

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Doyet A. Early, III, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JONATHAN XAVIER MILLER,

APPELLANT

APPELLATE CASE NO. 2013-001860

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. The trial judge erred in denying the pre-trial motion to suppress the crack cocaine found under the seat of the vehicle driven by appellant after the traffic stop because the seizure of the drugs that occurred during the inventory search prior to the towing of the vehicle constituted an illegal search and seizure as the vehicle was located on private property, which in turn meant that the actions taken by the police in this case were neither statutorily authorized under S.C. Code Ann § 56-5-2520 nor allowed via an exception under S.C. Code Ann § 56-6-5635.

II. The trial judge erred in denying appellants motion for a directed verdict of acquittal on the drug charge because appellant was neither in actual nor constructive possession of the crack cocaine found at the scene.

STATEMENT OF THE CASE

Appellant Jonathan Xavier Miller was indicted for possession with intent to distribute crack cocaine, but found guilty of simple possession of crack cocaine per jury trial held during the August 2013 term of the Richland County General Sessions Court before Judge Doyet A. Early. Appellant was sentenced to imprisonment for a period of nine years. Lucas Hawks and Jessamine Grice represented appellant at trial, and Assistant Solicitors Brent Avant and Jennifer McKellar appeared on behalf of the state.

Appellant appealed his trial court conviction and sentence. This brief follows.

QUESTION I

The trial judge erred in denying the pre-trial motion to suppress the crack cocaine found under the seat of the vehicle driven by appellant after the traffic stop because the seizure of the drugs that occurred during the inventory search prior to the towing of the vehicle constituted an illegal search and seizure as the vehicle was located on private property, which in turn meant that the actions taken by the police in this case were neither statutorily authorized under S.C. Code Ann §56-5-2520 nor allowed via an exception under S.C. Code Ann § 56-6-5635.

The state's case consisted of three witnesses: Chemist Brenda Jenkins and Police Officers James Westbury and Shaun McDonald.

At trial, Officer Westbury testified that he was responding to a theft call in the Rosewood section of Columbia, South Carolina, on January 10, 2013, when he received a neighborhood complaint regarding a particular vehicle that had large silver and green rims seen in the same neighborhood and how this vehicle was allegedly connected to drug sales in the area. Minutes later during a routine patrol of the area, Officer Westbury happened upon the vehicle in question at a nearby mini-mart and followed the vehicle until the driver pulled into and stopped in a private driveway in front of a private residence. Officer Westbury stated that he confronted the driver, i.e. appellant, and arrested him after learning that he was driving under a suspended license. Westbury added that it was police policy to tow the vehicle after appellant's arrest. R. 24 – R. 39, l. 21. R. 113, l. 22 – R. 123, l. 17.

Officer McDonald, who arrested Officer Westbury during this traffic stop, testified at trial verifying Officer Westbury's account of the events, and added that if a driver is

arrested for DUS, then the proper protocol is to have the vehicle towed thereafter. R. 59, l. 12 – R. 66, l. 16. R. 142, l. 4 – R. 147, l. 7; R. 64, l. 4 – 9.

The events that transpired after appellant's DUS arrest became the subject of the illegal search and seizure issue in the case. Officer Westbury summarized the events that occurred subsequent to appellant's arrest as follows:

Q. Then what occurred next?

A. At that time I called for a tow of the vehicle.

Q. Why did you do that?

A. When the driver is arrested in a vehicle and it's obvious the individual is not the – the vehicle owner is not on the scene, the vehicle has to be towed. Due to that, we also have to do an inventory search of the vehicle which is where we go through the vehicle making sure there's no items in there that could be damaged or stolen, anything like that, while its being towed or stored. We have to do an inventory search of the vehicle. R. 123, l. 20 – R. 124, l. 5.

Prior to trial, defense counsel had moved to suppress the crack cocaine seized pursuant to the inventory search of the vehicle driven by appellant before the vehicle was towed because police officers had no authority to do so per S.C. Code Ann § 56-5-2520 (1976), (which the state cited as authority in support of the inventory search and subsequent tow), because this code section¹ applied to vehicles left without drivers stranded **on highways only**, and did not grant any authority to tow vehicles under similar circumstances found on private property. R. 22 – R. 23, l. 19.

Officer Westbury stated that after appellant was arrested for DUS on private property, an inventory search of the car was conducted and crack cocaine was found under

¹ § 56-5-2520

the driver's seat, and that when appellant stated the vehicle did not belong to him, the call for the tow was placed because the owner of the vehicle was not on the scene. R. 34, l. 3 – R. 35, l. 18; R. 78, l. 12 – 21; R. 56, l. 7 – 8; R. 59, l. 3- 6.

The Court inquired regarding the location of the vehicle as follows:

Examination by the Court

Q. Officer McDonald, the vehicle that you ultimately inventoried, where was it parked?

A. It was parked in a driveway on Timberlane.

Q. Is a driveway party of the highway system?

A. No.

Q. What authority did you have to – what authority did you rely in removing it from the private driveway?

A. Like I said, sir, to my knowledge, it wasn't his residence, and I was trained from day one that is the person gets arrested and it's not their residence that the vehicle gets towed.

Q. So if it's out in the middle of a field, anywhere not on the highway, you still tow it?

A. Correct. R. 66, l. 19 – R. 67, l. 18.

Before and after the in camera hearing, Officers Westbury and McDonald gave their accounts of the events that led to appellant's arrest and the towing of the vehicle, then defense counsel objected to the search R. 23 on the ground that the statute (S.C. Code Ann. § 56-5-2520) which the state relied upon in support of the inventory search and tow did not give the officers the authority to tow and conduct the inventory search that followed because this code section referenced such authority only upon public highways as opposed to private highways. R. 75, l. 2 – R. 76. The state argued that the statute did not limit or

exclude the authority to tow on public property only. R. 76, l. 18 – R. 77, l. 16. S.C. Code

Ann. § 56-5-2520 reads as follows:

(a) Whenever any police officer finds a vehicle in violation of any of the provisions of § 56-5-2510 he may move the vehicle or require the driver or the other person in charge of the vehicle to move it to a position off the roadway.

(b) Any police officer may remove or cause to be removed to a place of safety any unattended vehicle illegally left standing upon any **highway**, bridge, causeway or in any tunnel in such position or under such circumstances as to obstruct the normal movement of traffic.

(c) Any police officer may remove or cause to be removed to the nearest garage or other place of safety any vehicle found upon a **highway** when:

(1) A report has been made that the vehicle has been stolen or taken without the consent of its owner.

(2) The person in charge of the vehicle is unable to provide for its custody or removal.

The trial judge's preliminary ruling follows:

The Court: But the problem you've got with that it is it says highway. I mean, I see where its probably – they need rely on this statute and this statute says upon a highway, am I not limited to reading the statute and giving it its ordinary reading? R. 82, lines 10 – 15.

Later, however, the trial judge denied the motion to suppress and ruled that the inventory search pursuant to the tow in question were both proper and allowed the admission of the crack cocaine found inside the car to be entered into evidence at trial based on S.C. Code Ann. § 56-5-5635. R. 88, l. 1 – 7. R. 83, l. 14 – R. 84, l. 10. The defense argued that this was an erroneous statutory interpretation. R. 84, l. 11 – R. 87, l. 16.

S.C. Code Ann. §56-5-5635 reads as follows:

(A) Notwithstanding another provision of law, a law enforcement officer who directs that a vehicle be towed for any reason, whether on public or private property, must use the established towing procedure for his jurisdiction. A request by a law enforcement officer resulting from a law enforcement action including, but not limited to, a vehicle collision, vehicle breakdown, or vehicle recovery incident to an arrest, is considered a law enforcement towing for purposes of recovering costs associated with the towing and storage of the vehicle unless the request for towing is made by a law enforcement officer at the direct request of the owner or operator of the vehicle.

At the close of the state, appellant renewed the motion to suppress the drugs based on an unlawful search. R. 163, lines 20 – 23. The court denied the motion. R. 163, lines 24 – 25.

This case boils down to a statutory interpretation of S.C. Code Ann. 56-5-2520 and 56-5-5635, and whether the officers erred in towing the vehicle appellant drove from its location on private property and in conducting the inventory search that occurred as a result of the decision to tow, since this ultimately led to the discovery of crack inside the vehicle. As a rule, the words of a statute are to be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. State v. Manning, 2014 WL 1805319 (May 7, 2014 S.C. App), citing to State v. Sweat, 386 S.C. 339 688 S.E.2d 564 (2010). Here, the statute in question (56-5-2520) only allows police to tow or "remove" a vehicle off a road way for whatever reason if the vehicle is found "upon a **highway**." At the time of his arrest, appellant had already parked the vehicle on a private driveway. Therefore, since the vehicle appellant drove prior to his arrest was not parked on a highway, which is public, then the towing of the vehicle and the inventory search that was

conducted prior to the towing were illegal and statutorily unauthorized actions taken by police. Again, the vehicle appellant had been driving at the time of the arrest was parked in a private roadway. The words of the statute clearly refer to circumstances that would warrant the removal of a vehicle from a public highway as opposed to a private highway. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court had no right to expand or impose another meaning. State v. Manning, *supra*, citing to State v. Jacobs, 393 S.C. 584, 713 S.E.2d 621 (2011).

Nonetheless, the trial judge used S.C. Code Ann. §56-5-5635 (Cum. Supp. 2004), to justify the towing as proper and the admission of the crack cocaine seized via the inventory search that preceded the towing into evidence as proper as well. However, this statute² referred not to the authority to tow (and the accompanying inventory search prior to the tow), but rather to the proper procedure (“must use the established towing procedure”) and the recovery of costs for towing a vehicle instead. To the contrary, this statute presupposes that an officer had the proper authority to tow and was previously authorized to tow any such vehicle. In other words, the proper towing procedure under S.C. Code Ann §56-5-5635, **would apply only after the threshold requirement to tow had been authorized** in the first place per S.C. Code Ann. § 5-56-2500. Therefore, since S.C. Code Ann. § 56-5-5635 was inapplicable and misapplied by the trial judge in the case at bar, the search and seizure in the case were unconstitutional and in violation of the Fourth and Fourteenth Amendments to the United States Constitution and article 1,§10 of the South

² §56-5-5635

Carolina State Constitution; and as a result, the crack seized constituted fruit of the poisonous tree³ and should have been suppressed at trial.

QUESTION II

The trial judge erred in denying appellants motion for a directed verdict of acquittal on the drug charge because appellant was neither in actual nor constructive possession of the crack cocaine found at the scene.

Appellant was arrested for driving under suspension in this case. Appellant's arrest led to a search of the vehicle he had been driving at the time of the stop by police. A search of the said vehicle uncovered the presence of crack cocaine found under the driver's seat. However, the vehicle he drove prior to his stop and arrest was not his vehicle. It was discovered that the vehicle belonged to Cassandra Jones. R. 126, lines 2 – 7. Cassandra Jones was not at the scene at the time of the arrest. R. 126, l. 24 – R. 127, l. 7; R. 128, l. 13 – 24; R. 137, l. 6 – 9; R. 141, l. --- l. 14; R. 148, lines 8-10. Although appellant was found guilty of the lesser included offense of simple possession of crack cocaine, he was neither in actual not constructive possession of crack cocaine. Apparently, the officers never spoke with Ms. Jones. R. 151, l. 22 – R. 152, l. 4.

At the close of the case, counsel moved for a directed verdict of acquittal on the ground that the evidence was insufficient to show that petitioner was in constructive possession of crack, but was merely present in a car where crack was found. R. 164, l. 2 – R. 170, l. 24. The court denied the motion. R. 170, l. 25 – R. 171, l. 15.

³Wong Sun v. United States, 371 U.S. 471 (1963).

In the case at bar, appellant was driving a vehicle that did not belong to him and did not admit to ownership of the vehicle or the drugs. This meant that the state failed to prove that appellant was in actual or constructive possession of crack cocaine found in the vehicle. Actual possession occurs when the drugs are found in the actual physical custody of a defendant and constructive possession arises when a defendant has dominion and control of the right to exercise dominion and control over the drugs. State v. Heath, 370 S.C. 326, 635 S.E.2d 181 (2006). In Heath, supra, the Court held that there was insufficient evidence that the defendant, who lived with his mother at the time of the arrest, was in constructive possession of crack where the crack was found in a car washing mitt in a recycling bin outside near the back of a house owned by the defendant's mother.

Compare the following **vehicle** cases where the defendants were found not to have been in actual or constructive possession of the drugs found at the crimes scenes. See State v. Jackson, 395 S.C. 250, 717 S.E.2d 609 (2011), where the Court held that the State's evidence was insufficient to establish that the defendant had actual or constructive possession of the marijuana found under the center console of the vehicle where the drugs were not visible and where the defendant was merely a passenger in the vehicle who had only met the driver once at his (defendant's) grandchild's party en route to Greenville to promote a music gig. See also, State v. Brown, 267 SC 311, 227 S.E. 2d 674 (1976), where the defendant was merely a passenger in the vehicle, who had neither ownership rights to the vehicle nor a relationship with the driver of the vehicle and could not have seen or known of the opaque bag of marijuana under the rear floorboard of the vehicle, and thus had no dominion and control over the marijuana. Compare further, State v. Hernandez 382 S.C. 620, 677 S.E.2d 603 (2009), where the Court held that the involvement of the defendants who occupied a rental moving truck following a trailer was only present because the

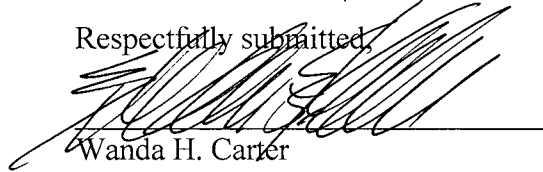
state did not establish that they had any knowledge that drugs were in the trailer they followed and that as a result, the state's evidence of trafficking was insufficient and "merely speculation." Finally, in State v. Pradubsri, 403 S.C. 270, 743 S.E.2d 98 (2013), where a traffic stop of the defendant's vehicle resulted in a search where crack cocaine was found only on his girlfriend (actual possession) who was a passenger in the vehicle, the Court held that there was insufficient evidence that the defendant was in constructive possession of the drugs found on his girlfriend without his girlfriends' testimony to that effect.

Here, the state failed to prove that appellant was in actual or constructive possession of the drugs found a vehicle that belonged to someone else; and since possession was a material element of the crime, the conclusion is the same as reached in Heath, i.e., that the state "failed to establish an essential element of the crime charged." In reviewing a denial of a motion for a directed verdict, an appellate court must review the evidence in the light most favorable to the state, and a case can only be submitted to the jury if there is any direct or substantial circumstantial evidence that reasonably tends to prove the guilt of the accused or from which his guilty maybe fairly or logically deduced. State v. Jackson, supra. In the case at bar, the state's case was lacking competent evidence against appellant, which meant that the trial judge erred in failing to grant appellant's motion for a directed verdict in the case. The state failed to prove every element of the offense charged as required via the Fourteenth Amendment due process clause and article 1, §3 of the South Carolina State Constitution. See Jackson v. Virginia, 443 U.S. 307 (1979).

CONCLUSION

Based on the foregoing arguments, appellant requests that his conviction and sentence be vacated, or in the alternate reversed and remanded to the lower court for a new trial.

Respectfully submitted,

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Wanda H. Carter

Deputy Chief Appellate Defender

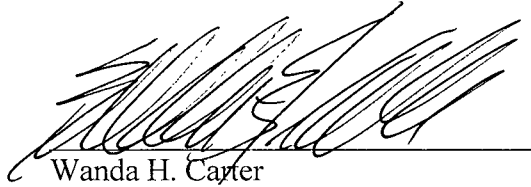
ATTORNEY FOR APPELLANT

This 3rd day of February, 2015.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR.

February 3, 2015

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', written over a horizontal line.

Wanda H. Carter
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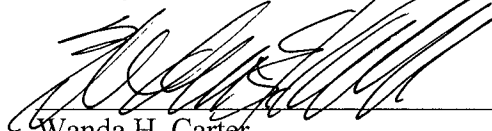
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CERTIFICATE OF SERVICE

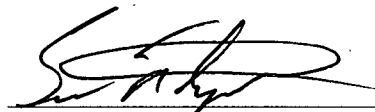
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 3rd day of February, 2015.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 3rd day of February, 2015.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.