THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM OCONEE COUNTY
Court of General Sessions

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2015-000981

The State, ... Respondent,

V.

Teresa Davis, ...Appellant.

APPELLANT'S FINAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

OTHER AUTHORITIES:

STATEMENT OF ISSUES ON APPEAL

I. Did the trial judge err in denying Appellant's motion to sever her charges?

II. Did the trial judge err in denying Appellant's motion for a directed verdict on her possession with intent to distribute methamphetamine charge and her first degree burglary charge?

STATEMENT OF THE CASE

Appellant Teresa A. Davis was indicted by a grand jury for first-degree burglary and possession with intent to distribute methamphetamine, second offense. (R. p. 9, lines 7-10).

On April 23, 2015, Appellant's case was called to trial in the circuit court. (R. p. 7). Appellant was convicted, by a jury, as indicted. (R. pp. 3-6; p. 229, lines 6-15). The court sentenced Appellant to an aggregate term of eighteen years' imprisonment. (R. pp. 3-6; p. 234, lines 10-11).

This appeal follows.

STATEMENT OF THE FACTS

On February 10, 2014, Douglas Paul drove by his mother's residence in Seneca, South Carolina. (Tr. P. 73, line 24 – P. 77, line 17). Prior to February 10, 2014, Paul's mother moved into a nursing home and the house was placed on the market. (R. p. 78, line 1 – p. 81, line 14). As Paul drove by the house, he noticed a car in the driveway that was not supposed to be there. (R. p. 82, lines 2-6). Paul stopped and returned to the house to investigate. (R. p. 82, lines 20-22). Paul looked in the car's windows and went to the front door of the house, which was locked. (R. p. 82, line 21 – p. 83, line 6). Paul noticed the interior garage door into the house was open. (R. p. 83, lines 9-15). Paul called his wife to bring a key to the house so he could gain entry into the house. (R. p. 83, lines 17-22). Once he gained entry into the house, Paul noticed a back sliding glass door open and he heard noises from the second floor. (R. p. 84, lines 9-24). Paul then called 9-1-1. (R. p. 85, lines 11-12). After a sweep of the house was conducted by law enforcement, Paul entered the property and noticed that a number of items inside the residence had been shifted or moved. (R. p. 88, line 11 – p. 90, line 8).

Paul informed law enforcement that his wife observed an individual who

did not "look like he belong[ed]" in the neighborhood. (R. p. 85, lines 16-22). Appellant's brother was located a short distance from the house, detained, and brought back to the scene. (R. p. 111, line 25 – p. 112, line 20).

Officer William Freestate of the Oconee County Sherriff's Department arranged for the vehicle in the driveway, which was determined to be registered to Appellant's mother, to be towed from the property. (R. p. 123, line 20 – p. 124, line 3). Officer Freestate conducted an inventory of the car. During his search of the vehicle, he discovered a black purse and small plaid bag on the driver's seat. (R. p. 124, line 21 – p. 131, line 23). Appellant's driver's license, lip gloss, and paperwork were recovered from inside the black purse. (R. p. 130, lines 5-7). Inside the small plaid bag, law enforcement found two bags containing a crystal-like substance, which was eventually tested and later confirmed to be methamphetamine. (R. p. 131, line 25 – p. 132, line 5; p. 152, lines 6-9).

After the house was searched, the vehicle inventoried and towed, law enforcement observed Appellant on the roof of the house, clinging to the chimney. (R. p. 134, line 21 – p. 135, line 9). Officers retrieved a ladder from the garage and assisted Appellant down from the roof. (R. p. 135, lines 19-24).

Appellant was placed in investigative detention. (R. p. 136, lines 1-2).

Following Appellant's arrest, she stated to law enforcement that she was dropping her friend off at the house. (R. p. 136, lines 14-16). When asked why she was on the roof of the house, she responded that she was scared. (R. p. 136, lines 17-19). When asked who the crystal-like substance belonged to, Appellant stated that it belonged to her and that her brother did not do methamphetamine. (R. p. 137, lines 4-8). Appellant later recanted her statement that the drugs were hers and instead stated to law enforcement that the drugs were not hers. (R. p. 137, lines 9-12).

Law enforcement were unable to recover any fingerprints from inside the house matching Appellant. (R. p. 156, lines 1-3).

LAW/ANALYSIS

I. The Circuit Court Erred in Denying Appellant's Motion to Sever Her Charges

In the instant case, Appellant was indicted for first-degree burglary and possession with intent to distribute methamphetamine, second offense. At trial, Appellant moved to sever her charges on the grounds the charges were not closely related in kind or character. Appellant further alleged the prejudicial effect of trying the charges together would be substantial to Appellant. The

court denied Appellant's motion.

"The appellate court considers several factors when deciding whether the trial court's consolidation of charges was proper." State v. Rice, 368 S.C. 610, 614, 629 S.E.2d 393, 395 (Ct. App. 2006). Only when separate indictments are of the same general nature, involving connected transactions closely related in kind, place, and character, can a trial judge order the indictments be tried together. See State v. Sullivan, 277 S.C. 35, 44, 282 S.E.2d 838, 843 (1981) (noting where offenses charged in separate indictments are of same general nature, involving connected transactions closely related in kind, place, and character, trial judge has authority to order indictments tried together, absent a showing that defendant's substantive rights would be violated); see also State v. Simmons, 352 S.C. 342, 350, 573 S.E.2d 856, 860 (Ct. App. 2002) (stating joinder of charges proper if the chargers were of the same general nature and sprung from the same series of transactions, were committed by the same offender, and required the same proof). "Offenses are considered to be of the same general nature when they are interconnected." State v. Jones, 325 S.C. 310, 315, 479 S.E.2d 517, 519 (Ct. App. 1996). A motion for severance is addressed to the sound discretion of the trial court. State v. Walker, 366 S.C.

643, 656, 623 S.E.2d 122, 128 (Ct. App. 2005). An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. Id.

The trial court erred in denying Appellant's motion to sever her charges. While the incidents leading to the charges occurred close in time, the charges were not of the same general nature or related in kind and character. The charges did not require proof by the same evidence or the same witnesses. Rather, Officer William Freestate was the only witness to testify regarding where the methamphetamine was found. Conversely, several other officers, who did not participate in the search of the vehicle where the drugs were found, testified regarding finding Appellant on the roof of the home. Further, the drugs were found in the vehicle some time before Appellant was discovered on the roof. Thus, the evidence in the record does not support the notion that Appellant's charges were of the same general nature and closely related in kind, place, and character. Accordingly, the trial judge erred in denying Appellant's motion to sever her charges.

II. The Circuit Court Erred in Denying Appellant's Motions for a Directed Verdict

"When ruling on a motion for a directed verdict, the trial court is

concerned with the existence or nonexistence of evidence, not its weight." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). When reviewing a denial of a directed verdict, an appellate court views the evidence and all reasonable inferences in the light most favorable to the State. Id. The appellate courts can only find the case was properly submitted to the jury—and, therefore, the denial of defendant's directed verdict was proper—when there is any direct evidence or substantial circumstance evidence reasonably tending to prove the guilt of the accused. Id.

The trial court should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty. State v. Hernandez, 382 S.C. 620, 625, 677 S.E.2d 603, 605 (2009). "A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." State v. Galimore, 396 S.C. 471, 475, 721 S.E.2d 475, 477 (Ct. App. 2012).

a. The Circuit Court Erred in Denying Appellant's Motion for a Directed Verdict on the Possession with Intent to Distribute Charge Where the State Failed to Present Evidence Appellant Had Control Over the Drugs Found in the Vehicle

At the close of the State's case, Appellant moved for a directed verdict, arguing the State failed to prove Appellant had control over the methamphetamine found in the vehicle since Appellant was on the roof of the

home at the time the drugs were discovered. The court denied Appellant's motion.

"Possession of any amount of controlled substance coupled with sufficient indicia of intent to distribute will support a conviction for possession with intent to distribute." State v. James, 362 S.C. 557, 562, 608 S.E.2d 455, 457 (Ct. App. 2004). Possession is an essential element of the crime of possession with intent to distribute narcotics. Possession may be actual or constructive. Actual possession occurs when the drugs are found to be in the actual physical custody of the person charged with possession, while 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. See State v. Mollison, 319 S.C. 41, 45, 459 S.E.2d 88, 91 (Ct. App. 1995). A defendant's mere presence in or around location where the illegal substance is found is insufficient to prove constructive possession of the illegal substance. Id.

In State v. Heath, our Supreme Court found the evidence presented by the State was insufficient to establish that defendant was in constructive possession of the controlled substance where: (1) the controlled substance was

found in car-washing mitt in outside recycling bin near back door of home owned by defendant's mother, (2) there was no direct circumstantial evidence that linked defendant to the controlled substance; and (3) the State presented no evidence that defendant could have exercised dominion and control over area where controlled substance was found. State v. Heath, 370 S.C. 326, 330, 635 S.E.2d 18, 19 (2006).

In the case at bar, the State failed to present direct or circumstantial evidence tending to prove Appellant either actually or constructive possessed the methamphetamine found in the vehicle. With regard to actual possession, the State did not present any evidence the methamphetamine was found on Appellant's person. Therefore, the State failed to prove Appellant actually possessed the methamphetamine.

Moreover, Officer William Freestate testified the car was registered to Lavina Davis, Appellant's mother. Officer Freestate further testified that when he searched the vehicle, a purse, containing Appellant's driver's license, was found on the driver's seat. However, Freestate stated he observed a plaid bag on the driver's seat next to the purse. It was in this small plaid bag that investigators discovered the methamphetamine. The State failed to present any

evidence, direct or circumstantial, that would tend to prove Appellant could have exercised dominion and control over the small plaid bag where the drugs were found. See Heath, supra.

Based on the foregoing, the trial judge erred in denying Appellant's motion for a directed verdict on the PWID methamphetamine charge.

b. The Circuit Court Erred in Denying Appellant's Motion for a Directed Verdict on the Burglary Charge Where the State Failed to Present Evidence that the Home was Occupied at the Time of the Incident

At the close of the State's case, Appellant moved for a directed verdict on her burglary charge, arguing there was no occupant or habitant of the home against whom the offense could have been committed. Appellant noted for the court that the house was on the market and the owner of house had been moved into a nursing home at the time of the incident. The trial court denied Appellant's motion.

"A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and . . . (2) the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both[.]" S.C. Code Ann. § 16-11-311(A)(2) (2015). A dwelling house loses its status as

such when the occupants or residents leave without the purpose of returning. "[A] house, although furnished as a dwelling house loses its character as such for the purpose of burglary, if the occupant leaves it without the intention to return." State v. Ferebee, 273 S.C. 403, 405, 257 S.E.2d 154, 155 (1979) (internal citation omitted) (reversing defendant's conviction for burglary where the evidence showed there was no occupant or inhabitant against whom the offense could have been committed). "While authorities agree that the temporary absence of occupants will not prevent a resident from becoming the subject of a burglary it is required that such occupants leave with the purpose of returning in order for a breaking and entering during their absence to constitute burglary." Id. The rationale for requiring an occupant or resident to reside and sleep within the dwelling rests upon notion that burglary is an offense against habitation rather than against property. Id. (emphasis added).

In Ferebee, the Supreme Court found that a vacant apartment unit, abandoned a week prior by former tenants, was not a dwelling house for purposes of the burglary statute. The Court noted that the burglary statute required the apartment have an identifiable occupant sleeping or residing therein. The Court also noted the statute required that the occupant leave with

the purpose of returning in order for the apartment to be considered a dwelling. Conversely, in State v. Glenn, 297 S.C. 29, 374 S.E.2d 671 (1988), the Court determined there was sufficient evidence that occupant did not vacate the home, but left with the intention of returning where the occupant left over $10,000 worth or personal possessions in a mobile home and returned to the mobile home on numerous occasions to gather some possessions.

Here, the State failed to present direct or circumstantial evidence that the homeowner left the residence in issue with the intention of returning. By Douglas Paul's own admission, his mother, the homeowner, had been placed in a nursing home and had not lived at the residence for six-months prior to the incident. Paul further admitted the family placed the house on the market while the homeowner was in the nursing home.[1] While the homeowner's possessions remained at the residence, the State failed to prove the residence was more than a mere storage facility for such possessions. Unlike Glenn, the record does not

[1] Appellant asks this Court to take judicial notice of the fact that the house was placed on the market and subsequently sold. Appellant further asks this Court to take judicial notice that the homeowner never resided at the residence once she was placed in the nursing home. See Rule 201(f), SCRE ("Judicial notice may be taken at any stage of the proceeding."); see also Palmetto Homes, Inc. v. Bradley, 357 S.C. 485, 593 S.E.2d 480 (Ct. App. 2003) (finding appellate court may take judicial notice of rules not within the record on appeal).

indicate that the homeowner ever returned to the residence to periodically gather some possessions. Based on the foregoing, the State failed to present any evidence tending to prove the homeowner had any intention of returning to the residence. Accordingly, the trial court erred in denying Appellant's motion for a directed verdict on the burglary charge.

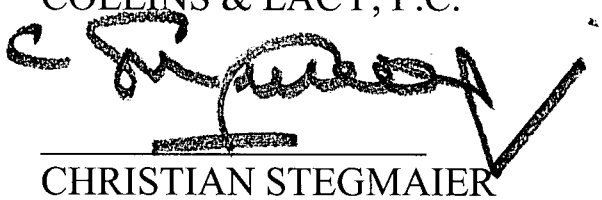
CONCLUSION

For the foregoing reasons, Appellant's conviction and sentence should be reversed and this case remanded for a new trial.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

COLLINS & LACY, P.C.



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