ORIGINAL

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Doyet A. Early, III, Circuit Court Judge

Appellate Case No. 2013-001860

THE STATE, ...RESPONDENT

v.

JONATHAN XAVIER MILLER, ...APPELLANT.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Respondent's Statement of Issues on Appeal 1

Statement of the Case 2

Statement of Facts 3

Argument:

I. The trial court properly denied Appellant's motion to suppress the crack cocaine found during an inventory search of the car he was driving following his arrest where: (1) the police had authority to tow the car under the plain and unambiguous terms of section 56-5-2520 of the Code; (2) the police also had authority to tow the car under the terms of section 56-5-5635 of the Code; and (3) regardless of specific statutory authorization the inventory search was reasonable under the totality of the circumstances. 9

II. The trial court properly denied Appellant's motion for a directed verdict and submitted the case to the jury where the State presented substantial evidence from which the jury could fairly and logically find that Appellant had actual and/or constructive possession of the crack cocaine which served as the basis of his drug charge. 18

Conclusion 23

TABLE OF AUTHORITIES

Cases:

Federal:

Colorado v. Bertine, 479 U.S. 367 (1987) 12, 17

South Dakota v. Opperman, 428 U.S. 364 (1976) 11, 12, 17

State:

Abell v. Bell, 229 S.C. 1, 91 S.E.2d 548 (1956) 13

Branch v. City of Myrtle Beach, 340 S.C. 405, 532 S.E.2d 289 (2000) 13

City of Columbia v. Niagara Fire Ins. Co., 249 S.C. 388, 154 S.E.2d 674 (1967) 14

Crescent Manufacturing Co. v. South Carolina Tax Commission, 129 S.C. 490, 124 S.E. 761 (1924) 13

DeLoach v. Scheper, 188 S.C. 21, 198 S.E. 409 (1938) 13

Gaffney v. Mallory, 186 S.C. 337, 195 S.E. 840 (1938) 13

Hamm v. S.C. Pub. Serv. Commission, 287 S.C. 180, 336 S.E.2d 470 (1985) 14

Hay v. S.C. Tax Commission, 273 S.C. 269, 255 S.E.2d 837 (1979) 13

Laird v. Nationwide Ins. Co., 243 S.C. 388, 134 S.E.2d 206 (1964) 13

Miller v. Aiken, 364 S.C. 303, 613 S.E.2d 364 (2005) 14

State v. Attardo, 263 S.C. 546, 211 S.E.2d 868 (1975) 21

State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006) 10, 18

State v. Ballenger, 322 S.C. 196, 470 S.E.2d 851 (1996) 19, 20

State v. Bridges, 278 S.C. 447, 298 S.E.2d 212 (1982) 11

State v. Brown, 267 S.C. 311, 227 S.E.2d 674 (1976) 20

State v. Brown, 319 S.C. 400, 461 S.E.2d 828 (Ct. App. 1995) 20

State v. Brownlee, 318 S.C. 34, 455 S.E.2d 704 (1995) 20

State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004) 18

State v. Commander, 396 S.C. 254, 721 S.E.2d 413 (2011)... 11

State v. Condrey, 349 S.C. 184, 562 S.E.2d 320 (Ct. App. 2002).................................. 18

State v. Dantonio, 376 S.C. 594, 658 S.E.2d 337 (Ct. App. 2008)................................. 19

State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002)... 19

State v. Harris, 351 S.C. 643, 572 S.E.2d 267 (2002) 18

State v. Hudson, 277 S.C. 200, 284 S.E.2d 773 (1981)...................................... 19, 20, 21

State v. Lemacks, 275 S.C. 181, 268 S.E.2d 285 (1980)... 12

State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012).. 10, 18

State v. Mollison, 319 S.C. 41, 459 S.E.2d 88 (1995)... 21

State v. Morris, 376 S.C. 189, 656 S.E.2d 359 (2008) 11

State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999) 19

State v. Nix, 288 S.C. 492, 343 S.E.2d 627 (Ct. App. 1986)... 21

State v. Prince, 335 S.C. 466, 517 S.E.2d 229 (Ct. App. 1999) 13

State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993).. 10

State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996) 9

State v. Smith, 337 S.C. 27, 522 S.E.2d 598 (1999).. 9

State v. Tabory, 260 S.C. 355, 196 S.E.2d 111 (1973)... 20

State v. Tindall, 379 S.C. 304, 665 S.E.2d 188 (Ct. App. 2008)..................................... 19

State v. Weston, 367 S.C. 279, 625 S.E.2d 641 (2006) 18

State v. Williams, 346 S.C. 424, 552 S.E.2d 54 (2001)... 19

State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001)... 10, 18

Statutes:

S.C. Code Ann. § 56-5-2520(c) (2006) 13

S.C. Code Ann. § 56-5-430 (2006) 14

S.C. Code Ann. § 56-5-450 (2006) 14

S.C. Code Ann. § 56-5-2520 (2006) 14, 15

S.C. Code Ann. § 56-5-5635 (2006) 16

S.C. Code Ann. § 56-5-5635(A) (2006) 16

RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court properly denied Appellant's motion to suppress the crack cocaine found during an inventory search of the car he was driving following his arrest where: (1) the police had authority to tow the car under the plain and unambiguous terms of section 56-5-2520 of the Code; (2) the police also had authority to tow the car under the terms of section 56-5-5635 of the Code; and (3) regardless of specific statutory authorization the inventory search was reasonable under the totality of the circumstances.

2. Whether the trial court properly denied Appellant's motion for a directed verdict and submitted the case to the jury where the State presented substantial evidence from which the jury could fairly and logically find that Appellant had actual and/or constructive possession of the crack cocaine which served as the basis of his drug charge.

STATEMENT OF THE CASE

Jonathan X. Miller (Appellant) was indicted at the August 2013 term of the grand jury for Richland County for possession with intent to distribute crack cocaine (2013-GS-40-04661). He was represented by Assistant Public Defenders Lucas Hawks and Jessamine Grice, of the Fifth Circuit Public Defenders Office. The State was represented by Assistant Solicitors Brent Arant and Jennifer McKellar of the Fifth Circuit Solicitor's Office. On August 26-28, 2013, Appellant proceeded to trial by jury pursuant to which he was found guilty of the lesser included offense of simple possession of crack cocaine. He was sentenced by the Honorable Doyet A. Early, III, to nine (9) years' imprisonment. Appellant timely filed a notice of intent to appeal his conviction and sentence and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

On January 10, 2013, Officers James Westbury and Shaun McDonald of the Columbia Police Department (CPD) followed a suspicious car down a city street until it turned in to a residential driveway. They made contact with the driver as he was exiting the car and identified that driver as Appellant. Upon determining Appellant had been driving under suspension, the officers placed him under arrest. Pursuant to CPD policy, they then called for the vehicle to be towed and conducted a pre-towing inventory search for valuables. During the search they discovered a small bag of crack-cocaine under the driver's seat and Appellant was later charged with possession with intent to distribute crack-cocaine. (R.p.1-p.39; R.p.40-p.97).

The case was called for trial on August 26, 2013. Following jury selection, Appellant moved to suppress the crack-cocaine found in the car he was driving on grounds that the warrantless search of that car violated the Fourth Amendment to the United States Constitution. He argued it was the State's burden to prove a valid inventory exception to the search requirements. The State agreed and presented evidence in support of the search. (R.p.22, line 21-p.23-line 24).

First, the State called Officer Westbury to the stand. He explained that in 2013 he worked for the city of Columbia as a patrolman and was assigned to the South Region. On January 10, 2013, he responded to a call from a resident claiming an individual may have been stealing things from her yard. While investigating the complaint the police were advised that a silver-and-green older-model vehicle with large rims may have been involved in several additional instances of criminal activity in the neighborhood. Westbury was on the lookout for the suspicious vehicle throughout the day when he passed a car matching the description that was traveling in the opposite direction. As he

turned around, he saw the car turning into a convenience store. He then saw it driving down a neighborhood street at a high rate of speed. Westbury followed the car, catching up just as it turned into a driveway. He pulled in behind the car and got out to speak to the driver as the driver was exiting the vehicle. Appellant identified himself but when Westbury asked for a driver's license Appellant said it was inside the residence. Appellant acknowledged he did not live at the house. Westbury ran Appellant's name through the DMV database, discovered Appellant was driving under suspension, and placed him under arrest. During a search incident to arrest, a small, black, electronic scale was discovered in Appellant's pocket. Westbury then called for the vehicle to be towed and conducted a pre-towing inventory search pursuant to standard CPD policies and procedures.[1] A small bag containing a white rock-like substance was found under the driver's seat and the substance field tested positive as crack-cocaine. Although a female came out of the residence after Appellant was placed under arrest, she was not the owner of the vehicle. Neither Appellant nor the owner of the vehicle ever filed an appeal or complaint challenging the appropriateness or the legality of the towing. (R.p.24, line 2-p.39, line 25; R.p.44, line 1-p.47, line 6).[2]

On cross-examination, Westbury acknowledged Appellant's girlfriend was the female who came out of the residence and that the vehicle was in the driveway, not the road. He also acknowledged that despite seeing the vehicle moving at a high rate of speed, the encounter with Appellant was not a traffic stop. (R.p.47, line 6-p.57, line 3).

[1] The relevant provision provides: "Departmental personnel may also tow the following vehicles: Any vehicle for which an officer makes an arrest and there is no responsible party to whom it can turn over the possession of the vehicle." (R.p.37, lines 1-4).

[2] The court reporter became ill during the suppression hearing. As a result the hearing was interrupted on August 27, 2013, and continued before a different court reporter on August 28, 2013.

Next, the state called Officer McDonald to the stand. He corroborated Westbury's testimony in regard to the neighborhood complaints and the subsequent search for the suspicious green and silver vehicle. McDonald identified Appellant as the person he saw driving the car that he and Westbury followed to the residence where Appellant was arrested. He testified they normally arrest someone for driving under suspension and said he was trained that every time a driver gets arrested the vehicle gets towed. Under further examination by the trial judge, McDonald acknowledged the driveway was not part of the highway system and the car was parked in a private driveway; however, he explained he has always been trained that if a driver is arrested and the vehicle is parked anywhere besides the driver's residence, the vehicle gets towed. (R.p.59, line 11-p.70, line 17).

At the conclusion of the State's evidence, the parties argued their respective positions about the validity of the inventory search. Appellant argued Section 56-5-2520 sets forth the only instances where law enforcement officers are authorized to tow a vehicle and that as a penal statute it should be strictly construed against the State. He contended the CPD was not authorized to tow the car he was driving because he had parked it in a private "driveway" rather than a "highway." The State argued that Section 56-5-2520 is not an exhaustive list of instances where towing is authorized and that because the statute does not specifically prohibit towing from private property, the towing of the car and the inventory search conducted pursuant to CPD policy was legal. The State then referenced Section 56-5-5635 of the Code and argued that it plainly gives law enforcement officers the right to tow vehicles from private property in certain circumstances. The trial judge noted the language of Section 56-5-5635 which provides a

law enforcement officer can direct towing from private property "notwithstanding another provision of law." Ultimately, the trial court found: "I'm going to deny the motion to suppress. I think, even if I construe 56-5-2520 to a highway application, obviously police officers can't appropriately rely upon other statutes and other recognized law, and 56-5-5635 allows the towing as set forth in this case, and I respectfully deny your motion to suppress." (R.p.75, line 8-p.88, line 8).

After the ruling, Appellant was allowed to call the owner of the vehicle, Cassandra Jones, to the stand. She testified she cosigned for the vehicle together with Appellant at the time it was purchased because he did not have enough money. Jones testified she never drove the vehicle and considered it Appellant's car. She claimed Appellant's name was on the title with her name, and that he paid the taxes on the car. Appellant then presented additional arguments in regard to his motion to suppress, continuing to contend the search did not meet the requirements of the inventory exception. The trial court considered the additional arguments but stood by its original ruling and denied the motion to suppress. (R.p.88, line 14-p.97, line 25). The jury was then sworn and case proceeded to trial. (R.p.104, lines 1-23).

First, Officer Westbury described the investigation and the entire encounter with Appellant, including the inventory search and discovery of the bag containing a rock-like substance that field-tested positive as cocaine. Appellant made no objection. (R.p.113, line 21-p.130, line 4). Next, Officer McDonald described the decision to tow the vehicle, the inventory search, and explained how he "found under the driver's seat a plastic baggy containing a white rock-like substance which later on field-tested positive for crack-cocaine." Again, Appellant made no objection. (R.p.141, line 23-p.149, line 11).

Finally, the State offered Brenda G. Jenkins, a chemist employed by City of Columbia, as an expert in chemistry and the analysis of narcotics. The trial court qualified her as an expert without objection. Jenkins testified her analysis confirmed the substance in the bag was crack cocaine. When the State then offered the drugs into evidence, Appellant's counsel stated: "Objection, Your Honor, based on all my pretrial motions that the search and seizure of my client was unlawful." The trial court responded: "Thank you. Overruled." Jenkins then testified the weight of the crack cocaine was determined to be 4.99 grams. (R.p.156, line 16-p.162, line 21).

After the State concluded its case in chief, Appellant stated: "we'll be renewing our initial motions to suppress based on our belief that this evidence was obtained – that the crack was obtained through unlawful proceedings." The trial court denied the motion "based upon the reasoning earlier expressed." (R.p.163, lines 2-25). Appellant then moved for a directed verdict, arguing that since the drugs were not found in his hands or pockets, this was a constructive possession case built on circumstantial evidence and that the State had only proven mere presence. The trial court found there was sufficient evidence to support a conviction if the evidence was believed by the jury, and denied the motion. (R.p.164, line 2-p.171, line 15). Appellant rested and renewed "all my motions from before." The motions were again denied. (R.p.172, line 21-p.173, line 1). The parties then gave closing arguments and the trial court charged the jury on the law. After beginning deliberations, the jury sent out a note asking for the definition of constructive possession. The trial court recharged actual possession and constructive possession and after further deliberation, the jury returned a guilty verdict for the lesser included offense of simple possession of crack cocaine. (R.p.174, line 7-p.201, line 16). Appellant

renewed his pretrial motion to suppress based on unlawful search and seizure and that motion was denied. The trial court sentenced Appellant to nine (9) years' imprisonment. (R. p217; R.p.202, line 2-p.210, line 19).

ARGUMENT

I.

The trial court properly denied Appellant's motion to suppress the crack cocaine found during an inventory search of the car he was driving following his arrest where: (1) the police had authority to tow the car under the plain and unambiguous terms of section 56-5-2520 of the Code; (2) the police also had authority to tow the car under the terms of section 56-5-5635 of the Code; and (3) regardless of specific statutory authorization, the inventory search was reasonable under the totality of the circumstances.

Appellant argues the trial court erred in denying his pretrial motion to suppress the crack cocaine found under the driver's seat of the vehicle he was driving. He contends the inventory search conducted prior to the towing of the vehicle constituted an illegal search because the police had no authority to tow the vehicle under the terms of the South Carolina Code. The State disagrees and submits Appellant's argument should be denied and dismissed on several grounds.

Issue Not Preserved for Appeal

Initially, the State submits Appellant's argument regarding the propriety of the inventory search is not preserved for appellate review because Appellant failed to renew his pretrial objection when the State elicited testimony about that inventory search during trial. Generally, a motion in limine seeks a pre-trial evidentiary ruling to prevent the disclosure of potentially prejudicial evidence to the jury, and a ruling on such a motion is preliminary and subject to change based on developments during trial. State v. Smith, 337 S.C. 27, 32, 522 S.E.2d 598, 600 (1999). A ruling on a motion in limine does not constitute a final ruling on the admissibility of evidence. State v. Simpson, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996). Therefore, an objection must be made at the time the

evidence is introduced during trial in order to preserve the issue for appellate review. State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993).

Here, the State elicited detailed trial testimony from officers Westbury and McDonald regarding the inventory search. Each officer described the encounter with Appellant which led to his arrest for DUS, the subsequent inventory search of the car, the discovery of the bag containing a white rock-like substance under the driver's seat, and the field-test which showed the substance was crack-cocaine. Appellant did not object to any of this testimony. Although Appellant eventually objected when the State sought to introduce the crack-cocaine itself into evidence through the testimony of expert witness Brenda Jenkins, this objection was too late to sufficiently preserve his challenge to the inventory search for appellate review. Indeed, even if the trial court had sustained the objection and decided to exclude the drugs, the jury had already been presented with substantial evidence supporting its conclusion that Appellant was guilty of possessing crack-cocaine. He suffered no additional prejudice from admission of the drugs once the officers' testimony had been admitted. For these reasons, Appellant has failed to preserve this issue for appeal, and his conviction should be affirmed. In any event, to the extent this Court determines Appellant's argument is preserved for review, it is without merit because the CPD's decision to tow the vehicle was authorized by the terms of the South Carolina Code and was reasonable under the totality of the circumstance.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Liverman, 398 S.C. 130, 137, 727 S.E.2d 422, 425 (2012); State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829

(2001). The conduct of a criminal trial is left largely to the sound discretion of the presiding judge and the appellate court will not interfere unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way. State v. Commander, 396 S.C. 254, 262, 721 S.E.2d 413, 417 (2011) (quoting State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982)). Thus, the admission or exclusion of evidence is left to the sound discretion of the trial court, and the court's decision will not be reversed absent an abuse of discretion. State v. Morris, 376 S.C. 189, 205-06, 656 S.E.2d 359, 368 (2008).

Discussion

"Although automobiles are 'effects' within the reach of the Fourth Amendment, warrantless examinations of automobiles have been upheld in circumstances in which a search of a home or office would not." South Dakota v. Opperman, 428 U.S. 364, 367 (1976). "In the interest of public safety and as part of what the Court has called 'community caretaking functions,' automobiles are frequently taken into police custody." Id. at 368. "These caretaking procedures have almost uniformly been upheld by the state courts" and "the majority of the Federal Courts of Appeals have likewise sustained inventory procedures as reasonable police intrusions." Id. at 369-371. Similarly, as recognized in Opperman: "The decisions of this Court point unmistakably to the conclusion reached by both federal and state courts that inventories pursuant to standard police procedures are reasonable." Id. at 372. The Court went on to state: "In applying the reasonableness standard adopted by the Framers, this Court has consistently sustained police intrusions into automobiles impounded or otherwise in lawful police custody where the process is aimed at securing or protecting the car and its contents." Opperman,

428 U.S. at 373. Thus, conducting a routine inventory search of an automobile lawfully impounded by police clearly does not violate the Fourth Amendment when police are following standard police procedures. Id. at 376; See Colorado v. Bertine, 479 U.S. 367, 374 (1987) ("Reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment, even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure."); See also State v. Lemacks, 275 S.C. 181, 183, 268 S.E.2d 285, 286 (1980) ("Whether a routine inventory search of an automobile may lawfully extend to the locked trunk of the vehicle depends on the facts and circumstances of each case."). Furthermore, an inventory search of a vehicle is not rendered unconstitutional simply because departmental regulations give the police officers discretion to choose betwixt impounding the vehicle or parking it in a public parking place, so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity. Bertine, 479 U.S. at 375.

Here, there is no claim that the CPD failed to follow standard police procedures for conducting the routine inventory search once they decided to tow the car. Indeed, the testimony supports the conclusion that the officers were merely following CPD policies and procedures for locating and securing any valuable personal property in the car prior to having it towed. Instead, Appellant contends the decision to tow the vehicle was not lawful in the first place and that as a consequence the ensuing inventory search was unconstitutional. The State disagrees.

The South Carolina Code describes several circumstances by which police officers are authorized to remove (tow) vehicles. It provides in part that:

> (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:
>
> . . . .
>
> (3) **The person driving** or in control of the vehicle **is arrested** for an alleged offense for which the officer is required by law to take such person before a magistrate or other judicial officer without unnecessary delay.

S.C. Code Ann. § 56-5-2520(c) (2006) (emphasis added). The elementary and cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Branch v. City of Myrtle Beach, 340 S.C. 405, 409, 532 S.E.2d 289, 292 (2000); State v. Prince, 335 S.C. 466, 472, 517 S.E.2d 229, 232 (Ct. App. 1999). A law must be interpreted reasonably and practically, consistent with the purpose and policy of the General Assembly. Prince, 335 S.C. at 472, 517 S.E.2d at 232; Hay v. S.C. Tax Commission, 273 S.C. 269, 273, 255 S.E.2d 837, 840 (1979). The purpose of enactment always takes precedence over the language employed, and a court will not read into a statute something which is not within the manifest intention of the General Assembly. Abell v. Bell, 229 S.C. 1, 4, 91 S.E.2d 548, 549 (1956); Laird v. Nationwide Ins. Co., 243 S.C. 388, 395, 134 S.E.2d 206, 209 (1964). The Courts are permitted to look to existing circumstances at the time of enactment. Gaffney v. Mallory, 186 S.C. 337, 195 S.E. 840, 845 (1938). Moreover, the meaning of a statute is not to be deemed to depend upon a single part or an isolated sentence. DeLoach v. Scheper, 188 S.C. 21, 198 S.E. 409, 414 (1938). Legislative intent must always be gathered from the statute as a whole, read in light of all circumstances. Crescent Manufacturing Co. v. South Carolina Tax Commission, 129 S.C. 490, 124 S.E. 761, 765 (1924). An absurd result not possibly intended by the Legislature will be rejected. Miller v. Aiken, 364 S.C. 303, 307, 613

S.E.2d 364, 366 (2005); Hamm v. S.C. Pub. Serv. Commission, 287 S.C. 180, 182, 336 S.E.2d 470 (1985). Thus, the true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in light of its manifest purpose. City of Columbia v. Niagara Fire Ins. Co., 249 S.C. 388, 391, 154 S.E.2d 674, 676 (1967). Every technical rule as to construction of a statute is subservient to and must yield to the expression of the will of the legislature, since all rules of statutory construction have for their sole object the discovery of the legislative intent and are valuable only insofar as in their application they aid the interpreters in their endeavor to ascertain that intent. Id.

The State submits that under the plain and unambiguous terms of section 56-5-2520, the CPD had authority to tow the vehicle in question because: (1) Appellant was driving the vehicle; (2) Appellant was subsequently arrested for DUS; and (3) officers Westbury and McDonald first "found" the vehicle upon a highway[3] when they observed Appellant driving it through the neighborhood before he parked in a driveway.[4] The relevant subsection specifically describes the person who is ultimately arrested as one who is "driving or in control of the vehicle" when that vehicle is "found upon a highway;" therefore, it contemplates towing regardless of where that person eventually stops the car. So long as the person was initially found driving on a street or highway, the statute authorizes towing or removing the vehicle following arrest.

[3] "The entire width between boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel is a 'street' or 'highway.'" S.C. Code Ann. § 56-5-430 (2006).

[4] "Every way or place in private ownership not used for vehicular travel by the owner and those having express or implied permission from the owner but not by other persons is a "private road" or "driveway." S.C. Code Ann. § 56-5-450 (2006).

Appellant argues that since the vehicle was parked in a private road or driveway at the time of his arrest, it was not "found upon a highway" for purposes of Section 56-5-2520. However, this interpretation must be rejected because it is not reasonably and practically consistent with the likely purpose and policy of the legislature, and because it would lead to an absurd result the legislature could not possibly have intended. In the instant case, Appellant stopped the vehicle of his own accord and was not the subject of a traffic stop. Nevertheless, the officers observed Appellant driving the car on a highway before he stopped in the private driveway. There are no doubt hundreds of examples across South Carolina each day of a police officer making a traffic stop of a single driver, where the car ends up parked in a driveway or on other private property at the time of an arrest. Under Appellant's theory, the police would be prohibited from having any such vehicle towed simply because the driver happened to stop on private property. This would hold true regardless of whether the vehicle was blocking a private driveway, blocking a parking lot entrance, or located in any other place regardless of whether it had a right to remain. Such a result is absurd. The intent of the legislature appears to be to authorize officers to remove or tow a vehicle pursuant to the lawful arrest of the driver of that vehicle, regardless of where it parks. Here, that is precisely what the CPD did, and they did so only after determining Appellant was not a resident of the house where the car was parked. Therefore, the motion to suppress was properly denied.

Furthermore, and as found by the trial court, the State submits the CPD was authorized to tow the vehicle under section 56-5-5635, notwithstanding the terms of section 56-5-2520, because the officers were conducting a vehicle recovery incident to

arrest and had directed that the vehicle be towed from private property in compliance with CPD policy. The South Carolina Code provides:

> 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 arrest, is considered 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.

S.C. Code Ann. § 56-5-5635(A) (2006) (emphasis added). The subsection in question authorizes a law enforcement officer to direct that a vehicle be towed for any reason, even from private property, and the same subsection specifically contemplates such direction being given because the officer is making a "vehicle recovery incident to arrest." The testimony established that the towing procedure for the city of Columbia requires towing of any vehicle if the driver is arrested and the vehicle is parked anywhere besides the driver's residence. Thus, section 56-5-5635 provides an independent basis which authorized the CPD to tow the vehicle Appellant was driving. Because the vehicle was being lawfully towed under either statute, the ensuing inventory search was appropriate and the trial court properly admitted the drugs discovered during the search.

Finally, there is no evidence to suggest the officers' decision to tow and inventory the vehicle was based on the suspicion that they would find evidence of criminal activity. In fact, the testimony from both officers was simply that they were following what they understood to be CPD standard policies whenever a driver is arrested and the car is parked anywhere but the driver's residence. Their intrusion into the car during the inventory search was clearly aimed at securing or protecting the car and its contents.

Therefore, the inventory search was reasonable under the totality of the circumstances and was not unconstitutional under the Fourth Amendment. Opperman, supra; Bertine, supra. For all of the foregoing reasons, Appellant's argument should be dismissed and his conviction should be affirmed.

II.

The trial court properly denied Appellant's motion for a directed verdict and submitted the case to the jury where the State presented substantial evidence from which the jury could fairly and logically find that Appellant had actual and/or constructive possession of the crack cocaine which served as the basis of his drug charge.

Appellant argues the trial court erred in refusing to grant a directed verdict of acquittal on his drug charge because the evidence was insufficient to show he had actual or constructive possession of the crack cocaine found at the scene. The State disagrees and submits Appellant's argument is entirely without merit because there was substantial evidence from which the jury could find Appellant had actual and/or constructive possession of the crack cocaine found in the car he was driving.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Liverman, 398 S.C. 130, 137, 727 S.E.2d 422, 425 (2012); State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). When reviewing a denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must find the case was properly submitted to the jury. Weston, 367 S.C. at 292-93, 625 S.E.2d at 648; State v. Cherry, 361 S.C. 588, 593-94, 606 S.E.2d 475, 477-78 (2004); State v. Harris, 351 S.C. 643, 653, 572 S.E.2d 267, 273 (2002); State v. Condrey, 349 S.C. 184, 190, 562 S.E.2d 320, 323 (Ct. App. 2002). The

appellate court may only reverse the trial judge's denial of a directed verdict motion if there is no evidence supporting the trial judge's ruling or if the ruling is based on an error of law. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002); State v. Dantonio, 376 S.C. 594, 603, 658 S.E.2d 337, 342 (Ct. App. 2008). When ruling on a motion for a directed verdict, the trial court is concerned with the existence or non-existence of evidence, not its weight. Gaster, 349 S.C. at 555, 564 S.E.2d at 92.

Discussion

The crime for which Appellant was indicted, possession with intent to distribute crack cocaine, and the lesser included offense for which he was convicted, simple possession of crack cocaine, each contain an element of possession. Conviction of possession of drugs or contraband requires proof of possession, either actual or constructive, coupled with knowledge of its presence. State v. Williams, 346 S.C. 424, 430, 552 S.E.2d 54, 57 (2001); State v. Muhammed, 338 S.C. 22, 26, 524 S.E.2d 637, 639 (Ct. App. 1999) (citing State v. Hudson, 277 S.C. 200, 284 S.E.2d 773 (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). However, even when a defendant does not have physical custody of the drugs when caught, circumstantial evidence can be used to prove actual possession. Id. at 199-200, 470 S.E.2d at 854. To prove constructive possession the State must show a defendant had dominion and control, or the right to exercise dominion and control, over any of the drugs or the property in which the drugs are found. State v. Tindall, 379 S.C. 304, 314, 665 S.E.2d 188, 194 (Ct. App. 2008).

Possession requires more than mere presence. Ballenger, 322 S.C. at 200, 470 S.E.2d at 854; State v. Tabory, 260 S.C. 355, 365, 196 S.E.2d 111, 113 (1973). However, "[w]hen contraband materials are found on premises under the control of the accused, this fact in and of itself gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury." Hudson, 277 S.C. at 203, 284 S.E.2d at 775. A person has possession of a controlled substance within the meaning of the law when he has both the power and the intent to control its disposition or use. State v. Brownlee, 318 S.C. 34, 38, 455 S.E.2d 704, 706 (1995); State v. Brown, 319 S.C. 400, 404, 461 S.E.2d 828, 830 (Ct. App. 1995). "Constructive possession can be established by circumstantial as well as direct evidence, and possession may be shared." Hudson, 277 S.C. at 200, 284 S.E.2d at 773; State v. Brown, 267 S.C. 311, 227 S.E.2d 674 (1976).

Here, substantial direct evidence was presented establishing Appellant had constructive possession of the crack cocaine discovered in the car he was driving. The same evidence constituted substantial circumstantial evidence establishing Appellant had actual possession of the drugs. Viewing the evidence in a light most favorable to the State, the testimony established that Appellant was driving the car immediately before the discovery of the drugs and that Appellant was the only individual inside the car when the police made contact and arrested him for DUS prior to conducting the inventory search. The drugs were then found directly below the driver's seat where Appellant had been sitting and a small electronic scale was found in his pocket.

Clearly the evidence supported the inference that Appellant had dominion and control of the drugs found in the car. Appellant's act of driving the car demonstrated that car was under his control. This fact in and of itself gives rise to an inference of

knowledge and possession which was sufficient to carry the case to the jury. Hudson, supra. Furthermore, the fact that the drugs were found under the driver's seat helps establish constructive possession because this was the seat occupied by Appellant while he was driving. Additionally, the discovery of the electronic scale shows Appellant's intent to control the disposition and use of the drugs. The evidence also constitutes circumstantial evidence Appellant had actual possession of the drugs prior to the encounter with the police. Likewise, the evidence was sufficient to establish Appellant's knowledge of the presence of the drugs. State v. Attardo, 263 S.C. 546, 550, 211 S.E.2d 868, 869 (1975) (finding that in drug cases, the element of knowledge is seldom established through direct evidence, but may be proven circumstantially). State v. Mollison, 319 S.C. 41, 45, 459 S.E.2d 88, 91 (1995). ("The knowledge element may be proved circumstantially by evidence of acts, declarations, or conduct of the accused from which an inference may be drawn that the accused knew of the existence of the prohibited substance. Possession gives rise to an inference of the possessor's knowledge of the character of the substance.").

Based on the trial testimony and evidence, a finder of fact could reasonably conclude Appellant had possession and knowledge of the crack cocaine found in the car and was therefore guilty of the convicted offense. This case did not present a complete failure of evidence requiring the grant of a directed verdict motion. State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986) ("[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."). Appellant's arguments to the contrary merely go to the weight of the evidence against him rather than

its sufficiency to submit the charge to the jury. Based on the existence of substantial evidence establishing the "possession" element of the convicted offenses, the trial court properly denied the directed verdict motion and the issue of Appellant's possession of the crack cocaine was properly left to the jury. Therefore, Appellant's convictions and sentences should be affirmed.

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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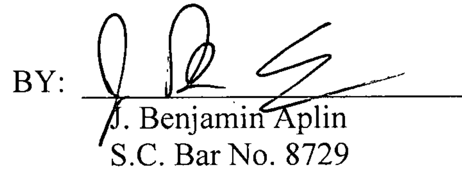
BY: 
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Columbia, South Carolina
February 3, 2015

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Doyet A. Early, III, Circuit Court Judge

Appellate Case No. 2013-001860

THE STATE,..RESPONDENT

v.

JONATHAN XAVIER MILLER,...APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.

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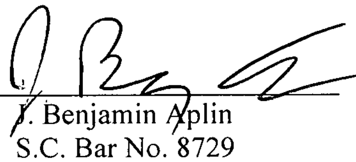
BY: 
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PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent*, dated February 3, 2015, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

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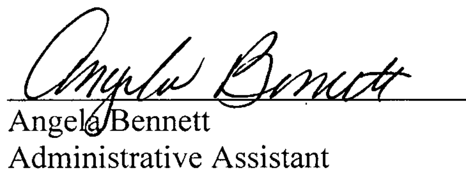
I further certified that all parties required by Rule to be served have been served. This 3rd, day of February, 2015.



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