

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari from Spartanburg County  
Honorable Roger L. Couch, Judge  
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RECEIVED

DEC 28 2011

S.C. Supreme Court

THE STATE,

PETITIONER,

vs.

ANDRE JACKSON,

RESPONDENT.

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**PETITION FOR WRIT OF CERTIORARI**  
\_\_\_\_\_

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**CERTIFICATION BY COUNSEL**

The South Carolina Court of Appeals denied the petition for rehearing by Order dated November 18, 2011.

## **QUESTIONS PRESENTED FOR REVIEW**

1. There was substantial circumstantial evidence reasonably tending to prove that the defendant was not merely present. Rather, the circumstantial evidence established that the defendant knew the marijuana was in the car and had dominion and control, or the right to exercise dominion and control, over the marijuana. Did the trial judge correctly submit the case to the jury?
  
2. When there was either direct evidence or substantial circumstantial evidence reasonably tending to prove that the defendant knew the marijuana was in the car and had dominion and control, or the right to exercise dominion and control, over the marijuana, should the appellate court have found that the trial court properly submitted the case to the jury?

## STATEMENT OF THE CASE

The Spartanburg County Grand Jury charged the defendant with possession with intent to distribute marijuana (09-GS-42-0268). The defendant and his counsel came to trial October 13, 14, 2009 before the Honorable Roger L. Couch, Judge, and a jury. Co-defendant (Nicholas Carl Davy [09-GS-42-0761]) was represented by counsel and tried jointly in his absence. The jury found the defendant guilty, and the court sentenced him to imprisonment for three years suspended upon time served, probation for three years, and 160 hours public service employment during probation.

The South Carolina Court of Appeals found that the State failed to present sufficient evidence to establish that the defendant had dominion and control of the marijuana and reversed the trial court's denial of the directed verdict motion. State v. Jackson, Opinion No. 4894 (S.C. Ct. App. filed October 5, 2011).

The State served its Petition for Rehearing, and the South Carolina Court of Appeals denied the petition by Order dated November 18, 2011.

## ARGUMENT

**There was evidence viewed in the light most favorable to the state that the defendant was not merely present. Rather, the evidence reasonably tended to prove that the defendant knew about the marijuana and had dominion and control, or the right to exercise dominion and control, over the marijuana. (Questions Presented 1 and 2).**

### The Traffic Stop

The appellate court's factual recitation and want of a decision on the existence of probable cause for the traffic stop<sup>1</sup> may suggest concern for the officer's subjective intent, possible ulterior motive, or reasonableness in stopping the car when he saw it impeding traffic in the middle lane of an interstate but traveling at a lawful speed. State v. Jackson, Opinion No. 4894 (S.C. Ct. App. filed October 5, 2011). A vehicle traveling below the prevailing speed of traffic should be driven in the right-hand lane. S. C. Code § 56-5-1810 (Westlaw 2010). Subjective intentions play no role in ordinary probable cause Fourth Amendment analysis. When an officer has probable cause to believe that he has witnessed a traffic violation, the officer may stop the vehicle. State v. Banda, 371 S.C. 245, 639 S.E.2d 36 (2006).

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<sup>1</sup> The defendant challenged the existence of "reasonable suspicion" for the traffic stop. (Appendix p. 194; Appellant's Statement of Issues on Appeal).

When the officer approached the defendant's (passenger's) side of the car, the officer smelled marijuana.<sup>2</sup> The scent was so strong that the drug dog could only affirm. (ROA. pp. 61-67; p. 70; pp. 72-77; pp. 80-85).

At the time of the traffic stop the defendant and co-defendant were vague about the purpose of their trip, but they were going to Greenville and returning that night. (ROA p. 85). At trial the defendant was not vague; he knew what he had been doing: He was going to Greenville to attend to his music business. His co-defendant/driver would continue to Florida or Georgia while he (defendant) returned home by bus. The defendant did not know that marijuana was in the vehicle, and he did not smell it. The defendant affirmed the substance of the officer's reason for stopping the car: the co-defendant/driver saw the police and slowed. (ROA pp. 114-117; pp. 124-126).

At trial the defendant allowed conveniently coordinating his music business with the co-defendant's travels, and he acknowledged meeting the co-defendant at an out-of-state family birthday and inviting the co-defendant to share his Charlotte home the previous night. (ROA. pp. 113-114; p. 123).

#### Applicable Law

The trial court passes upon the existence of either direct evidence or circumstantial evidence; the trial court does not weigh the evidence. The appellate court must find that the trial court properly submitted the case to the jury if there is any direct evidence or substantial circumstantial evidence reasonably tending to prove guilt. State v. Elmore, 368 S.C. 230, 234-35, 628 S.E.2d 271 (Ct. App. 2006). A conviction will not stand where

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<sup>2</sup> The Court of Appeals issued a transport Order dated June 7, 2011 for State's Exhibit No. 1, a video of the traffic stop.

there is a complete absence of any competent evidence. State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984).

The state had to prove that the defendant possessed the marijuana found under the center console. [Circumstantial evidence establishing intent to distribute the large quantity of marijuana in multiple packages was not challenged.] Possession of marijuana may be established by circumstantial evidence reasonably tending to prove that the defendant knows of its presence and has dominion and control or the right to exercise dominion and control over the marijuana. Possession may be shared. State v. Jackson.

To prove possession of marijuana found in a vehicle the state must show the defendant's interest in the vehicle or relationship with the driver or vehicle owner from which the defendant's control of the vehicle or its contents may be inferred. State v. Hernandez, 382 S.C. 620, 677 S.E.2d 603 (2009); State v. Brown, 267 S.C. 311, 227 S.E.2d 674 (1976). Accord, United States v. Blue, 957 F.2d 106 (4<sup>th</sup> Cir. 1992).

In Cochran v. State, 684 S.E.2d 136 (Ga. App. 2009) an officer stopped a vehicle for a traffic violation and noticed the odor of raw marijuana at the passenger side. Four bags of marijuana were found in the fender well of the trunk behind cardboard. The defendant/passenger had a relationship with the driver/girlfriend/co-defendant. They were returning in a rental vehicle to Ohio after finding that the co-defendant's mother had not been at home in Georgia for their visit. The co-defendant testified the defendant/passenger had the rental vehicle in his exclusive possession and drove it on his own several hours, without explanation, before the beginning of their trip. Defendant did not testify. The officer's smelling the marijuana - even with no showing that the defendant/passenger would necessarily recognize the smell of raw marijuana - combined with the other

evidence [defendant's relationship with driver, unaccomplished stated purpose of trip, marijuana located in position consistent with joint constructive possession], showed a connection between the defendant and the contraband. While constructive possession of contraband cannot rest upon mere spatial proximity - especially where it is hidden - the circumstantial evidence of constructive possession was sufficient to be considered by the jury.

In Maryland v. Pringle, 540 U.S. 366, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003) an officer stopped a car for speeding in which the defendant was the front seat passenger. After a warning for speeding, the driver consented to a vehicle search, and police found \$763 in the glove box and five bags of cocaine behind the upright arm rest in the back seat. None of the men, including the back seat passenger, admitted ownership. The defendant challenged the existence of probable cause for arrest [in sum, a reasonable ground for believing that he had knowledge of, and exercised dominion and control over, the cocaine]. The Court found probable cause to believe that the defendant possessed the cocaine, either solely or jointly: [1] A passenger in a car will often be engaged in a common enterprise with the driver. [2] “[I]t was reasonable for the officer to infer a common enterprise among the three men. The quantity of drugs and cash in the car indicated the likelihood of drug dealing, an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him.”

#### Discussion

The defendant moved for a directed verdict on the ground of lack of evidence reasonably tending to prove that he had constructive possession of the marijuana or that he knew of its presence. To wit, the co-defendant was driving the vehicle, and it was rented

by an undetermined person. (ROA. pp. 102-103, line 17). The court found sufficient evidence of constructive possession to go to the jury. (ROA. p. 104, line 7).

The defendant testified that he knew his co-defendant and shared his [defendant's] Charlotte home the previous night. The companions [defendant and co-defendant] were traveling together in the rental vehicle the following day when the co-defendant saw a police car and slowed down - by inference, driving in an overly cautious manner with the hope of avoiding a traffic stop. The police stopped the vehicle for impeding traffic and smelled marijuana in the car. At that time the companions were unsure of the purpose of their travel, but they were returning the same day. That was not the same account that the defendant gave at trial. Police found a large quantity of raw [unburned] marijuana hidden between the defendant and co-defendant. The video of the traffic stop shows the removal of the bulky, separate bags of marijuana from the car, and may illustrate the officer's testimony and explain, better than the weight of the substance, why the car reeked of its odor. The relationship between the companions, the defendant's sharing his home with his companion the previous night, the defendant's presence in the rental car that reeked with the odor of marijuana, the defendant's evolving account of his travel, and the close proximity of the marijuana between the defendant and co-defendant support a reasonable inference that the defendant knew about the marijuana and had dominion and control, or the right to exercise dominion and control, over the marijuana.

The record contains substantial circumstantial evidence reasonably tending to prove the defendant's purposeful presence in the car that smelled of marijuana, and his knowing and aiding the driver, from which the defendant's interest in and control of the marijuana - hidden between the driver and passenger - may be inferred. State v.

inference that the defendant knew about the marijuana and had dominion and control, or the right to exercise dominion and control, over the marijuana.

The record contains substantial circumstantial evidence reasonably tending to prove the defendant's purposeful presence in the car that smelled of marijuana, and his knowing and aiding the driver, from which the defendant's interest in and control of the marijuana - hidden between the driver and passenger - may be inferred. State v. Hernandez, 382 S.C. 620, 677 S.E.2d 603 (2009); State v. Brown, 267 S.C. 311, 227 S.E.2d 674 (1976). Accord, Maryland v. Pringle; Cochran v. State. The trial court soundly denied the motion for directed verdict. State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001).

## CONCLUSION

Those who possess and transport contraband with intent to distribute intend to profit. They have an interest in planning their enterprise and avoiding detection with its possible consequences – loss of their investment and their freedom. Finding suspects in their contraband laden vehicles - with scant additional facts and circumstances - may be the state's evidence.

This Court may wish to grant discretionary review and to guide the bench and bar in the application of precedent.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

December 28, 2011

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari from Spartanburg County  
Honorable Roger L. Couch, Judge  
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THE STATE,

PETITIONER,

vs.

ANDRE JACKSON,

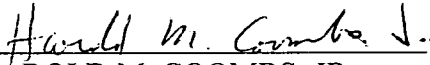
RESPONDENT.

—————  
**PROOF OF SERVICE**  
—————

I, Harold M. Coombs, Jr., certify that I have served the within Petition for Writ of certiorari and Appendix on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Kathrine H. Hudgins, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.

This 28<sup>th</sup> day of December, 2011.

  
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