STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LAURENS COUNTY
Court of General Sessions
Hon. Frank R. Addy, Jr., Circuit Judge

Appellate Case No. 2016-002524

The State, ... Respondent,

vs.

Terrance Edward Stewart ..... Appellant.

INITIAL REPLY BRIEF

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Question I

Did the lower courts err in failing to suppress the items seized from the residence of Terrance Stewart when the affidavit for the search warrant was not sufficient and the issuing magistrate had no recall of any of the oral information supplied to her allegedly to supplement the affidavit?

Terrance Stewart agrees with the State when it argues "An appellate court reviewing the decision to issue a search warrant should decide whether the magistrate had a substantial basis for concluding probable cause existed." Br. of Resp. at 23. The focus is, as it should be, what the magistrate knew to make the determination. Under the State's theory of ignoring what the magistrate heard, concentrating on what the officer said, the statement of the officer would not have even been required to be in a voice loud enough fo he magistrate to have even hear the statement in order to be sufficient. The State might as well argue that the information could be sufficient if the officer thought it and did not actually speak the words. At a suppression hearing the office could then say "This is what I meant to say but forgot to say." A reviewing court could then say "based upon the totality of circumstances, including what the officer knew but forgot to say, I find that probable cause existed to establish probable cause to issue the warrant and conduct the search." There is legally no difference between an officer saying something out loud and the magistrate not hearing it and the officer not saying it, but otherwise knowing the information. In either case the magistrate did not hear the information and made the decision on the warrant.

As the South Carolina Supreme Court has said "The nucleus of the neutrality requirement is that the issuing officer not be functioning in a capacity charged with the duty of investigating

or prosecuting crimes." *State v. Sachs*, 264 S.C. 541, 553-54, 216 S.E.2d 501, 507 (1975). The Court in *Sachs* further said "The security of one's privacy-the core of the warrant requirement-is protected against arbitrary decisions by the police by interposing a neutral magistrate between the request for a warrant and execution." *Id.* at 553, 216 S.E.2d at 507. If this Court were to accept what the investigating officer recalls he told the magistrate and not what the magistrate recalls he was told, then the citizen would not be protected from an arbitrary decision by the investigating officer. Also, what if the magistrate recalled one version of the facts as to what was told them and the officer recalled a different version. Would a reviewing court have the authority to say what the magistrate recalls is wrong and the investigating officer is correct? If a court were to so rule, the ' nucleus of the neutrality requirement" of a search warrant would be destroyed.

The basis for this dilemma is the holding in *Sachs* that a search warrant can be supplemented by oral testimony. In that case the Supreme Court did not address the question presented in this case. Perhaps the dissenting comment by Justice Bussey was looking forward to this case. "Just where this leads us with respect to future cases is indeed most difficult to predict." *Id.* at 573, 216 S.E.2d at 518. If the trule meaning of a neutral and detached magistrate is to be honored, this Court should reverse the lower court in failing to quash the indictment.

Question II

Did the lower courts err in failing to suppress the items seized from the residence of Terrance Stewart when the magistrate failed to comply with S. C. Code § 17-13-141 when the magistrate failed to comply with the records required by the statute and as a result, Mr. Stewart was prejudiced?

The State argues that Terrance Stewart was not prejudiced due to the fact that he obtained

a copy of the incident report in the discovery and the officer testified at the suppression hearing. Br. of Resp. at 27. The State fails to address the real prejudice to Mr. Stewart is that the magistrate kept no record of what, if anything, was told to her orally at the time of the issuing of the search warrant. As a result Mr. Stewart did not have the best evidence available to refute the testimony of the officer. Had the issuing magistrate kept the required record, then there would be no dispute as to what, if anything, he said to the magistrate. As prejudice has been shown a violation of S. C. Code § 17-13-141 should be sufficient reason to suppress the evidence seized pursuant to the invalid search warrant.

Question III

Did the trial court err in failing to charge the lesser included offense of possession of heroin with intent to distribute when S. C. Code § 44-53-370 by statute makes possession with intent to distribute a lesser included offense?

The State's reliance upon *Sellers v. State*, 362 S.C. 182, 607 S.E.2d 82 (2005) is completely misplaced. The provision of the code relevant to this case was added in 2000 under Act 355. *Sellers* was tried before 2000. The Supreme Court noted in the opinion "This Court affirmed his convictions and sentences on direct appeal. *State v. Sellers*, Op. No. 99-MO-79 (S.C. Sup. Ct. filed November 15, 1999)." *Id.* at 187, 607 S.E.2d at 84. As the *Sellers* case was tried before the statute was amended to add the provision about possession with intent being a lesser included of trafficking, it has no application to this case.

Question IV

Did the trial court err in failing to dismiss the charges on the basis the prosecution is prohibited by S. C. Code §44-53-410 which provides a prosecution in state court is barred

if the same act is tried in federal court resulting in either a conviction or acquittal when Judge Herlong in federal district court found that Mr. Stewart had committed this same crime when he sentenced Mr. Stewart and enhanced his federal sentence ?

The State's reliance upon *Witte v. United States*, 515 U.S. 389 (1995) and *Khan v. State*, 694 A.2d 485 (Md. Ct. Sp. App. 1997) is misplaced. Neither case involved the interpretation of the word "conviction"in a state statute involving what could be called a statutory double jeopardy. Both cases involved the interpretation of double jeopardy under the Fifth Amendment to the Constitution of the United States of America. The *Witte* case involved the interpretation of the word "punishment" and not "conviction." Under traditional double jeopardy analysis, a conviction in federal court is not a bar to a trial in state court.

Judge Herlong did more than use the pending charges to enhance the punishment of Mr. Stewart in federal court. He took testimony which established in federal court the facts which were established in state court. Judge Herlong heard the testimony and made a specific finding that Mr. Stewart did in fact commit the crimes that occurred in Laurens County while he was out on bond. As a result of that specific finding, Judge Herlong did increase the punishment. Under the statute inovled in this case, punishment in federal court is not necessary to bar prosecution in state court. All that is required is a conviction. Convicting Mr. Stewart is exactly would Judge Herlong did. As a result, Mr. Stewart cannot now be tried in state court.

The Laurens County officers who traveled to federal court in Greenville were not, as far as this record shows, required to testify. The State has not argued they were required to testify. Either the officers of the solicitor's office in Laurens could have contacted the federal court and advised them of the problems that exist with the Laurens case being tried in federal court as part

of federal sentencing of Mr. Stewart. As Mr. Stewart was in fact found guilty of the charges in Laurens County, he was convicted and a state trial is barred.

Question V

Did the trial court err in charging the jury "The Defendant's knowledge and possession may be inferred when a substance is found on the property under the Defendant's control" when such a charge lessens the burden of proof on the State and is an improper charge on the facts in violation of Article V, §21 of the Constitution of the State of South Carolina?

The State argues that a charge of inference from control of the premises is proper because it logically flows from the facts. If this is true, would a charge that the jury could infer that the wife of Mr. Stewart was also in control of the premises and therefore the jury may infer she had dominion and control over the drugs have been proper?

The State further contends that *State v. Adams,* 291 S.C. 132, 352 S.E.2d 483 (1987) in support for such a charge. As noted in the opening brief, none of the cases cited by *Adams* stand for the proposition that a jury is to be charged concerning an interference of possession based upon a person exercising dominion and control of the place where the drugs are found. In fact, as such a holding was not even necessary to the decision in *Adams* one could argue that such a holding is *dicta.* The Court in *Adams* simply held improper a charge that one "must be deemed to be in the constructive possession of the person controlling the house in the absence of evidence to the contrary." *Id.* at 135, 352 S.E.2d at 486. If, as the State argues, the inference is :inherently rational" (Br. of Resp. at 39) then there is in fact no need for such an inference charge. It tells the jury nothing that they do not inherently know. When, however, it is given

when two people are in control fo the premises, then it become inhreently prejudicial.

The State then appears to argue that the charge is harmless because the evidence is strong. The State, when arguing for the charge before the trial court never asserted the charge was harmless. The State argued strongly for the charge because they felt they needed the charge to win the case. A harmless error analysis on a jury charge sought by the State shold be different from a harmless error analysis on the admissibility of evidence. As evidence is presented during a trial the State does not know for certain what other evidence is going to be admissible later in the trial. When at the end of the trial a reviewing court looks back at the totality of the evidence, a determination that some evidence that was admitted was cumulative or otherwise harmless is easy to make. But then the State insists upon a certain jury charge after all the evidence in concluded, then the appellate court should accept at face value the fact that the State believes it needs the charge to win the case. At that point the State has observed the witnesses and decided it needed the charge to prevail. If they felt the charge was not needed they wouldhave told the judge they had not objection to removing the charge to which Mr. Stewart was objecting. If the State believed it needed the charge at the time of trial, then this Court should not find it harmless.

Charging the Jury They may Infer Knowledge, Dominion and Control of Drugs Found in the Premises Under the Control of Terrance Stewart is a Charge on the Facts in Violation of Article V, § 21 of the Constitution of the State of South Carolina.

The charge was not, as argued bu the State, a declaration of the law in South Carolina and therefore proper. Br. of Resp. at 41. The entire *Adams* case did not mention or discuss the issue of whether the charge constituted a charge on the facts in violation of Article V, § 21 of the Constitution of the State of South Carolina. Thus the case cannot stand for the proposition that

giving an inference charge does not violate the state constitution that prohibits such a charge.

While the State correctly argues that a defendant is given the presumption of innocence, a defendant is never given a charge that tells the jury an inference form the facts is to be used to buttress that presumption of innocence. Only the State is given a charge that tells a jury that they may infer from certain facts that the State has over come the presumption of innocence. In fact the South Carolina Supreme Court has rejected in several occasions the giving of any charge that tells the jury they can interpret certain facts as being helpful to the defendant. *State v. Hartley*, 307 S.C. 239, 414 S.E.2d 182 (1992); *State v. Bagwell*, 201 S.C. 387, 23 S.E.2d 244 (1942).

The State then apparently argues that a water-down charge on the facts does not constitute a charge on the facts. As the State argued "When read as a whole rather than in isolation, the inference charge was not a charge on the facts because the trial court repeatedly emphasized to the jury that 'this inference is simply an evidently fact to be taken into consideration by you along with other evidence and to be given the weight you think it deserves.'" Br. of Resp. at 44. This argument does no make the charge any less a charge on the facts. The charge takes one fact - who was in control of the premises - and elevates it above all other fact by telling the jury from this fact the law permits them to infer dominion and control over the drugs. This is the exact same inference prohibited in *Finch v. Atlanta and C Airline Ry.*, 87 S.C. 190, 69 S.E. 208 (1907). A watered-down violation of Article V, § 21 of the Constitution of the State of South Carolina, is still a violation of that provision.

Question VI

Did the trial court err in instructing the jury "Constrictive possession mean that the Defendant had dominion and control over either the drugs itself or the property upon which

the drugs were found" when such a charge eliminates any men rea of possession of the drugs when found on the property of the Defendant?

The State appears to agree that the objected to charge does eliminate a mens rea at least in part. They argue "While the jury charge allows dominion and control of the property to substitute for knowledge of the drugs, it does not allow dominion and control to substitute for intent to control the disposition or use of the drugs." Br. of Resp. at 45. Knowledge of the drugs is an important part of the mens rea in this and any drug case. The State concedes that this important part of invalidate a regularly charges statement of the law of South Carolina the government's case was proven by simply proven he controlled the premises. The charge in essence directed a verdict for the State when such a charge is given. If the government can not prove knowledge, then the jury never needs to consider whether a particular defendant has the intent to control the drugs. Intent without knowledge is a failure of proof by the State. The Supreme Court has further said "Because actual knowledge of the presence of the drug is strong evidence of intent to control its disposition or use, knowledge may be equated with or substituted for the intent element." *State v. Kimbrell*, 294 S.C. 51, 54, 362 S.E.2d 630, 631 (1987). Thus, proving knowledge gets the state more than half way home in proving the case.

The State further argues "In other words, he [Mr. Stewart] invites this court to make new law which would invalidate a regularly charged statement of the law of South Carolina. This Court should decline the invitation." Br. of Resp. at 46. The problem with the position of the State is that they cite no law to holding that giving a charge that eliminates the need for the State to prove the mens rea of knowledge of the presence of the drugs is the law of our State. The reason is simple, there are no such cases.

CONCLUSION

For the reasons stated in Questions I, II, III, V, and VI, of this brief and the opening bried, this Court should reverse the conviction for Terrance Stewart and remand the matter to the lower court for a new trial. As it Question IV, of this brief and the opening brief this Court should reverse the conviction of Terrance Stewart and remand the matter to the lower court to dismiss the case with prejudice.

November 6, 2017

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AFFIDAVIT OF SERVICE

Personally appeared before me, Sandy Traynham, who, after being duly sworn, deposes and says that she is the Secretary for C. Rauch Wise, Attorney for the Appellant in the above entitled case. That on November 6, 2017, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Initial Reply Brief to John Benjamin Aplin, SC Attorney General's Office, P.O. Box 11549, Columbia, SC 29211.

Sandy Traynham

Sworn to and Subscribed
before me this 6th day
of November, 2017

Notary Public for South Carolina
My Commission Expires: 12/7/2019

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November 6, 2017

Jenny Abbott Kitchings, Clerk
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Re: State vs. Terrance Edward Stewart, Appellate Case No. 2016-002524

Dear Ms. Kitchings:

I am enclosing herewith the original and one (1) copy of the Initial Reply Brief together with the original Affidavit of Service regarding the above matter. Your help is greatly appreciated.

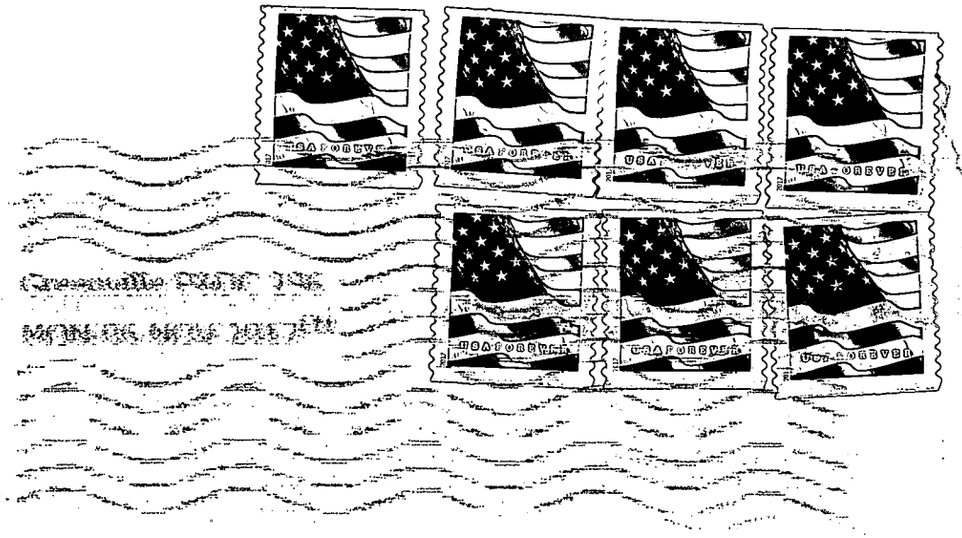
With kindest regards, I am

Very truly yours,

C. Rauch Wise

CRW/slt
Enclosure

cc John Benjamin Aplin



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