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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Roger L. Couch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

REGINALD R. WHITE,

APPELLANT

APPELLATE CASE NO. 2015-000171

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court erred in ruling that evidence of a prior drug distribution by appellant at a trailer two days before the other drug charges for which appellant was being tried for from the same trailer would be admissible because it was a prior bad act and unduly prejudicial as propensity evidence?

II. Whether the trial court erred in denying counsel's directed verdict motion when the State failed to present any substantial evidence beyond a reasonable doubt that appellant had dominion and control over the drugs or the premises in which they were found?

STATEMENT OF THE CASE

Appellant was convicted of trafficking in cocaine, third offense, and possession with intent to distribute crack cocaine, third offense, after a jury trial held before the Honorable Roger L. Couch in York County from January 12-14, 2015. Appellant was sentenced to life imprisonment without parole on each conviction. William A. McKinnon, Esq. was defense counsel. Matthew W. Shelton, Esq. and Christopher Epting, Esq. were the assistant solicitors.

This appeal follows.

Argument I

The trial court erred in ruling that evidence of a prior drug distribution by appellant at a trailer two days before the other drug charges for which appellant was being tried for from the same trailer would be admissible because it was a prior bad act and unduly prejudicial as propensity evidence.

A hearing was held on the admissibility of certain statements appellant made and the prejudice of allowing a prior bad act to come into evidence. Just prior to that hearing, Detective Carson Neely testified about a search warrant that was drawn up to search a residence in reference to drug activity. (Tr. p. 71, lines 10-12) The residence was a mobile home on 809 Silver Creek Drive in York County. (Tr. p. 75, line 8- p. 76, line 6) Jessica Collins testified that she resided at the mobile home on February 26, 2014, when the search warrant was executed and she was present when the police came. The electric bill was in her name and her mail came there. (Tr. p. 79, line 3- p. 80, line 24)

Investigator McGarity testified that on February 27, 2014, he advised appellant of his rights during the investigation of this case. (Tr. p. 86, l. 20-24) Appellant agreed to speak with him. (Tr. p. 92, lines 15-17) McGarity said appellant indicated he lived at the mobile home. He said he and Ms. Collins had a child together. In response to a question of what the police would find if they searched the premises, appellant replied that they would find crack cocaine, cocaine, and oxycodone pills. (Tr. p. 92, line 10- p. 93, line 23)

Detective Neely testified that he also spoke with appellant and appellant told him that on February 24, 2014, at the mobile home he gave two people crack cocaine and they smoked it. (Tr. p. 116, line 20- p. 117, line 9)

Defense counsel argued that the above was a prior bad act under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) and there was no connection with that act and the drugs that were found in the mobile home on February 26. On the trafficking charge, intent was not an element of the offense so intent was not relevant. On the possession with intent charge, appellant was above the one gram limit so the State could rely on the statutory presumptive intent. The real question for the jury in this case was whether the cocaine and crack cocaine found in the air vent in the mobile home belonged to appellant based on the theory of constructive possession. Any reliance on "intent" by the State should be far outweighed by the prejudice of the prior bad act. (Tr. p. 126, line 1- p. 127, line 13)[1]

The assistant solicitor argued that the fact appellant gave crack cocaine to two people two days earlier went to prove that the drugs found on February 26 were appellant's drugs. (Tr. p. 129, lines 7-14)

Defense counsel argued that the State did not have to prove intent because of the amount of drugs found. To bring up the prior bad act would be extraordinary prejudicial. The State just wanted to prejudice the jury and to get the jury to believe the drugs found during the search belonged to appellant. (Tr. p. 132, lines 7-19)

The trial court found the prior bad act to be more probative than prejudicial and allowed it to come into evidence. (Tr. p. 134, line 14- p. 135, line 9) That ruling was in error.

In State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984) the court wrote:

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[1] At the directed verdict motion the prior bad act was brought up multiple times as if it should prove the substantive charges for which appellant was on trial. (Tr. p. 285; Tr. p. 286; Tr. p. 298; Tr. p. 303; Tr. p. 325; Tr. p. 331; Tr. p. 335; Tr. p. 336; Tr. p. 340; Tr. p. 348)

> Under our system of justice, a conviction must be based upon evidence of the offense for which the accused is on trial rather than prior criminal or immoral acts. *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). Furthermore, where bad acts did not result in a conviction, guilty plea, indictment, or arrest of the appellant, this Court has limited the State's use of the evidence. *State v. Smith*, 279 S.C. 440, 308 S.E.2d 794 (1983). (Appellant's lover improperly related instance of the appellant's unconvicted sexual battery upon her in his trial for murder of another woman); *State v. Rivers*, 273 S.C. 75, 254 S.E.2d 299 (1979). (In trial for criminal sexual conduct with the prosecutrix the court erred in receiving testimony from the appellant's wife regarding his prior unconvicted acts of sexual misconduct on her); *State v. Conyers*, 268 S.C. 276, 233 S.E.2d 95 (1977). (Allegations that the appellant poisoned her first husband not admissible because the evidence was not clear and convincing); *State v. Drew*, 283 S.C. 118, 316 S.E.2d 367 (S.C.1984). (Cross-examination and reply testimony regarding unconvicted act of burning a combine not proper in criminal conspiracy trail for burning a business.)
>
> We conclude that, under circumstances of this case, solicitor's cross-examination regarding the prior fire was prejudicial. When, as here, the previous alleged bad act is strikingly similar to the one for which the appellant is being tried, the danger of prejudice is enhanced. Additionally, we believe that the circumstantial evidence nature of the case makes the mention of an alleged similar misdeed by the appellant particularly damning in the jury's eyes.

As the court noted in State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991) and under Rule 403, SCRE, "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis..." In State v. Carter, 323 S.C. 465, 476 S.E.2d 916 (Ct. App. 1996) the court held that evidence of a drug transaction involving the defendant four days before the transaction giving rise to the charge against the defendant was not admissible for any proper purpose.

The prior bad act also placed appellant's character into issue. In Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989) the Court wrote:

> In a criminal case, the State cannot attack the character of the defendant unless the defendant herself first places her character in issue. State v. McElveen, 280, S.C. 325, 313 S.E.2d 298 (1984); State v. Swords, 279 S.C. 554, 309 S.E.2d 750 (1983); State v. Gamble, 247 S.C. 214, 146 S.E.2d 709 (1966). Further, evidence of prior bad acts is inadmissible to show criminal propensity or to demonstrate that the accused is a bad person.

In State v. Ross, 272 S.C. 56, 249 S.E.2d 159 (1978), the Court noted: "Character evidence is so highly prejudicial that it is usually excluded under hard and fast rules." (citation omitted). In State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987), the Court elaborated on the subject:

> It is well established that evidence of other crimes or prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad individual. *See, e.g., State v. Gregory*, 191 S.C. 212, 4 S.E.2d 1 (1939).

The prior bad act was irrelevant to the trafficking charge because "intent" was not an element of that offense. It only served to prejudice appellant's case because it served as propensity evidence. The prior bad act was not necessary for the possession with intent to distribute crack cocaine charge because the amount of crack cocaine involved was 5.11 grams. (Tr. p. 279, lines 12-14) This was well above the statutory presumptive intent charge. So the State's reliance on the prior bad act for the crack cocaine charge should have been outweighed by its prejudice. Finally, the trial court failed to give a limiting instruction on the affect of the prior bad act. The rule is that when evidence of other crimes is admitted for a specific purpose, the trial court is required to instruct the jury to limit their consideration of this evidence for the particular purpose for which it was offered. State v. Timmons, 327 S.C. 48, 488 S.E.2d 323 (1997) Hence, the jury was free to view the prior bad act as propensity evidence which was prejudicial to appellant.

<u>Argument II</u>

<u>The trial court erred in denying counsel's motion for a directed verdict when the State failed to present any substantial evidence beyond a reasonable doubt that appellant had dominion and control over the drugs or the premises on which they were found</u>.

During the actual trial, Investigator McGarity testified that a search warrant was executed on February 26, 2014, around 6:00 PM at the mobile home on Silver Creek Drive. Detectives Beck and Neely were with him along with some other officers. (Tr. p. 168, line 3-20) He said Jessica Collins who lived at the residence showed up as they were executing the warrant. Appellant was not there. There were children living at the residence. (Tr. p. 173, line 6- p. 174, line 11) As a result of the search, the detective said they found a glass jar that appeared to contain one bag of crack cocaine and three bags of cocaine in the back bedroom inside the floor vent. A digital scale was found on the kitchen table. What appeared to be a pill grinder containing white powder was found in the back bedroom under the bed. (Tr. p. 179, lines1-9). Some men's clothing and shoes were found along with some photos of appellant and some bank statements. (Tr. p. 179, line 25- p. 180, line 19) Jessica Collins was arrested on the evening of the search and appellant was a suspect. (Tr. p. 186, line 24- p. 187, line 10) Later in the evening, appellant was found at the residence off of Hudson Street and was taken into custody. (Tr. p. 192, lines 5-15) Investigator Mcgarity said appellant indicated that he and Jessica Collins lived at the mobile home on Silver Creek Drive and that they had a child in common. Appellant also indicated that if the residence was searched, the police would find cocaine and crack cocaine. (Tr. p. 196, line 5-20)

On cross-examination Mcgarity admitted that the address listed on both appellant's driver's license and license plate registration was 367 East Jefferson Street. And none of the forensic testing at Silver Creek Drive linked appellant to that address. (Tr. p. 202, line 10- p. 205, line 4)

Detective Neely testified that he spoke with appellant after he was brought into custody and appellant indicated that he was living at Silver Creek Drive. Appellant also said that he provided some crack cocaine to two individuals on February 24 at the Silver Creek Drive residence. (Tr. p. 256, lines 6-25)

Kimberly Kinley testified that both Jessica and appellant lived at the mobile home. (Tr. p. 262, line 25- p. 263, line 6) It was Jessica who rented the trailer. (Tr. p. 264, lines 21-24)

At the conclusion of the State's case, defense counsel moved for a directed verdict to the charges because the State failed to provide any substantial evidence over the issue of dominion and control. There was evidence that appellant stayed at the house from time to time but there was no evidence to show that he had dominion and control over the drugs that were found in the floor air vent. (Tr. p. 282, line 18- p. 283, line 10)[2]

The trial court ruled as follows:

> "In this particular case there are several factors which--and I am reviewing it from the totality of the circumstances. I'm making an effort not to weigh the evidence, but to determine the existence of evidence, but I think that the exercise requires that I weight the evidence to a certain degree.
>
> And in this particular case the evidence is that the defendant had children that lived in the residence in question. The mother of those children lived there as well. There wasn't evidence as to who actually--whether he had--his name on the lease or he was an actual tenant. There was evidence from a neighbor, however, that he lived there quite often. He would come and go and stay there. While he was not there for periods of time at that address.

[2] The motion discussion covered almost 70 pages of the transcript. (Tr. p. 282- p. 352)

Evidence inside of that location would indicate that he was present and living there as well, such as the pill bottle that was found on the nightstand or dresser in the bedroom which the drugs were found that had his name on it, as well as the bank records that were found in the home that had his name on, which were fairly recent of the date, indicating that they had recently been placed there.

In his statement given to police he admitted having been at that premises two days prior to the search. That at that time he had had people there at the home with him and he had distributed drugs to those people at that time and at that location.

Also in his statement when he was asked about what drugs might be found in that location if it was searched, the defendant was able to describe exactly the drugs that were found hidden in the location by—without fail. There was no error in his description of what would be found in that location.

Here I think that I'm looking at whether or not the defendant exhibited a right to exercise dominion and control over this premises. It appears that he did come and go quite often. The fact that he simply lived there in not determinative of itself, but he did take the liberty of inviting people to that location. He did take the liberty of distributing drugs from that location, which would indicated to me that he was exercising a certain degree of dominion or control.[3]

The evidence doesn't indicate whether the other person involved, the mother of his children, was involved in that transaction or not, so I have to just take it as it is. The only evidence is that he was present with two other people and drugs were distributed. That's all it says.

Now, in taking the totality of the circumstances, and I realize that it's a circumstantial case, but the cases all say that constructive possession can be proven by circumstantial evidence. In fact, it may be the only way that you prove constructive possession in this matter. And, again, attempting not to weigh the evidence but attempting to determine if there is evidence. And also I am constrained by the fact I must view the evidence in the light most favorable to the State, not in the light most favorable to the defendant in this matter.

Based on all of those factors, I am going to deny the motion and allow the case to go forward to the jury."

(Tr. p. 353, line 11- p. 355, line 14)

[3] Earlier the trial court expressed concern over the issue of dominion or control. (Tr. p. 303, lines 3-10; Tr. p. 305, lines 3-25; Tr. p. 307, lines 14-19)

The ruling denying the directed verdict motion was in error. Due process as guaranteed by the Fourteenth Amendment requires "that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." Jackson v. Virginia, 443 U.S. 307, 316, 99 S.Ct. 2781, 2787 (1979).

Our Court has held:

> [T]he trial judge is concerned with the existence or non-existence of evidence, not with its weight; and, although he should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury if there be any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. [Emphasis added].

State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924, 926 (1955); State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989), cert. denied, 493 U.S. 895, 110 S.Ct. 246 (1989).

In applying this standard, our Court has held that evidence which is "sufficient to raise a strong suspicion of the guilt of the accused" is not sufficient to constitute "any evidence form which the guilt of the accused may be fairly and logically deduced." State v. Totherow, 263 S.C. 275, 210 S.E.2d 228, 230 (1974). See, also, State v. Turner, 117 S.C. 470, 109 S.E. 119, 120 (1921). The motion for a directed verdict should be granted, therefore, "where evidence merely raises a suspicion of guilt, or is such to permit the jury to merely conjecture or to speculate as to the accused's guilt." State v. Brown, 267 S.C. 311, 227 S.E.2d 674, 677 (1976), citing State v. Matarazzo, 262 S.C. 662, 207 S.E.2d 93, cert. denied, 420 U.S. 945 (1974). "If the evidence is consistent with both innocence and

guilt it cannot support a conviction." United States v. Varoz, 740 F.2d 772, 775 (10th Cir. 1984); United States v. Ortiz, 445 F.2d 1100, 1103 (10th Cir 1971). Guilt is only to be found when there is a "rationally supportable state of near certitude." Evans-Smith v. Taylor, 19 F.3d 899, 906 (4th Cir 1994).

In this case, the State was required to prove that appellant had dominion and control over the drugs or the premises where the drugs were found as well as knowledge of the drugs being present. State v. Hudson, 277 S.C. 200, 284 S.E.2d 773 (1981). This was a circumstantial evidence case as the assistant solicitor admitted and the trial court recognized that as such. Because it was circumstantial evidence case the State was required to show substantial circumstantial evidence before the case could be submitted to the jury. State v. Bostic, 392 S.C. 134, 708 S.E.2d 774 (2011): State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2011)

In Statev. Heath, 370 S.C. 326, 635 S.E.2d18 (2006) the defendant was 22 years old at the time of his arrest. He lived in a house with his mother and a young child. The mother owned the house. The police got a search warrant to search in and around the house for crack cocaine. When they arrived at the house, the defendant and his brother were outside in front of the house. The defendant appeared to have just finished washing his car in front of the house. The police found crack cocaine, $2,500 in cash, and scales inside the house. In addition, the police found 43.48 grams of crack cocaine in a car-washing mitt in a recycling bin near the back door of the house. The defendant was convicted of trafficking in the crack cocaine found in the car-washing mitt. The issue was whether the defendant was knowingly in constructive possession of that crack cocaine. On appeal the court reversed the conviction and wrote as follows:

> The State presented no direct or circumstantial evidence linking Appellant to the 43.48 grams of crack. As a result, the question becomes whether Appellant had dominion and control over the property where the crack was found.
>
> We hold that the State failed to present evidence that Appellant could exercise dominion and control over the area where the crack was found. However, the home is owned by Appellant's mother. As a result, it is arguable that Appellant merely had a right to access the area where the crack was found, not actual dominion and control of the property.
> (emphasis supplied)

In Goldsmith v. Witkowski, 981 F.2d 697 (4th Cir. 1992) the State only presented "an evidentiary picture of an accused sitting at a table laden with narcotics and narcotic paraphernalia in an apartment where other drugs and paraphernalia were later discovered." 981 F.2d at 702. The court also wrote:

> Essentially, the government only proved Goldsmith's presence in the apartment and his awareness of the drugs. 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*[4], in our view, would require the invalidation of convictions based solely on evidence of mere presence, as was established in this case.

981 F.2d at 701.

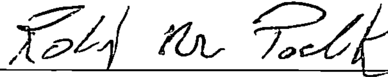
As in Heath, appellant merely had a right to access the area where the drugs were found. He did not have dominion and control.

[4] Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979)

CONCLUSION

Appellant should be granted a directed verdict on Argument II, or in the alternative, a new trial on Argument I.

Respectfully submitted,



Robert M. Pachak
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ATTORNEY FOR APPELLANT

This 20th day of August, 2015.

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THE STATE,

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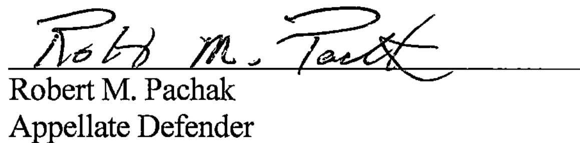
APPELLANT

APPELLATE CASE NO. 2015-000171

CERTIFICATE OF SERVICE

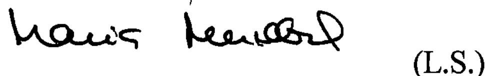
The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Reginald R. White, #353172, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 20th day of August, 2015.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of August, 2015.



_____________________________(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.