's apartment complex on the night of the murder failed to place defendant at the scene of the crime or show his participation, where there was no evidence that the car belonged to defendant's girlfriend or that defendant entered the victim's apartment near the time of the murder.); and State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984) (Defendant was entitled to a directed verdict of not guilty where no evidence placed defendant at the scene of the murders, experts could not testify that footprint found at scene was made by shoes that purportedly belonged to defendant, the State could

not establish that cigarettes found at the scene had been smoked by defendant, and handprint found at the scene was not defendant's handprint.).

Here, there is absolutely no direct evidence or substantial circumstantial evidence that Appellant had knowledge that he was involved in any drug activity with Crosby and Pope. However, there is evidence that Appellant did not behave suspiciously and that he was willing to talk to officers at the scene of the stop. Although Appellant was driving the Ford Expedition, the vehicle did not belong to him. In fact, it belonged to Pope. Tr. vol. 1, 75, lines 11 – 12.

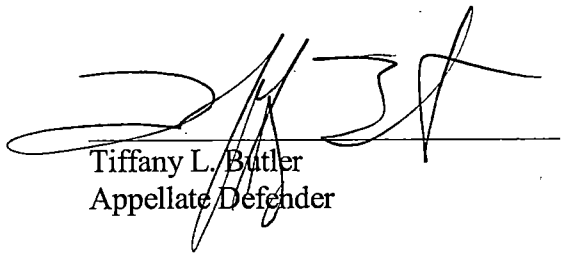
Officers found no drugs in the vehicle or on Appellant's person. Neither Crosby nor Pope had drugs on their person. While officers found the scale with the suspected cocaine residue in the vehicle, the scale was underneath the seat in the back. There was no evidence presented that Appellant knew what was in the vehicle.

The fact that no drugs were found on either defendant or in the car makes the bag of crack cocaine that Corporal Vinson claimed to have found in his patrol car even more questionable. Vinson asserted that he searched his car before placing Appellant and Crosby inside. However, Appellant and Crosby were both in handcuffs and were not moving around in the car. Appellant was not sitting in the spot where the bag of crack was found. There is **no** evidence that established Appellant had knowledge of any drug activity that may have been taking place, knowledge that the scale was in the Ford Expedition, and knowledge that drugs were in the patrol car. See State v. Lee, 298 S.C. 362, 380 S.E.2d 834 (1989) ("Possession requires more than mere presence."); State v. Brown, 267 S.C. 311, 227 S.E.2d 674 (1976) ("Mere presence" where the drugs are present is not sufficient to prove possession.); State v. Brownlee, 318 S.C. 34, 455 S.E.2d 704 (Ct. App. 1995) ("[T]he presence of the defendant at the location where drugs are found is . . . insufficient by itself to convict a defendant of . . . possession.").

CONCLUSION

For the grounds argued, Appellant Lashad Brewton respectfully requests this Court to grant a directed verdict of acquittal on the charge of trafficking in cocaine base. In the alternative, Appellant respectfully requests this Court to reverse his conviction and sentence and remand his case to the lower court with an order to suppress the scale and money found during the traffic stop, and the drugs found in the patrol car.

Respectfully submitted,



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of March, 2015.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Union County
John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LASHAD DEMOND BREWTON,

APPELLANT

APPELLATE CASE NO. 2014-000880

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 30th day of March, 2015.

Tiffany L. Butler
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 30th day of March, 2015.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.