

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**APPEAL FROM LAURENS COUNTY
Court of General Sessions**

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AUG 18 2017

SC Court of Appeals

**The Honorable Donald Hocker, Circuit Court Judge
Appellate Case No.2015-002206**

The State of South Carolina, Respondent,

vs

Timothy Artez Pulley, Appellant.

REPLY BRIEF OF APPELLANT

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Argument

Question I

Did the trial court err in charging the jury that they may infer Timothy Pulley had dominion and control of the drugs found on the back floorboard of the automobile he was driving when the automobile was the property of his girlfriend and he was driving with her permission?

The State, in arguing that *State v. Adams*, 291 S.C. 132, 352 S.E.2d483 (1987) was correctly decided, errs when it concludes that *State v. Hudson*, 277 S.C. 200, 284, S.E.2d 773 (1981) and *State v. Ellis*, 263 S.C. 12, 207 S.E.2d 408 (1974) “clearly support the instruction.” Br. of Resp. at 7. Neither *Hudson* nor *Ellis* involved a jury charge. In both cases the South Carolina Supreme Court simply acknowledged that the jury could infer they possessed the drugs from being in control of or owning the house. These cases cannot be interpreted to mean that a judge should charge the jury such an inference. As former Chief Justice Costa Pleicones said “Simply because certain facts may be considered by the jury as evidence of guilt in a given case where the circumstances warrant, it does not follow that future juries should be charged that these facts are probative of guilt. It is always for the jury to determine the facts, and the inferences that are to be drawn from these facts.” *State v. Cheeks*, 401 S.C. 322, 328, 737 S.E.2d 480, 484, (2013). This is the error in the *Adams* decision.

The State then argues that the inference is reasonable and states facts that support why the inference is reasonable. As noted in the *Cheeks* decision, these factors are for the jury to determine without the State being given the edge by telling the jury they may infer

a certain result. The charge in this case did more than “assist the jury in understanding application of the doctrine of constructive possession.” Br. of Resp. at 9. The charge told them they could convict simply because Mr. Pulley was in sole possession of the automobile.

The State in referring to all the facts the jury could consider, such as Mr. Pulley’s girlfriend saying she had not had possession of the automobile for several weeks, fails to realize that the credibility of her testimony is for the jury to consider. The consideration of all the facts by the jury should not have been influenced by an improper inference charge.

The unconstitutional comment on the facts in this case is as egregious as *State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016). In that case the Court said “The charge invites the jury to believe the victim, explaining that to confirm the authenticity of her statement, the jury need only hear her speak.” *Id.* at 499, 787 S.E.2d at 483. Here the charge invites the jury to convict Mr. Pulley based solely on his being the driver and sole occupant of the automobile. Notably, the State has not attempted to distinguish the inference charge the Court held unconstitutional in *Yarborough v. Southern Ry.*, 78 S.C. 103, 58 S.E. 936 (1907) and *Finch v. Atlanta and C Airline Ry.*, 87 S.C. 190, 69 S.E. 208 (1907). If an inference charge is unconstitutional in a civil case where a money judgment is being sought, it likewise should be unconstitutional in a criminal case where a defendant’s liberty is at stake.

Question II

Did the trial court err in failing to charge the jury they the state must prove a

complete chain of custody before they can convict Timothy Puller?

In discussing the question of the chain of custody the State makes two arguments with which the Defendant mostly agrees. The State, citing *State v. Carter*, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001), argues that any flaw in the chain of custody “is only one of credibility, not admissibility.” The State further argues “Appellant raises issues with regard to the credibility of the chain of custody. These issues are solely for the determination of the jury.” Br. of Resp. at 19. Finally they say “[T]he failure to immediately place the items in a tamper proof bag at the scene goes to the weight of the evidence and not the admissibility.” *Id.*

Whether one says “credibility” or “weight” is to be determined by the jury, the concept is meaningless unless the jury is given an instruction on how the chain of custody evidence is to be evaluated. Otherwise, the issue becomes a question of law with the sole determination being by the judge. This is not what “credibility” nor “weight” mean. The requested jury charge would have simply instructed the jury as to what their verdict should be if they believe the State did not establish a proper chain of custody.

Question III

Did the trial court err in failing to suppress the items seized from the automobile driven by Timothy Pulley when the State failed to prove a proper chain of custody of the items seized?

The State has not discussed the problem in this case with the testimony of Roger Craven. As noted in the opening brief, Mr. Craven testified that he seized the drugs and placed them in the evidence drop box at the Laurens Police department. When defense

counsel pointed out later in the trial that the drugs were on the hood when Officer Craven left, the State recalled Officer Brewer to testify that he gave the drugs to Officer Craven. The State never recalled Officer Craven to confirm this fact. Until Officer Craven testifies that he received the drugs from Officer Brewer and then placed the same drugs in the evidence drop box, a proper chain of custody has not been proven. As Officer Craven was in fact available, the State has not established the chain of custody.

Question IV

Did the trial court err in failing to require the State to open fully on the law and the facts of the case and replying only to new arguments of defense counsel when the defendant was deprived of a fair trial in violation of the due process clause of Article I, § 3 of the Constitution of the State of South Carolina and the Fourteenth Amendment to the Constitution of the United States of America by his counsel not being able to respond to the new arguments made by the State in its rebuttal closing argument?

The South Carolina Supreme Court addressed this issue in *State v. Beaty*, Op. № 27693 (S.C.Sup.Ct. filed Dec. 29, 2016)(Shearhouse Adv.Sh. № 1at13). Rehearing was granted in this case on March 24, 2017. The case was re-argued on June 15, 2017. The ultimate decision in this case should control this issue in the present case.

Question V

Did the trial court err in failing to suppress the items seized from the automobile Timothy Pulley was driving when the officers for the City of Laurens failed to follow the written policy for inventory searches?

The Officer in this case simply cannot cover up an illegal search with a half hearted attempt to comply with the regulations for an inventory search. First, the State has not established there is a policy for the City of Laurens to tow an automobile that is parked in a private parking lot. The Officer cannot “begin” their inventory search if there is no basis to tow the vehicle. The State has not shown that the City of Laurens has a policy concerning the towing of a vehicle while it is on private property.

The “ministerial” acts in this case are the exact acts that makes the search legal. To take the State’s argument to the extreme, an officer could simply say “I was conducting an inventory search” and do nothing more. Under the State’s theory, the “ministerial” acts of completing the search would be unimportant.

The State also misapplies the plain view doctrine. If the Officers had no legal basis to conduct an inventory search, then they had no right to open the car door so that something could be in plain view. As The South Carolina Supreme Court has said “[T]he two elements needed to satisfy the plain view exception are: (1) the initial intrusion which afforded the authorities the plain view was lawful and (2) the incriminating nature of the evidence was immediately apparent to the seizing authorities.” *State v. Wright*, 391 S.C. 436, 443, 706 S.E.2d 324, 327 (2011). Here the initial intrusion was not lawful as there was no basis to conduct an inventory search.

Question VI

Did the trial Court err in finding that the items seized from the automobile Timothy Pulley was driving were seized as a search incident to arrest for the marijuana charge?

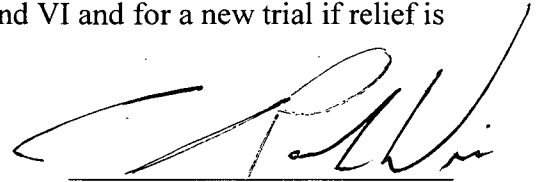
The trial court found that the marijuana was found in the initial contact with Mr. Pulley, which was before the methamphetamine was found. This finding is simply not borne out by the facts nor is it logical. The audio on the dash camera from the automobile established that marijuana is not mentioned on the audio until after the methamphetamine is found. As noted in the opening brief, the testimony that the arresting officer found the marijuana in Mr. Pulley's pocket and then put it back in his pocket defies logic or belief. The State did not attempt to justify this argument.

As no drugs were found on Mr. Pulley prior to the methamphetamine being found this was not a search incident to arrest. Also, at the time of the search of the automobile Mr. Pulley was in custody and unable to retrieve any weapon from the automobile. Thus, the principles established in *Arizona v. Gant*, 556 U.S. 332 (2009) have been violated.

CONCLUSION

For the foregoing reasons and for the reasons established in the opening brief, this matter should be reversed and remanded to the lower court with instructions to dismiss the case in the event relief is granted on Questions V and VI and for a new trial if relief is granted on any other issue.

August 9, 2017



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The Honorable Donald Hocker, Circuit Court Judge

Appellate Case № 2015-02206

The State of South Carolina, Respondent,

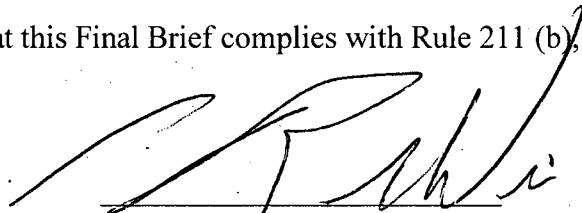
vs.

Timothy Artez Pulley, Appellant.

CERTIFICATE OF COUNSEL

SCACR. The undersigned certified that this Final Brief complies with Rule 211 (b).

August 8, 2017



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