STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County

Honorable Maite Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RODRIQUEZ J. WOLFE,

APPELLANT

APPELLATE CASE NO. 2015-000433

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the court err by failing to direct a verdict of acquittal for possession with intent to distribute crack cocaine and by later failing to grant a new trial after the jury convicted Appellant of the lesser included offense of possession of crack cocaine when the state failed to prove Appellant was knowingly in actual or constructive possession of crack?

STATEMENT OF THE CASE

An Orangeburg County Grand Jury indicted Appellant at the September 8, 2014 term of the Court of General Sessions for failure to stop for a blue light and possession with intent to distribute crack cocaine. R. 132. His case was called to trial on January 26, 2015 before the Honorable Maite Murphy, and a jury. R. 1. Assistant Solicitor Joshua Edwards represented the state, and Joshua Koger represented Appellant. R. 1.

On January 28, 2015, the jury acquitted Appellant of possession with intent to distribute crack cocaine, but found him guilty of failure to stop for a blue light and the lesser included offense of possession of crack cocaine. R. 128, l. 18 – 129, l. 2. Judge Murphy sentenced Appellant to ten years' imprisonment for the possession offense and three years concurrent for failure to stop for a blue light. R. 131, ll. 8-23.

This appeal follows.

ARGUMENT

The court erred by failing to direct a verdict of acquittal for possession with intent to distribute crack cocaine and by later failing to grant a new trial after the jury convicted Appellant of the lesser included offense of possession of crack cocaine when the state failed to prove Appellant was knowingly in actual or constructive possession of crack.

Relevant Facts

Appellant was driving his aunt's car when he approached a driver's license checkpoint conducted by the South Carolina Highway Patrol in Orangeburg County around 2:00 am on April 29, 2014. Appellant, who had a suspended driver's license, backed up and quickly turned around approximately an eighth of a mile away from the checkpoint. R. 9, l. 12 – 12, l. 25; R. 28, ll. 1-7; R. 34, ll. 20-22; R. 36, ll. 7-9; R. 50, l. 1 – 51, l. 1.

Trooper Willie McCauley, who observed Appellant's actions, attempted to pull Appellant over by activating his blue lights and siren, but Appellant refused to stop. After a short chase, Appellant crashed his vehicle as he traveled around a sharp curve. The car "rolled over" onto its roof. Appellant was arrested for failure to stop for a blue light without incident after he crawled out of the driver's side window. R. 13, l. 1 – 15, l. 15.

Despite learning that Appellant did not own the vehicle, law enforcement decided to tow the car upon Appellant's arrest without contacting the owner. During an "inventory search" conducted before the car was towed, Trooper McCauley allegedly found a clear plastic bag that contained 3.53 grams of crack cocaine on the inside roof near the driver's seat. R. 19, l. 21 – 21, l. 8; R. 28, ll. 1-25; R. 30, ll. 13-16; R. 67, ll. 16-

22; R. 69, ll. 2-4. Consequently, Appellant was also charged with possession with intent to distribute crack cocaine.

There was no evidence presented regarding where the crack was located before the accident. Specifically, there was no evidence regarding whether the crack was in plain view in the car or whether it was concealed. Trooper McCauley testified that he did not know where the crack was before the car flipped over. He further admitted the drugs could have been in the glove compartment or in the closed center console or even concealed in the backseat area before the accident. R. 38, l. 4 – 39, l. 16.

After the state rested, Appellant moved for a directed verdict arguing there was insufficient evidence to submit the case to the jury. The court found the state had presented both direct and circumstantial evidence of each element of the offense and denied the motion. R. 84, l. 18 – 85, l. 12. After the jury convicted Appellant of possession of crack cocaine, he moved for a new trial again arguing the evidence presented was insufficient to support the jury verdict. However, the court found there was sufficient evidence, both direct and circumstantial, and refused to grant a new trial. R. 130, ll. 1-8.

Discussion

The court erred by failing to direct a verdict for possession with intent to distribute crack cocaine and by later failing to grant a new trial after the jury convicted Appellant of simple possession of crack cocaine when the state failed to prove Appellant was knowingly in actual or constructive possession of the crack found in the crashed vehicle that undisputedly did not belong to him.

In State v. Heath, 370 S.C. 326, 329, 635 S.E.2d 18, 19 (2006), our Supreme Court held the evidence presented was insufficient to establish Heath was in constructive possession of crack cocaine and consequently directed a verdict of acquittal in his favor. Heath, 370 S.C. at 328, 635 S.E.2d at 18. Heath lived in a house with his mother and a young child. His mother owned the house. Law enforcement obtained a warrant to search in and around the house for crack cocaine. When officers arrived to execute the search warrant, Heath and his brother were outside in front of the house. It appeared Heath had just finished washing his car. Upon the officers' arrival, Heath's brother ran inside the house and locked himself in a bathroom. Officers ultimately found crack cocaine, numerous plastic baggies, scales, and twenty-five hundred dollars in cash inside the home. Additionally, a police dog discovered a car washing mitt in a recycling bin near the back door of the house containing 43.48 grams of crack cocaine. Id. at 328-329, 635 S.E.2d at 18-19.

The Court held the state presented no direct or circumstantial evidence linking Heath to the crack cocaine. The Court further held the state failed to present evidence Heath could exercise dominion and control over the area where the crack was found. In so holding, the Court noted that, while Heath lived in the home where the crack was found, the home was owned by his mother. As a result, the Court concluded, "[I]t was arguable that [Heath] merely had a right to access the area where the crack was found, not actual dominion and control of the property." Id. at 330, 635 S.E.2d at 19.

"A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." State v. Brannon, 388 S.C. 498, 501, 697 S.E.2d 593, 595 (2010) (citing State v. Ladner, 373 S.C. 103, 120, 644 S.E.2d 684, 693 (2007)); State v.

McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001) (citing State v. Brown, 103 S.C. 437, 88 S.E.21 (1916)). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001) (citing State v. Pinckney, 339 S.C. 346, 529 S.E.2d 526 (2000) and State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000)).

A directed verdict is proper when the evidence produced "merely raises a suspicion the accused is guilty." Lollis, 343 S.C. at 584, 541 S.E.2d at 256 (citing Martin, 340 S.C. 597, 533 S.E.2d 572). Our courts define suspicion as "a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." Lollis, 343 S.C. at 584, 541 S.E.2d at 256 (citing State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963)). Moreover, the prosecution must prove the identity of the defendant as the person who committed the charged crime beyond a reasonable doubt. Gibbs v. State, 403 S.C. 484, 495-496, 744 S.E.2d 170, 176 (2013).

Appellant was indicted for possession with intent to distribute crack cocaine pursuant to S.C. Code Ann. § 44-53-375(B). He was ultimately convicted by a jury of simple possession of crack cocaine. Our Supreme Court "has repeatedly recognized that a conviction for possession of contraband drugs requires proof of actual or constructive possession, **coupled with knowledge** of the presence of the drugs." State v. Halyard, 274 S.C. 397, 400, 264 S.E.2d 841, 842 (1980) (emphasis added).

"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." State v. Ballenger, 322 S.C. 196, 199, 470 S.E.2d 851, 854 (1996) (citing State v. Ellis, 263 S.C. 12, 22, 207 S.E.2d 408, 413 (1974) and State v. Mollison, 319 S.C. 41, 459 S.E.2d 88 (Ct. App. 1995)). "Such possession may be established by circumstantial as well as direct evidence." Halyard, 274 S.C. at 400, 264 S.E.2d at 842. "Mere presence is insufficient to prove constructive possession." Heath, 370 S.C. at 329, 635 S.E.2d at 19 (citing State v. Tabory, 260 S.C. 355, 364, 196 S.E.2d 111, 113 (1973)).

Additionally, "[t]he knowledge element may be proved circumstantially by evidence of acts, declarations, or conduct of the accused from which an inference may be drawn that the accused knew of the existence of the prohibited substance." Mollison, 319 S.C. at 45, 459 S.E.2d at (citing State v. Attardo, 263 S.C. 546, 211 S.E.2d 868 (1975)).

Here, like in Heath, the state failed to present any direct evidence or circumstantial evidence linking Appellant to the crack cocaine found in the vehicle. Despite knowing Appellant did not own the vehicle where the crack was found, Trooper McCauley admitted law enforcement never had the plastic bag that contained the crack analyzed for latent prints. R. 41, l. 22 – 42, l. 15.

Moreover, the state failed to present sufficient evidence that Appellant was *knowingly* in actual or constructive possession of the crack cocaine or that he had actual dominion and control over the vehicle where the crack was found. It was undisputed at trial that Appellant did not own the car where the crack was found. For whatever reason, law enforcement never contacted nor interviewed the owner during its investigation. While Appellant was driving the vehicle that morning, there was no evidence presented that he could exercise dominion and control over the car. Appellant merely had a right to

access the car or permission to use the car where the crack was found, not actual dominion and control of the property as required to prove constructive possession. See Id. at 330, 635 S.E.2d at 19.

Additionally, there was no evidence presented regarding where the crack cocaine was located before the vehicle flipped over, specifically whether the crack was in plain view and thus noticeable to Appellant or whether it was concealed. Trooper McCauley admitted the drugs could have been hidden in the glove compartment or in the closed center console or even concealed in the backseat area before the vehicle flipped over. R. 38, l. 4 – 39, l. 16; R. 42, ll. 19-24. Consequently, there was no direct or circumstantial evidence Appellant knew the crack was inside the car. At most, the evidence established Appellant was merely present in the vehicle where the contraband was found. "Mere presence is insufficient to prove constructive possession." Id. at 329, 635 S.E.2d at 19 (citing Tabory, 260 S.C. at 364, 196 S.E.2d at 113).

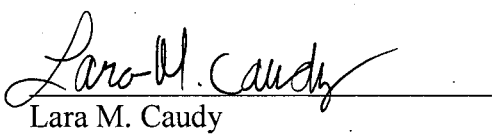
Importantly, the court's failure to properly direct a verdict for possession with intent to distribute crack cocaine prejudiced Appellant because it led to a compromised verdict. Instead of focusing critical attention on whether the state had proved Appellant was knowingly in actual or constructive possession of the crack, the jury likely merely compromised and found Appellant guilty of the lesser offense. See State v. Blassingame, 271 S.C. 44, 244 S.E.2d 528 (1978).

Consequently, the trial court erred by failing to direct a verdict for possession with intent to distribute crack cocaine and for later failing to grant a new trial after the jury convicted Appellant of simple possession of crack cocaine. Respectfully, this Court should reverse Appellant's conviction and sentence and direct a verdict in his favor.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his conviction for possession of crack cocaine and direct a verdict of acquittal in his favor.

Respectfully submitted,



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ATTORNEY FOR APPELLANT

This 20th day of October, 2016.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final 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."

October 20, 2016

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