STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Spartanburg County

Roger L. Couch, Special Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANDRE JACKSON,

APPELLANT

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals correctly find that the trial judge erred in denying respondent's motion for a directed verdict when the State failed to present sufficient evidence of knowledge and dominion and control to establish constructive possession of marijuana found under the center console in the plastic housing where the gear shifter is located in a car in which respondent was merely a passenger?

STATEMENT OF THE CASE

In January of 2009, the Spartanburg County Grand Jury indicted Jackson for possession with intent to distribute marijuana, indictment #09-GS-42-268. On October 13, 2009, Jackson proceeded to jury trial before the Honorable Roger L. Couch. The co-defendant driver, Carl Davy's case was called for trial at the same time and Davy was tried and convicted in his absence. Attorney Andre Price represented Jackson and attorney Roger Poole represented Davy. The jury returned verdicts of guilty for both defendants. Judge Couch sentenced Jackson to three years suspended upon the service of time served with three years probation with 160 hours of pubic service work.

Jackson filed a timely notice of intent to appeal and a direct appeal was perfected. On June 15, 2011, the case was argued before a three judge panel of the South Carolina Court of Appeals. On October 15, 2011, the South Carolina Court of Appeals reversed Jackson's conviction and sentence finding that trial judge erred in denying respondent's motion for a directed verdict when the State failed to present sufficient evidence of knowledge to establish constructive possession of marijuana found under the center console in the plastic housing where the gear shifter is located in a car in which respondent was merely a passenger. State v. Jackson, 395 S.C. 250, 717 S.E.2d 609 (Ct.App. 2011).

The State filed a petition for rehearing that was denied on November 18, 2011. On December 28, 2011, the State filed a petition for writ of certiorari. This return follows.

ARGUMENT

> The Court of Appeals correctly found that the trial judge erred in denying respondent's motion for a directed verdict when the State failed to present sufficient evidence of knowledge and dominion and control to establish constructive possession of marijuana found under the center console in the plastic housing where the gear shifter is located in a car in which respondent was merely a passenger.

At trial, Respondent Jackson testified that he had been living in the Charlotte area for seven or eight years. He was working for Cabarras Plastics and also working as a caterer and a musician. (App. p. 117, lines 6-14). Jackson testified that he met the co-defendant, Mr. Davy, one time through his son during a birthday party for respondent's grandchildren in his home state of Maryland. Jackson testified that he believed that his son and Mr. Davy were school friends. (App. pp. 116; 126). Jackson testified that he barely knew Davy and had only met him the one time, four or five months earlier. (App. p. 126, lines 4-15). Jackson testified that on September 16, 2008, Davy contacted him, through his son, indicating that he was going to Florida or Georgia and that he wanted to stop over and stay for the night with appellant and his wife in Charlotte. Appellant testified, "I told him, well, he could stop over, you know, just for the night to rest." (App. p. 117, lines 17 – p. 118, lines 1-2).

Jackson testified that Davy came to his house and that, later, Davy gave him a ride to Greenville. Jackson testified that he had a musical "gig" in Greenville and that he was supposed to go to Greenville to promote the occasion but he needed a ride because his license was suspended. (App. pp. 118 - 119). Jackson testified that he left for Greenville with Davy driving the Impala he had arrived in. (App. p. 119, lines 6-25). Jackson testified that neither he nor his wife rented the Impala that Davy was driving. (App. p. 122, lines 5-11).

Jackson testified that as they were driving on I-85, he noticed that Davy had slowed down for some reason. Jackson testified, "So, when I looked at him, you know, he say 'it's an, it's an

officer, a police car behind me.' For that matter I didn't, you know, care cause, you know, why he - - you know, I know he got his driver's license as far as, you know, to my knowledge. So, I wonder why he was slowing down and by that time we got pulled over by the police officer." (App. p. 120, lines 6-15).

At trial Duncan Police Department Officer Jonathon Montjoy testified that he stopped a Chevrolet Impala driven by Davy on I-85 for driving 55 miles an hour in a 60 mile per hour zone. (App. p. 64, lines 4- p. 65, 66, lines 1-5). The officer testified that when he returned to the car to get the rental agreement, he smelled marijuana. (App. p. 66, lines 6-22). The officer deployed his canine, Pico, who alerted to an illegal substance. (App. p. 69, lines 10-23). Upon searching the vehicle the officer found marijuana "[u]nder the center console where the gearshifter is, the plastic housing." (App. p. 70, lines 21-23). Both Jackson and Davy were arrested and charged with possession with intent to distribute marijuana.

Jackson testified that he knew nothing about marijuana in Davy's vehicle. He testified that he never saw or smelled any marijuana. (App. p 129, lines 14 – p. 130, lines 1-8). Davy provided no statement to the police and was tried in his absence. There were no additional amounts of marijuana found. There was no evidence of cash being found and no evidence of any paraphernalia being found. There was no evidence that Jackson was nervous or made any suspicious movements. Jackson did not own, rent or drive the car. There was no evidence that Jackson had been in the car previously or that he ever had access to the car prior to his trip with Davy. Davy was the driver and Jackson had only met him once before at a grandchild's birthday party.

At the close of the State's case Jackson moved for a directed verdict. Defense counsel argued, "Your Honor, Mr. Jackson would assert, based upon his previous objections and previous arguments that have been heard both in and outside the presence of the jury that the State is not met

its burden in this case in proving that, not only did he make, not even have what was a good constructive possession of any marijuana, that he may not have even known it was in there. There is no evidence in that matter, Your Honor, and based on that argument we would move for a directed verdict on behalf of Mr. Jackson." (App. p. 106, lines 2-11). The trial judge ruled, "I find that there are sufficient facts to establish a case for constructive possession in the case, and therefore, I will allow it to go to the jury." (App. p. 102, lines 2-6). Under these circumstances, where the State failed to submit any direct or substantial circumstantial evidence suggesting that Jackson exercised dominion or control over the marijuana or that Jackson had knowledge of the marijuana, the trial judge erred in denying appellant's motion for directed verdict.

A trial court must submit the case to the jury if any direct or substantial circumstantial evidence has been presented that reasonably tends to prove the defendant's guilt or from which his guilt may be fairly and logically deduced. State v. Fennell, 340 S.C. 266, 270, 531 S.E.2d 512, 514 (2000). However, the trial court should grant a directed verdict motion when the evidence presented merely raises a suspicion of guilt. State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004). Suspicion implies a belief or opinion as to guilt based upon facts or circumstances not amounting to proof, but the trial court is not required to find the evidence infers guilt to the exclusion of any other reasonable hypothesis. *Id.*

In State v. Hudson, 277 S.C. 200, 202, 284 S.E.2d 773, 774-75 (1981) the South Carolina Supreme Court wrote:

> Conviction of possession of [illegal drugs] requires proof of possession-either actual or constructive, coupled with knowledge of its presence. Actual possession occurs when the drugs are found to be in the actual physical custody of the person charged with possession. To prove constructive possession, the State must show a defendant had dominion and control, or the right to exercise dominion and control, over the [drugs]. Constructive possession

> can be established by circumstantial as well as direct evidence, and possession may be shared.

"Possession requires more than mere presence." State v. Stanley, 365 S.C. 24, 43, 615 S.E.2d 455, 465 (Ct.App.2005). "In drug cases, the element of knowledge is seldom established through direct evidence, but may be proven circumstantially." State v. Hernandez, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009). "Knowledge can be proven by the evidence of acts, declarations, or conduct of the accused from which the inference may be drawn that the accused knew of the existence of the prohibited substances." Id..

The State's evidence at trial showed that at the time of the stop the officer smelled marijuana and Davy and Jackson gave "vague" statements about the purpose of the trip. The evidence is insufficient to establish that Jackson exercised dominion and control and had knowledge of the marijuana required to establish constructive possession. The Court of Appeals correctly found that the trial judge erred in denying Jackson's motion for a directed verdict.

In State v. Brown, 267 S.C. 311, 315, 227 S.E.2d 674, 676 (1976), this Court found that the State failed to present sufficient evidence to establish constructive possession and the judge erred in denying the motion for directed verdict when, "[t]he sum total of the State's evidence against Brown is that he was a passenger in a car on a deserted rural road about 1:00 A.M., that [the driver] had an undetermined sum of cash in a large roll, that Brown was nervous and had no identification, that there was a smell of marijuana in the car, and that there was a large opaque bag containing eight pounds of marijuana on the rear floorboard. [The driver] knew Brown's name as Chuck Brown and Brown told [the driver] to be quiet when [the driver] started to admit the crime."

In United States v. Blue, 957 F.2d 106 (4th Cir. 1992) the Court found that the Government failed to establish that the passenger of a car constructively possessed a hand gun found under the passenger's seat. In Blue the Court wrote:

> Beyond [the officer's] claim that he saw [the passenger]'s shoulder dip and the discovery of the pistol underneath the passenger seat, the government did not substantiate its case against [the passenger]. It did not produce fingerprints or any other physical evidence which would link [him] with the gun. The government introduced no evidence demonstrating that [the passenger] owned the gun or testimony that [he] had been seen with the gun. The car in which the gun was found did not belong to [the passenger]; in fact, no evidence indicated that [he] had ever been in that car before. Without more evidence than that proffered by the government, we cannot sustain [the passenger]'s conviction.
>
> Id. at 108.

The present case is distinguished from Maryland v. Pringle, 540 U.S. 366, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003) which involved a challenge to the **arrest** of a front passenger in a vehicle upon the police finding money in the glove compartment and cocaine behind the upright arm rest in the backseat. After the arrest but prior to trial, Pringle admitted ownership of the cocaine found in the backset. If the only evidence introduced by the Government had been the cocaine in the backseat, a directed verdict would have been required, as in this case.

The present case is also distinguished from Cochran v. State, 684 S.E.2d 136 (Ga. App. 2009) where the State produced sufficient evidence that the passenger constructively possessed marijuana found in the fender well of the trunk behind cardboard. In Cochran the passenger was traveling a long distance with the driver, a person with whom he had a five year intimate relationship. Both the passenger and the driver had access and control of the car. In the present case, Jackson barely knew the driver Davy and there is no evidence that Jackson ever had access or control of the car.

In State v. Jackson, 395 S.C. 250, 258, 717 S.E.2d 609, 613 (Ct.App. 2011) the South Carolina Court of Appeals wrote, "Here, the evidence against Jackson is even less than in either *Brown* or *Blue.* The drugs were more out of sight, and the State presented no evidence that Jackson was nervous or made any suspicious movements. Accordingly, the State failed to present sufficient circumstantial evidence of knowledge to submit the case to the jury. Thus, the trial court erred in denying Jackson's motion for a directed verdict." There were no additional amounts of marijuana found. There was no evidence of cash being found and no evidence of any paraphernalia being found. Jackson did not own, rent or drive the car. There was no evidence that Jackson had been in the car previously or that he ever had access to the car prior to his trip with Davy. Davy was the driver and Jackson had only met him once before at a grandchild's birthday party. The South Carolina Court of Appeals correctly reversed Jackson's conviction based upon the State's failure to present sufficient evidence of constructive possession.

The initial traffic stop in the present case was challenged at trial and on appeal but not addressed by the opinion. The illegality of the stop provides an additional sustaining ground for the reversal. Prior to trial, Jackson moved to suppress the marijuana found based on the fact that the initial traffic stop was illegal. (App. p. 10, lines 22 – p 11, lines 1-7). During the pre-trial hearing, Duncan Police Department Officer Jonathon Montjoy testified that he stopped a Chevrolet Impala driven by Davy on I-85 for driving 55 miles an hour in a 60 mile per hour zone. (App. pp. 14-16). Officer Montjoy agreed that the maximum speed limit along that particular stretch of the interstate is 60 miles per hour while the minimum speed limit is 45 miles per hour. (App. p. 25, lines 1-19). Officer Montjoy testified that appellant's vehicle was traveling in the center lane of the three lane highway at a rate of 54 miles per hour which the officer characterized as "a real low rate of speed slower than the other traffic." (App. p. 14, lines 16-18).

The officer testified that, during rush hour traffic, the average speed of drivers is 70 to 75 miles per hour. (App. p. 15, lines 1-5). However, despite testifying that the many of the cars in the flow of traffic were exceeding the speed limit, the officer did not choose to stop any of the drivers who were speeding down the highway at upwards of 70 miles per hour and passing the vehicle in which appellant was riding as it obeyed the speed limit. Instead, the officer stopped the car driving within the posted speed limit and over the posted minimum speed, concluding that the driver was committing the crime of "impeding traffic." (App. p. 25, lines 15-19).

Jackson argued, "Your Honor, you've also heard that the maximum speed limit is 60 miles an hour. Now if one is going 60 miles an hour, which is the maximum speed limit, albeit during rush hour as people are going home, 55 miles an hour is not too far out of line to be considered to be impeding traffic. There is a minimum. There is a maximum. . . .As you heard, it is a 45. It is a 60. He was well within those boundaries. He was not in the far left-hand passing lane. He was in the middle lane. He was in a rental car in an unfamiliar place. Your Honor, it would be our . . . motion today that he is just not going slowly enough in order to be qualified for a stop in this matter." (App. p. 40, lines 11 – p. 41, line 1).

The judge denied the motion to suppress stating, "In this particular case, I understand your argument that all three lanes constitute the right side of the road, but I think it's generally accepted, when you're driving on a three lane interstate highway, that the left lane of the direction in which you're traveling is the faster lane or passing lane or the one you should go to if you're traveling faster. And then across the interstate to the right would be as you go slower and slower. I would - - I think that's generally the way you do that, and, of course, slower traffic stays to the right. I've seen that posted on roads all over the State for years. " (App. p. 50, lines 24-p. 51, lines 1- 9). The judge erred.

The officer lacked reasonable suspicion to conduct an investigatory stop where the vehicle appellant occupied was being driven legally. The stop, search, and seizure of appellant violated his rights against unreasonable searches and seizures as guaranteed by the Federal Constitution, and the distinct right to privacy guaranteed by Article I, §10 of the South Carolina Constitution. The stopping of a vehicle and the detention of its occupants constitutes a seizure and implicates the Fourth Amendment's prohibition against unreasonable searches and seizures. Delaware v. Prouse, 440 U.S. 648, 653-54, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). "Therefore, an automobile stop implicates the Fourth Amendment prohibition against unreasonable searches and seizures, imposing a standard of 'reasonableness' upon the exercise of discretion by state law enforcement officials." State v. Banda, 371 S.C. 245, 639 S.E.2d 36 (2006).

Generally, the decision to stop an automobile is reasonable when the police have probable cause to believe a traffic violation has occurred. Banda, 371 S.C. at 252, 639 S.E.2d at 40. "A police officer may stop and briefly detain and question a person for investigative purposes, without treading upon his Fourth Amendment rights, when the officer has a reasonable suspicion supported by articulable facts, short of probable cause for arrest, that the person is involved in criminal activity." Evidence seized in violation of the Fourth Amendment must be excluded from trial. A police officer may stop and briefly detain and question a person for investigative purposes without treading upon his Fourth Amendment rights only when the officer has a reasonable suspicion supported by articulable facts, short of probable cause for arrest, that the person is involved in criminal activity. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); State v. Woodruff, 344 S.C. 537, 546, 544 S.E.2d 290, 295 (Ct.App.2001).

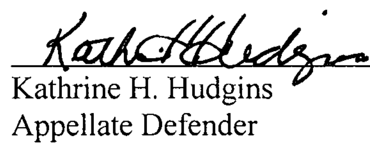
"Reasonable suspicion" requires a "particularized and objective basis that would lead one to suspect another of criminal activity." United States v. Cortez, 449 U.S. 411, 418, 101 S.Ct.

690, 695, 66 L.Ed.2d 621, 629 (1981). In determining whether reasonable suspicion exists, "the totality of the circumstances-the whole picture-" must be considered. Id. 449 U.S. at 417, 101 S.Ct. at 695, 66 L.Ed.2d at 629; State v. Khingratsaiphon, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002). The "impeding traffic" accusation because the driver was driving within the range of posted speed limits does not provide reasonable suspicion to stop the vehicle. The initial stop was illegal and the judge erred in refusing to exclude the marijuana as fruit of the poisonous tree.

CONCLUSION

Based on the above argument, the State's petition for writ of certiorari should be denied.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 27th day of April, 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Roger L. Couch, Special Circuit Court Judge

THE STATE,

RESPONDENT,

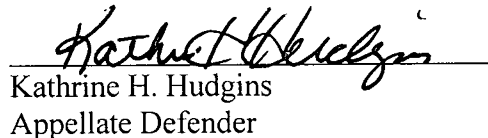
V.

ANDRE JACKSON,

APPELLANT

CERTIFICATE OF SERVICE

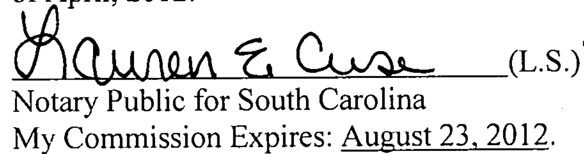
I certify that a true copy of the return to petition for writ of certiorari in this case have been served on Harold M. Coombs, Jr., Esquire, this 27th day of April, 2012.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 27th day
of April, 2012.


(L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2012.