

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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AUG 28 2015

SC Court of Appeals

Appeal from Beaufort County

Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DWAYNE CHISOLM,

APPELLANT

APPELLATE CASE NO. 2014-002327

ANDERS BRIEF OF APPELLANT

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The trial judge erred in denying appellant's motions for directed verdicts on the drug charges because appellant was neither in actual nor constructive possession of the drugs found at the scene.

STATEMENT OF THE CASE

Appellant Dwayne Chisholm was convicted of trafficking in cocaine (100 grams or more), possession with intent to distribute crack cocaine, possession of a weapon during the commission of a violent crime, and possession of a firearm with an obliterated serial number per jury trial held during the October 2014 term of the Beaufort County General Sessions Court before Judge Carmen T. Mullen. Appellant was sentenced to imprisonment for an aggregate period of twenty five years. Attorneys Jessica Saxon and Ari Bax represented petitioner at trial, and Assistant Solicitors May Concannon and Julie Kate Kenney appeared on behalf of the state

Appellant appealed his convictions and sentences. This brief follows.

ARGUMENT

The trial judge erred in denying appellant's motions for directed verdicts on the drug charges because appellant was neither in actual nor constructive possession of the drugs found at the scene.

This case was comprised of the testimony of five police officers and a chemist. Appellant did not testify at trial. State's witness Officer Angela Boland testified that she executed a search of appellant's Beaufort County home on May 19, 2010, per a search warrant previously obtained for that property. Officer Boland testified that cocaine was found in a shoe in one bedroom closet in the house, and that a plastic baggy of crack cocaine was found in that same bedroom in the house, and that a small bag of cocaine was found in the living room area of the house, and white powder residue on a straw in the house as well. Tr. 136, l. 24 – p. 165, l. 11.

Police Officer Williams Spears testified that he questioned appellant at the scene and that appellant stated the following:

- 1.) That he lived at the residence searched;
- 2.) That his (appellant's) younger brother David Green lived with him at the residence also;
- 3.) That there was probably some cocaine inside the residence on the chair and in a shoe in a closet;
- 4.) That he (appellant) would do the time for all the drugs in the residence;
- 5.) That he (appellant) did not sell any drugs out of his residence; and
- 6.) That he was in disbelief that it appeared that his brother David Greene was selling drugs out of the house. Tr. 201, l. 2 – p. 206, l. 24; App. 210, l. 1 – p. 213, l. 6.

At the close of the state's case, the defense moved for directed verdicts on the drug charges on the ground that appellant had no knowledge about the drugs and was merely present at the house, and thus had no dominion and control over the drugs. Tr. 268, l. 6 – p. 272, l. 8. The trial judge denied the directed verdict motions. Tr. 274, l. 11 – 23.

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 or the right to exercise dominion and control over the drugs. State v. Heath, 370 S.C. 326, 635 S.E.2d 181 (2006). State v. Hudson, 277 S.C. 200, 284 S.E.2d 773 (2014). However, possession convictions require proof of possession “coupled with knowledge of its presence.” State v. Hudson, supra. Compare State v. Hernandez, 382 S.C. 620, 677 S.E.2d 603 (2009), where the Court held that the defendants who occupied a rental moving truck following a trailer were only present and had no knowledge that drugs were in the trailer they followed, and that as a result, that state's evidence of trafficking was insufficient and “mere speculation.” 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 the house owned by the defendant's mother.

In the case at bar, appellant was unaware of and had no knowledge that his little brother had cocaine and crack in his house; but he (appellant) simply volunteered to protect his little brother by accepting responsibility for the drugs and agreeing to serve time if convicted in place of his guilty little brother. To the contrary, however, appellant could not have had constructive possession of the drugs in his house without knowledge that the drugs were in his house. Per Hudson, the rule is that if contraband materials are found on the

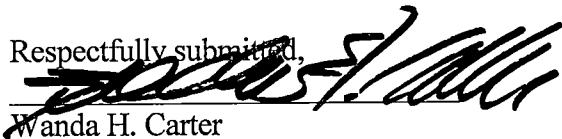
premises, the inference is that the same would be under the possessory control of the owner of the premises, and that the inference is that knowledge of the drugs is implied to said owner of the premises. However, such an inference cannot be made here due to the unique facts of appellant's case. Here, the evidence established that neither knowledge nor constructive possession of the drugs could be assigned to appellant. Appellant was simply taking the fall for his younger brother.

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 circumstantial evidence in existence that reasonably tends to prove the guilt of the accused or from which his guilty maybe fairly or logically deduced. State v. Zeigler, 364 S.C. 94, 610 S.E.2d 859 (Ct. App. 2005). In the case at bar, the state's case was lacking in competent evidence of appellant's actual or constructive possession of the drugs in question, which meant that the trial judge erred in failing to grant appellant's motions for directed verdicts on the drug charges 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 argument, appellant requests that the Court reverse the case and remand for the issuance of directed verdicts on the drug charges.

Respectfully submitted,


Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 28th day of August, 2015.

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Appeal from Beaufort County

Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

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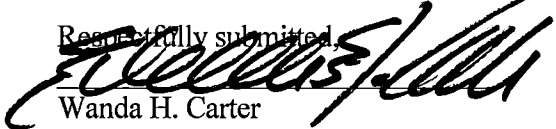
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Dwayne Chisolm states:

1. She is Deputy Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Carmen T. Mullen, which was held on October 23, 2014, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Dwayne Chisolm.

Respectfully submitted,



Wanda H. Carter

Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of August, 2015.

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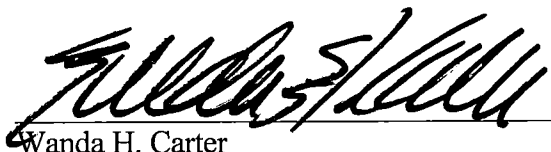
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s);
- (2) Entire Trial Transcript

I certify that this designation contains no matter which is irrelevant to this appeal.

August 28th, 2015



Wanda H. Carter
Deputy Chief Appellate Defender

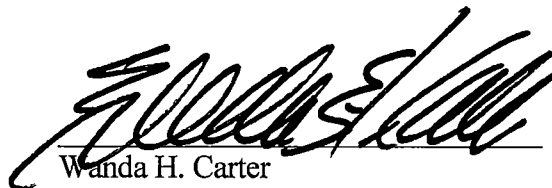
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PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

August 28, 2015

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

Wanda H. Carter
Appellate Defender

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Columbia, South Carolina 29211-1589

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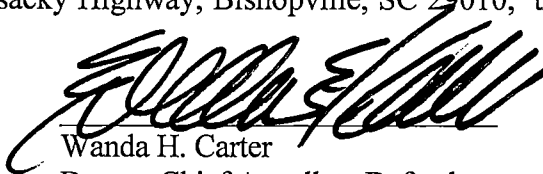
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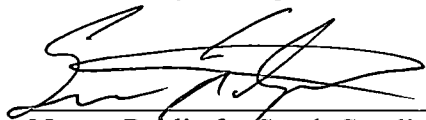
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders 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 a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Dwayne Chisolm, #325820 at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 28th day of August, 2015.



Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 28th day of August, 2015.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.