TATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM BERKELEY COUNTY
Kristi L. Harrington, Circuit Court Judge

Appellate Case No. 2014-000767

THE STATE, ...RESPONDENT

v.

BARRY JERROD STANLEY, ...APPELLANT.

INITIAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

Did the trial court properly deny Appellant's motion for directed verdict when evidence was presented establishing that cocaine base in excess of twenty-eight grams, but less than one-hundred grams, was recovered by an eyewitness who observed Appellant, as the only occupant of the vehicle, throw the drugs from the car during a police chase, when Appellant's fingerprints were found in that vehicle in a location an officer observed Appellant touch during the chase, and when witness testimony identified Appellant as the aggressor in a domestic dispute arising from an argument about drugs in the home, that Appellant was seen leaving the scene of the domestic dispute as the sole occupant of the car from which the drugs were thrown and where the victim of the domestic dispute reported that Appellant had drugs with him in the vehicle?

STATEMENT OF THE CASE

The Grand Jury of Berkley County indicted Appellant for failure to stop for a blue light and trafficking in cocaine base in excess of twenty-eight grams, but less than one-hundred grams, third offense. (R. ___ [Indictments]). Appellant proceeded to trial on April 7, 2014 before the Honorable Kristi Harrington, and a jury. The jury found the appellant guilty of both charges, and the Judge Harrington imposed sentences of three years imprisonment for the failure to stop for a blue light charge and thirty years imprisonment for trafficking cocaine base, consecutive. (Tr. 322).

Appellant filed a timely appeal and filed and served the brief of Appellant. This brief of Respondent follows.

ARGUMENT

The trial court properly denied Appellant's motion for directed verdict when evidence was presented establishing that cocaine base in excess of twenty-eight grams, but less than one-hundred grams, was recovered by an eyewitness who observed Appellant, as the only occupant of the vehicle, throw the drugs from the car during a police chase, when Appellant's fingerprints were found in that vehicle in a location an officer observed Appellant touch during the chase, and when witness testimony identified Appellant as the aggressor in a domestic dispute arising from an argument about drugs in the home, that Appellant was seen leaving the scene of the domestic dispute as the sole occupant of the car from which the drugs were thrown and where the victim of the domestic dispute reported that Appellant had drugs with him in the vehicle.

Issue and Ruling

Appellant moved at trial for a directed verdict of acquittal at the close of the State's case arguing the State failed to prove his actual or constructive possession and control of the drugs. (Tr. 262). The State argued the evidence supported Appellant's actual possession. (Tr. 262 – 264). Appellant rested without presenting witness testimony and renewed the motion. (Tr. 270; 277; 316 - 317). The court denied the motion finding that eyewitness testimony and fingerprint evidence placed Appellant as the driver of a vehicle from which 28.84 grams of cocaine base was thrown, police testimony confirmed that they engaged Appellant in a high speed chase past the location where the drugs were found, that the drugs were thrown from the window of the vehicle

Appellant was driving during the pursuit and retrieved moments later, and that the victim of the initial dispute reported that Appellant took her vehicle which was later identified as the car from which the drugs were thrown and reported that Appellant had drugs and possibly a gun in the vehicle with him when he fled. (Tr. 264 – 266). It was the State's theory of the case that Appellant was in actual possession of the drugs. (Tr. 270 – 276; 287; 293; 304 -305).

Trial Evidence

On March 11, 2013, Evette Nelson ran out of her apartment, frantic, toward neighbors playing basketball in the parking lot and asked them to "call the police, he's beating me, he's going to kill me." (Tr. 77, 80; 90; 93; 97). Greg Rider testified that he and his son calmed Ms. Nelson down but could not call the police because they did not have their phones. However, he observed Appellant come out of his apartment, get into his blue Crown Victoria, and drive slowly through the basketball court while Ms. Nelson backed up to another building. Appellant then traveled through the gate and Mr. Rider took Nelson to his apartment and asked his wife to call the police. Rider instructed his son to stay there to protect the two women. (Tr. 98; 92 – 93; 98 - 101). Once inside Nelson was still hysterical and saying that Appellant was going to "kill her." Tanya Deane called 9-1-1 while her husband, Rider, went back outside to make sure that Appellant did not return. (Tr. 93-98). Rider saw Appellant return to the apartment complex, stop the car in front of Appellant's apartment, and run into his apartment while the car was running, and then get in the vehicle and drive to where Rider stood outside waiting on officers to arrive. (Tr. 98 - 101). Appellant stopped, made eye contact with Rider, and drove off. Law enforcement officers arrived not more than 15 seconds later.

(Tr. 99). Rider said no one was in the vehicle with Appellant and that he was able to look at Appellant driving the vehicle twice, once as Appellant drove through the basketball court and a second time when Appellant returned to the apartment. (Tr. 99; 100). Rider had no doubt that Appellant was the individual he saw driving the vehicle that day and described the vehicle Appellant was driving as a dark blue older model Crown Victoria with large wheels. (Tr. 99; 100- 101). He also stated that Appellant was the only person he had seen driving that vehicle. Ms. Nelson confirmed that the Crown Victoria belonged to her but that Appellant had permission to use it. (Tr. 77 - 79; 89; 94; 100). Not only did Rider know Appellant from previous interactions with him, he also identified Appellant in a photographic lineup as the person he saw driving the vehicle that day. (Tr. 97; 101; 187; 189).

Corporal Ellwood and Detective Camp arrived at the apartment building and relayed to other officers the information that Appellant left in a Crown Victoria. (Tr. 104 – 105; 110). Nelson appeared very upset and fearful of Appellant and provided Camp a cell phone photograph of Appellant which was relayed by text to officers pursuing Appellant. (Tr. 106 – 108; 157). Ms. Nelson advised the officers that she and Appellant argued because she did not want Appellant to keep drugs in the apartment with her children. (Tr. 107; 280). Ms. Nelson also reported that Appellant took her vehicle and had drugs and possibly a firearm in the vehicle with him. (Tr. 157; 162). This information was also relayed to other officers. (Tr. 157).

Officer Dodd, an off duty resource officer, heard the commotion over the police radio about a black male who left the scene in a dark Crown Victoria and requested permission to join the pursuit as it was near his location. (Tr. 111 – 12). Officer Dodd

was the first to encounter Appellant driving in the opposite direction at a high rate of speed. (Tr. 112; 120 – 21). Dodd turned around, activated his blue lights and attempted to make a traffic stop, but Appellant did not stop. (Tr. 112-113). Instead, Appellant attempted to hit Dodd's patrol car but a collision was avoided when Dodd swerved off of the road. (Tr. 114). Dodd remained the lead officer in pursuit through several neighborhoods at which point Corporal Lanphere took over. (Tr. 114). Dodd identified Appellant as the person he saw driving the Crown Victoria that day. (Tr. 122; 124).

While the pursuit of Appellant was still active, a call was made to the police department that narcotics had been thrown out of a dark blue Crown Victoria that was currently involved in a police chase as the pursuit passed the intersection of Spring Hill and Fort Drive. (Tr. 115; 158-159). Corporal Ellwood and Officer Dodd responded. (Tr. 114; 123; 158). Dodd testified that he did not see anything being thrown from Appellant's vehicle during his pursuit of Appellant in that neighborhood but stated that he slowed as he and Appellant approached a sharp turn because he feared children might be present. Dodd testified that the narcotics were discovered along the sharp turn where he lost sight of Appellant. (Tr. 116 – 119; 121). Officers Dodd and Ellwood spoke with and took a statement from William Loflin. (Tr. 115- 116; 158; 164). Loflin reported that he heard the sirens and saw the blue Crown Victoria being driven by a black male and being pursued by officers in the residential neighborhood. Loflin reported that as the pursuit passed, he saw narcotics coming out of the Crown Victoria Appellant was driving. (Tr. 115 – 116; 163 - 164; 166). The item thrown from the car was given to the officers who described the contents as a clear plastic bag containing a disc-shaped substance and several shards. (Tr. 158 – 160). Ellwood conducted a quick test of the

substance. It tested positive for a cocaine based substance. (Tr. 160; 149). Ellwood took the evidence into custody and interviewed the witnesses, Rowland and his coworker, Lofin, who was out in the backyard smoking when he heard sirens then saw Appellant driving the car as it raced by and Appellant throw something out of the window. (Tr. 136-141).

William Loflin testified that he was on the back porch of the home smoking a cigarette when he heard sirens in the neighborhood. The residential neighborhood has only one access in and out. (Tr. 136). He walked into the back yard to investigate what he heard and saw a blue Crown Victoria "come flying by" and cut the corner with a "siren" behind it trying to catch up. Loflin stated that the driver of the Crown Victoria was looking over his shoulder the entire time for the officer in pursuit. Loflin stated that the driver threw a bag out of the vehicle and took off. Loflin testified that the officer following the Crown Victoria would not have been in a position to see the bag being tossed out. (Tr. 136 – 137; 140; 143 -146; 150 – 153). Loflin called to his roommate to retrieve the item that was thrown from the car and call officers about what they found. (Tr. 138; 153). Loflin saw his roommate pick up the bag and identified the contents of the bag as crack and also identified the drugs in court as the item he saw thrown from the Crown Victoria. (Tr. 141 – 142; 148 – 149).

Christopher Rowland testified that William Loflin was his roommate on the day in question and that he also heard sirens. He also testified that Loflin advised him that he saw a car fly by and throw a bag out of the window. Rowland went outside and found the bag on the side of the road. He retrieved the bag based upon his concern the bag contained drugs that would be found by children in the neighborhood and called law

enforcement officers to report what he found. (Tr. 168 – 169; 179). He turned the bag over to officers when they arrived and identified the drugs in court as the item he retrieved that day. (Tr. 170 – 175). The bag contained 28.85 grams of crack cocaine or cocaine base. Tr. 206 – 208; 219 – 225).

Officer Lanphere also received the call about the domestic assault and the fact that the assailant fled in a blue Crown Victoria. Lanphere waited near the neighborhood where Appellant was being pursued and took over the pursuit. (Tr. 126 – 129; 182). Appellant was identified as the driver and sole occupant of the blue Crown Victoria. (Tr. 133). Lanphere saw Appellant touch the rear-view mirror in the vehicle during his pursuit of Appellant. (Tr. 133). Officers Lanphere and Beaudoin observed as Appellant collided with another vehicle. (Tr. 129 – 131; 182). Appellant abandoned the Crown Victoria and fled on foot. Tr. 129-130). Appellant's fingerprints were found on the rear-view mirror of the blue Crown Victoria Appellant abandoned. (Tr. 200; 206; 253 – 259). Appellant was charged, and found guilty of failure to stop for a blue light and trafficking in cocaine base in excess of twenty-eight grams, but less than one-hundred grams, third offense.

Discussion

Appellant argues on appeal that the trial judge erred in failing to direct a verdict of acquittal on the charge of trafficking cocaine base, contending the State failed to introduce direct or substantial circumstantial evidence at trial that he was in constructive possession of the drugs found on the ground.

"When ruling on a directed verdict motion, the trial court is concerned with the existence or nonexistence of the evidence, not its weight. State v. Weston, 367 S.C. 279,

625 S.E.2d 641 (2006). "A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." State v. McCombs, 367 S.C. 489, 493, 629 S.E.2d 361, 362 - 63 (2006). However, the trial judge should deny a directed verdict motion and submit the case to the jury if there is any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused or from which guilt may be fairly or logically deduced. State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004) (emphasis added). "[A] trial [court] is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis." State v. Zeigler, 364 S.C. 94, 102 – 13, 610 S.E.2d 859, 863 (Ct. App. 2005). In State v. Cherry, 361 S.C. 588, 593-594, 606 S.E.2d 475, 478 (2004), the Court described circumstantial evidence and direct evidence as follows:

> There are two types of evidence which are generally presented during a trial – direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.

Where the State relies exclusively on circumstantial evidence, the trial court must submit the case to the jury if there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. State v. Buckmon, 347 S.C. 316, 555 S.E.2d 402 (2001). A case is considered a direct evidence case, rather than circumstantial, when the State relies upon direct evidence to prove the acts of the crime and the identity of the perpetrator, and circumstantial evidence was merely corroborative or offered to demonstrate intent. State v. Salisbury, 343 S.C. 520, 541 S.E.2d 247 (2001) (stating the officers' personal

observations and opinions of the defendant's actions, appearance, and condition constitute direct evidence of DUI because it is based on the officers' actual knowledge of the situation and requires no inference from the jury) (citing State v. Carroll, 277 S.C. 306, 286 S.E.2d 382 (1982); State v. Jenkins, 270 S.C. 365, 242 S.E.2d 420 (1978); State v. Simmons, 269 S.C. 649, 239 S.E.2d 656 (1977)).

On appeal from the denial of a directed verdict, an appellate court must view the evidence and all reasonable inferences in light most favorable to the State. State v. Weston, 367 S.C. 279, 625 S.E.2d 641 (2006). If there is any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." State v. Cherry, 361 S.C. at 588, 593 – 94, 606 S.E.2d 475, 478. "[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." State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986).

Appellant was charged with trafficking cocaine base, third offense, in violation of S. C. Code Ann. § 16-53-375 (C) (2) (c) (Supp. 2014). S.C. Code Ann. § 44-53-375 (C) provides in pertinent part that "[a] person who . . . is knowingly in actual or constructive possession or knowingly attempts to become in actual or constructive possession of ten grams or more of . . . cocaine base . . . is guilty of a felony which is known as "trafficking in . . . cocaine base . . . ."

Conviction by possession of illegal 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); State v. Bowers, 301 S.C. 457, 392 S.E.2d

482 (Ct. App. 1990). "Actual possession occurs when the drugs are found to be in the actual physical custody of the person charged with possession, while constructive possession occurs when the person charged with possession has dominion and control over either the drugs or the premises upon which the drugs are found." State v. Ballenger, 322 S.C. 196, 199, 470 S.E.2d 851, 854 (1996), citing State v. Ellis, 263 S.C. 12, 207 S.E.2d 408 (1974); State v. Mollison, 319 S.C. 41, 459 S.E.2d 88 (Ct. App. 1995). "In drug cases, the element of knowledge is seldom established through direct evidence, but may be proven circumstantially." State v. Jackson, 395 S.C. 250, 255, 717 S.E.2d 609, 612 (Ct. App. 2011), citing State v. Hernandez, 382 S.C. 620, 677 S.E.2d 603 (2009).

The theory of the State's case and the evidence presented at trial establish that the crack cocaine in question was in Appellant's actual possession. (See Tr. 287). The evidence reflects that Appellant and Ms. Nelson argued over Appellant having drugs in the apartment and that Appellant physically assaulted and threatened Nelson's life during the altercation. Nelson fled and sought assistance from neighbors Greg Rider, Rider's wife, Tanya, and their son, Preston. Law enforcement officers were immediately summoned. Rider, who knew Appellant, saw Appellant leave the apartment complex in the blue Crown Victoria belonging to Ms. Nelson but which Appellant had permission to drive. In fact, Appellant was the only person Rider had seen driving that vehicle. Appellant returned to the apartment complex moments later. Appellant pulled in front of his apartment, left the blue Crown Victoria running, and dashed inside his apartment momentarily. Appellant again fled the apartment complex no more than fifteen seconds before officers arrived. Appellant was the only person in the Crown Victoria. When

officers arrived, Ms. Nelson reported that Appellant assaulted her and had drugs in the vehicle and possibly a gun. Nelson provided a description and photograph of Appellant which was immediately relayed by text message to other officers along with a radio transmission about Appellant which resulted in the prompt sighting and pursuit of Appellant by Officer Dodd. The individual driving the Crown Victoria seen by Officer Dodd matched the description given of the perpetrator and was identified by Officer Dodd as Appellant. Appellant was the sole occupant of the Crown Victoria and refused to stop for the officers' blue lights and sirens, swerved toward a patrol car in an effort to escape and led officers on a high-speed chase indicating his consciousness of guilt. See State v. Burgess, 408 S.C. 421, 759 S.E.2d 407 (Ct. App. 2014), citing State v. Walker, 366 S.C. 643, 623 S.E.2d 122 (Ct. App. 2005).

During a portion of his pursuit, Appellant drove at a high rate of speed through a neighborhood with only one road allowing for entry and exit. Appellant was pursued by a law enforcement officer into the neighborhood. As Appellant sped through a sharp turn and while looking back at the patrol car in pursuit, Appellant threw a bag of cocaine base from the Crown Victoria at a point when the officer slowed his vehicle and was out of eyesight of Appellant's vehicle. However, a resident of the neighborhood saw Appellant's pursuit by the officer, identified the Crown Victoria Appellant was driving, and saw Appellant look back for the patrol car and throw the bag of cocaine base out of the blue Crown Victoria when the patrol car was out of sight. The bag thrown by Appellant was immediately retrieved and promptly turned over to law enforcement officers while other officers continued to pursue Appellant.

Appellant was seen by a pursuing officer touching the rear-view mirror inside the Crown Victoria. Appellant fingerprints were found on the rear-view mirror in the blue Crown Victoria after Appellant abandoned the vehicle during the pursuit and fled on foot. Appellant was identified as the only occupant of the blue Crown Victoria and the bag containing the cocaine base was identified in court as the item thrown from the Crown Victoria by Appellant. The bag contained 28.85 grams of cocaine base.

Respondent submits that the facts of this case are consistent with State v. Ballenger, 322 S.C. 196, 470 S.E.2d 851 and n. 3 (1996). In Ballenger, officers responding to a complaint about drugs being sold on a street corner saw the defendant who matched the description of given and who was engaged in what appeared to be a drug transaction. The defendant put something in his pocket and fled when he saw the officers. Officers pursued the defendant on foot, and found crack cocaine on the ground near where the defendant fell during the pursuit. Our supreme court concluded that there was sufficient evidence of actual possession to justify the trial court's denial of a directed verdict motion and noted the evidence did not support constructive possession. The court concluded that the defendant matched the description of the possible perpetrator, appeared to be involved in a drug transaction, put something in his pocket and fled when he saw the officers, and the drugs were found in the open in an area where the defendant fell during pursuit by officers. While the defendant did not have physical custody of the drugs when he was caught, the only reasonable inference from the evidence presented in Ballenger was that the defendant either discarded and abandoned the drugs or simply lost the drugs when he fell.

Similarly, the trial court properly denied Appellant's motion for directed verdict

in this case when evidence was presented establishing that cocaine base in excess of twenty-eight grams, but less than one-hundred grams, was recovered by an eyewitness who observed Appellant, as the only occupant of the vehicle, throw the cocaine base from the vehicle Appellant driving during a police pursuit, when Appellant's fingerprints were found in that vehicle in a location an officer observed Appellant touch during the pursuit, and when witness testimony identified Appellant as the aggressor in a domestic dispute arising from an argument about drugs in the home, when Appellant was seen fleeing the scene of the domestic dispute as the sole occupant of the vehicle from which the cocaine base was thrown and when the victim of the domestic dispute reported that Appellant had drugs with him in the vehicle, police pursuit occurred within moments of Appellant fleeing the scene of the domestic dispute, and Appellant intentionally attempted to elude officers. Respondent submits that direct eye-witness evidence of Appellant's actual possession of the drugs he threw from the Crown Victoria was sufficient to withstand the motion for directed verdict. See also State v. Grant, 275 S.C. 404, 272 S.E.2d 169 (1980) (finding that a jury charge on flight as evidence of guilt is improper, admission of evidence and argument by counsel concerning flight is permissible); State v. Gore, 318 S.C. 157, 456 S.E.2d 419 (Ct.App. 1995) (stating evidence sufficient to withstand directed verdict when marijuana was found after 1:00 a.m. in vacant parking lot under car where defendant had been).

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

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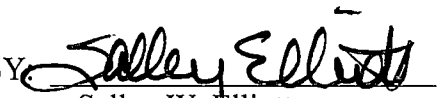
BY 
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Columbia, South Carolina
June 8, 2015

STATE OF SOUTH CAROLINA
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APPEAL FROM BERKELEY COUNTY
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Appellate Case No. 2014-000767

THE STATE, ...RESPONDENT

v.

BARRY JERROD STANLEY, ...APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Initial Brief of Respondent* and *Designation of Matter* , both dated June 8, 2015, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Tiffany L. Butler, Esquire
SC Commission on Indigent Defense
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I further certified that all parties required by Rule to be served have been served. This 8th, day of June, 2015.

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SC Court of Appeals

June 8, 2015

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Re: The State v. Barry Stanley
Appellate Case No. 2014-00767

Dear Ms. Butler:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Salley Elliott

Salley W. Elliott
Senior Assistant Deputy Attorney General
S.C. Bar No. 1871

SWE/ab
Enclosures

cc: Honorable Jenny A. Kitchings
(original enclosed)
Victim Services