ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Kristi Lea Harrington, Circuit Court Judge

THE STATE, RESPONDENT,

V.

BARRY JERROD STANLEY, APPELLANT

APPELLATE CASE NO. 2014-000767

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial judge erred by failing to direct a verdict of acquittal on the charge of trafficking in cocaine base, third offense, where the State failed to introduce direct or substantial circumstantial evidence at trial that Appellant was in constructive possession of the drugs found on the ground?

STATEMENT OF THE CASE

On February 11, 2014, a Berkeley County Grand Jury 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. 324 – 327. On April 7, 2014, Appellant's case proceeded to trial before the Honorable Kristi Harrington and a jury. R. 1. David Schwake and Chad Shelton represented Appellant. Michael Patterson and Charles Condon represented the State. R. 1.

After a three-day trial, Appellant was found guilty of both charges. R. 313. Judge Harrington sentenced Appellant to three years imprisonment for failure to stop for a blue light charge and thirty years imprisonment for trafficking cocaine base. R. 322. Both sentences were to run consecutive. R. 322.

Appellant appealed his convictions and sentences. This brief follows.

ARGUMENT

The trial judge erred by failing to direct a verdict of acquittal on the charge of trafficking in cocaine base, third offense, where the State failed to introduce direct or substantial circumstantial evidence at trial that Appellant was in constructive possession of the drugs found on the ground.

The Charge

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

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, 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. Lane, 271 S.C. 68, 73, 245 S.E.2d 114, 116 (1978); State v. Ellis, 263 S.C. 12, 22, 207 S.E.2d 408, 413 (1974).

Relevant Facts

On March 11, 2013, in Berkeley County, South Carolina, Evette Nelson, Appellant's girlfriend, ran to the apartment of her neighbor, Greg Rider, and claimed that Appellant assaulted her. R. 76 – 77. Rider was outside playing basketball with his son when he saw Nelson run over to his apartment. R. 97, lines 20 – 25. Rider brought Nelson into his apartment and asked his wife to call the police. R. 98, lines 10 – 12. Rider claimed that after calling the police, he saw Appellant

driving an older model, dark blue Crown Victoria that looked "like an old police car." R. 99, lines 21 – 24. Rider stated that Appellant parked, walked into the apartment that he shared with Nelson, walked right back out, and drove away. R. 98, line 22 – R. 99, line 6. The police arrived at the apartment about fifteen seconds after Appellant left. R. 99, lines 6 – 8.

Once officers responded, the description that Nelson gave of Appellant was dispatched to other officers in the area. R. 112, lines 2 – 6. There were no drugs found in the apartment. R. 75, lines 12 – 13. Nelson stated that she had never seen him with drugs in the apartment and that Appellant did not have drugs in the apartment on the day of the alleged incident. R. 75, lines 14 – 15.

Officer Dodd observed the vehicle that matched the description drive past him in the opposite direction. Dodd turned around and followed the driver who, according to Dodd, was driving at a high rate of speed. R. 112, lines 18 – 23. Dodd initiated his blue lights and attempted a traffic stop, but the driver did not stop. R. 112, lines 23 – 25.

Dodd stated that he got a "brief look" at the driver, who matched the description of Appellant. R. 113, lines 9 – 10. After following the car through several neighborhoods, including Spring Hill Road, Dodd allowed other officers to assume the pursuit. R. 114, lines 4 – 10. When Dodd returned to the police station, he received a call that drugs that had been thrown out of a fleeing car onto Spring Hill Road in Berkeley County. R. 114, lines 18 – 24. Dodd did not see the driver throw anything out of the car while in pursuit. R. 116, lines 22 – 24. He claimed that he lost sight of the driver in "the approximate area where the drugs were recovered." R. 116, line 25 – R. 117, line 1.

William Loflin told officers that he was outside on the back porch when he heard sirens. R. 136, lines 18 – 24. Loflin walked out into the backyard to get a better view of Spring Hill Road. R.

137, lines 1 – 3. He claimed to witness a "blue-colored" Crown Victoria "flying by." According to Loflin, the driver was "looking over his shoulder the whole time" and threw "a bag" out of the car. R. 137, lines 3 – 6. Loflin asked his roommate, Chris Rowland, to go and retrieve the bag thrown on the side of the road. R. 138, lines 10 – 13. Loflin never identified Appellant as the driver. He was never shown a photo line-up. The contents of the bag tested positively for cocaine base and weighed 28.8 grams. R. 224 – 25.

Appellant abandoned the car during the chase and fled on foot. He was later located and arrested. R. 205 – 206; R. 129 – 130. The Crown Victoria, which belonged to Evette Nelson, was photographed, searched and processed for evidence. R. 198, line 18 – R. 199, line 4. Officers discovered a thumb print on the rearview mirror that matched Appellant. R. 258, lines 9 – 11. Officers did not find any drugs, drug paraphernalia, or guns inside the car. R. 211, line 17 – R. 212, line 12. There were no fingerprints recovered from the plastic bag of cocaine base. R. 224, line 4 – R. 225, line 17.

Motion for Directed Verdict of Acquittal

At the close of the State's case, defense counsel moved for a directed verdict of acquittal on the trafficking cocaine base charge. R. 262. Counsel argued that the State's "evidence at best is speculative" as to Appellant's involvement. R. 262, lines 3 – 4. Counsel explained that the State "ha[d] not proven the possession and control of the drugs by [Appellant]." R. 262, lines 10 – 12. Further, the State had not shown "either actual or constructive possession." R. 262, lines 13 – 14.

The solicitor argued that the State had presented sufficient evidence to send the case to the jury. The solicitor stated that there was eyewitness testimony that put Appellant in the car, as well as fingerprint evidence. R. 262, lines 23 – 25. In addition, argued the solicitor, there was a witness who saw a bag get "tossed" out of the window of the speeding car. R. 262, line 25 – R. 263, line 2.

Judge Harrington denied defense counsel's motion.

Discussion

The trial judge erred by failing to direct a verdict of acquittal on the charge of trafficking cocaine base, third offense. The State failed to introduce direct or substantial circumstantial evidence at trial that Appellant was in constructive possession of the drugs officers found on the ground.

A criminal defendant is entitled to a directed verdict when the State fails to present evidence of the offense charged. State v. McCombs, 368 S.C. 489, 493, 629 S.E.2d 361, 362-63 (2006); State v. Cherry, 361 S.C. 588, 593, 606 S.E.2d 475, 478 (2004); State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). When reviewing the trial judge's denial of a directed verdict, an appellate court must review the evidence presented at trial in the light most favorable to the State. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. Buckmon, 347 S.C. 316, 321, 555 S.E.2d 402, 404 (2001). Where the State relies "exclusively" on circumstantial evidence, such evidence must be "substantial" before the judge submits the case to a jury. State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2001). When the evidence merely raises a suspicion that the defendant is guilty, the trial judge should grant a directed verdict motion. State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001).

Here, the State's evidence of constructive possession was purely circumstantial. Appellant was not arrested with or near the bag of drugs. Although there was a witness who claimed to see a bag being thrown out of the car, that witness did not identify Appellant as the one who threw the bag. Appellant's finger prints were not found on the bag. Further, Officer Dodd, who initiated the pursuit and continued to follow Appellant on the street where the bag of drugs was found, did not see Appellant throw anything out of the car.

When officers searched the car, they found no evidence that drugs were inside of the car. The fact that officers discovered Appellant's fingerprint in the car has no bearing on whether Appellant was in possession of the drugs. Evette Nelson told the police that Appellant drove her car often.

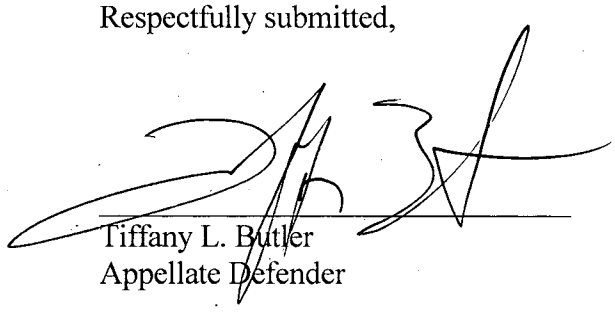
See State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011) (holding that the trial court should have granted a directed verdict of acquittal on the charge of murder where there was no direct evidence linking defendant to the crime scene or items from the victim's house found in a burn pile on defendant's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

Because the evidence the State introduced at trial raised only a suspicion that Appellant possessed the drugs found on the ground, the trial judge should have directed a verdict of acquittal on the charge of trafficking in cocaine base.

CONCLUSION

For the reasons argued, Appellant Barry Jerrod Stanley respectfully requests this court to direct a verdict of acquittal on the charge of trafficking in cocaine base, third offense.

Respectfully submitted,



Tiffany L. Butler
Appellate Defender

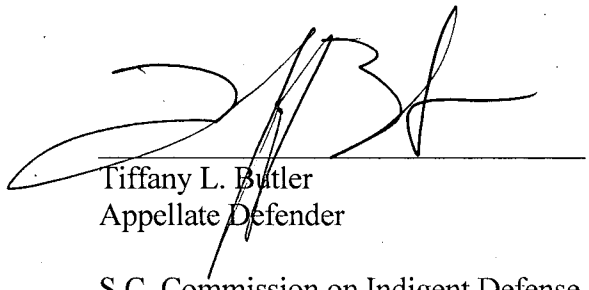
ATTORNEY FOR APPELLANT

This 24th day of July, 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.

July 24, 2015



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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 24th day of July, 2015.

Tiffany L. Butler
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 24th day of July, 2015.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.