

ORIGINAL

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LAURENS COUNTY
Donald B. Hocker, Circuit Court Judge
Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2016-002524

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SC Court of Appeals

THE STATE, ...RESPONDENT,

v.

TERRANCE EDWARD STEWART, ...APPELLANT.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General
S.C. Bar No. 8729

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

P.O. Box 516
Greenwood, South Carolina 29648
(864) 942-8800

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court properly denied Appellant's motion to suppress evidence discovered in the search of his residence where the supplemental oral information offered by the requesting officer in support of the search warrant affidavit provided a substantial basis upon which the magistrate could conclude there was a fair probability drugs and other incriminating evidence would be found inside the residence.
2. Whether the trial court properly denied Appellant's motion to suppress evidence discovered in the search of his residence where he failed to establish he was prejudiced by the magistrate's apparent failure to follow the statutory procedures in § 17-13-141 regarding the keeping of records related to the issuance of search warrants.
3. Whether the trial court properly declined Appellant's request to charge the jury on possession with intent to distribute heroin as a lesser included offense of trafficking in heroin where no evidence was presented at trial from which it could be inferred the lesser, rather than the greater, offense was committed.
4. Whether the trial court properly denied Appellant's motion to dismiss his charges pursuant to section 44-53-410 of the South Carolina Code where he did not previously receive a "conviction or acquittal under Federal law . . . for the same act."
5. Whether the trial court properly charged the jury that "The Defendant's knowledge and possession may be inferred when a substance is found on the property under the Defendant's control" where, when read as a whole, the jury charge contained the correct definitions and adequately covered the current and correct law of South Carolina.
6. Whether the trial court properly charged the jury that "Constructive possession means that the Defendant had dominion and control over either the drugs itself or the property upon which the drugs were found" where, when read as a whole, the jury charge contained the correct definitions and adequately covered the current and correct law of South Carolina.

STATEMENT OF THE CASE

Terrance Edward Stewart (Appellant) was indicted at the June 2015 term of the grand jury for Laurens County for distribution of heroin (2015-GS-30-0957), trafficking in heroin (2015-GS-30-0958), and possession with intent to distribute (PWID) oxycodone (2015-GS-30-0959). He was initially represented by public defenders Claude H. “Chip” Howe, III, and Chelsea McNeill of the Eight Circuit Public Defender’s Office; however, he was later represented at trial by C. Rauch Wise, Esquire. Respondent (the State) was represented by Assistant Solicitors C. Dale Scott, Margaret Boykin, and Jim Todd, all of the Eighth Circuit Solicitor’s Office. On December 13-14, 2016, Appellant proceeded to trial by jury pursuant to which he was found guilty of trafficking heroin, distribution of heroin, and the lesser included offense of possession of oxycodone. He was sentenced by the Honorable Frank R. Addy, Jr., to twenty-five (25) years’ imprisonment for trafficking in heroin, ten (10) years’ concurrent imprisonment for distribution of heroin, and five (5) years’ concurrent imprisonment for simple possession of oxycodone – third offense. (R.p.511-519; R.p.475-p.488). Appellant timely filed a notice of intent to appeal his convictions and sentence and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

As described in the solicitor's opening statement, the charges against Appellant stemmed from a police investigation into some tips about heroin usage in the upper part of Laurens County. The investigation led the police to a self-admitted heroin user, Lawrence Cheatham, who was asked to attempt to make a controlled buy of heroin from a suspected drug house. On January 21, 2015, Cheatham purchased five small bags of heroin from Appellant for \$100. Based on this controlled buy, the police obtained a search warrant and the next morning, January 22, 2015, they searched Appellant's house. During that search, the police found the five documented \$20 bills used during the controlled buy in the pocket of Appellant's pants. They also found a bag containing approximately 23 grams of heroin and a ball of tinfoil containing more than 50 oxycodone pills. The solicitor noted the jury would hear from expert witnesses confirming the substances were indeed heroin and oxycodone, and they would hear a recording of a jail phone call where Appellant admits the drugs were his. (R.p.261-p.267). In response, counsel for Appellant described the State's burden of proof, suggested the jury would find Cheatham was not credible, and asked the jury to find the State had not met its burden. (R.p.267-p.269).

Pretrial Motion to Suppress Evidence from the Search

On July 22, 2015, Appellant filed a pretrial motion to suppress evidence discovered during the search of his home pursuant to the January 21, 2015 search warrant issued by Magistrate Judge Glenda L. Tucker. (R.p. 520). He subsequently submitted a written memorandum arguing the affidavit presented to Magistrate Judge Tucker lacked probable cause and thus the ensuing search pursuant to that warrant violated his rights under the United States and South Carolina Constitutions. Appellant noted he expected the State to attempt to supplement the allegedly deficient search warrant affidavit through oral testimony and contended

the State should not be allowed to offer sworn testimony since the content of that testimony was not previously provided to the defense by way of discovery. (R.p.521-526). The State submitted a written response. (R.p. 527-528).¹

On July 27-28, 2015, a suppression hearing was convened at the Laurens County Courthouse before the Honorable Donald B. Hocker. (Rp.69).² Appellant was present and was represented by public defenders Howe and McNeill. The State was represented by Assistant Solicitors Scott and Boykin. Judge Hocker asked Appellant if he wished to make any arguments prior to the taking of testimony. Appellant noted his arguments were set forth in his written memorandum and therefore he would have no objection to waiting to make further arguments until after the taking of testimony, with the caveat that he would raise a contemporaneous objection at the appropriate time if the court was inclined to allow the oral supplemental testimony anticipated from the State. Judge Hocker advised Appellant that if the Court decided to take testimony related to the oral information given to Judge Tucker, it would entertain any objection from Appellant and would make a ruling later. (R.p.72-p.75).

First, the State called Deputy Steven Sweat of the Laurens County Sheriff's Office (LCSO) to the stand. He described the January, 2015 LCSO investigation into a series of heroin overdoses in Laurens County. Sweat received a phone call from the Fountain Inn Police Department telling him they had an informant willing to participate in the investigation. The confidential informant (CI) had been found unconscious at a gas station with a syringe in his arm and told police he was getting his heroin from a person he only knew as "Cheddar." He gave the

¹ The court indicates it was marking the State's response as Court's #2 (R.p.160); however, the exhibit list indicates the State's response is Court's #3 (R.p.71).

police a physical description of Cheddar, a description of the single-wide mobile home where Cheddar lived, and directions for how to get to that home. The police later determined the residence described had an address of 35 Hue Circle. The police also checked the Greenville County master ID system and determined Appellant used the nickname “Cheddar” and lived at 35 Hue Circle. Based on this information, the Sheriff’s Office proceeded to set up a controlled buy. (R.p.77-p.83).

Sweat described the controlled-buy procedure, which included having the CI make a phone call to set up the buy, searching the CI and his girlfriend and equipping them with audio/video surveillance equipment, and providing the CI with documented cash—five twenty dollar bills with recorded serial numbers—to make the buy. Sweat then described driving the CI to the controlled-buy site and watching the entire exchange except a brief moment when the CI went out of view before returning to the car with five small plastic bags containing an off-white powdered substance which field tested positive for heroin. Based on this buy, Sweat prepared a written incident report. (R.p. 494-510). He also generated a search warrant for the residence and made contact with Judge Tucker. (R.P.490-493); R.p.83-p.89).

Sweat testified he prepared and printed the search warrant at the Sheriff’s Office around 7:15 p.m. and then took it to Judge Tucker’s residence in Gray Court around 8 p.m. He recited the language he wrote in the search warrant affidavit and explained this information was not the only information he gave to the judge before she issued the warrant. Sweat testified he was able to supplement his affidavit with sworn testimony and, subject to Appellant’s objection, he was allowed to testify as to the substance of that sworn testimony. He explained that what he had just testified to before Judge Hocker was substantially the same thing he testified to before Judge Tucker, including describing the controlled buy, the documented funds, seeing Appellant at the

scene, and the results of the field test. Sweat testified the information he gave Judge Tucker was also documented in his incident report and that he spent approximately fifteen to twenty minutes presenting his case before she issued the search warrant. He explained the search was conducted early the next morning and that although he was at the scene he did not participate in the search due to his involvement in the controlled buy. Finally, Sweat described the drug evidence discovered during the search, including oxycodone pills, heroin, a loaded handgun, two boxes of ammunition, and a large amount of money, including the documented funds from the controlled buy. He said the search warrant return was generated after the search but he was not the officer who signed it. (R.p.89-p.101).

On cross-examination, Sweat testified he did not know if Judge Tucker had a tape recorder or other device available to record his testimony, and he was unaware of any recording being made. He also testified Judge Tucker did not take any notes during his testimony. Sweat said the search warrant return was made to Magistrate Judge Thomas L. Copeland rather than Judge Tucker because he was closer to the Sheriff's Office, and that Judge Copeland then mailed that return to Judge Tucker for her records. Sweat testified he told Judge Tucker about prior searches executed at this residence but did not provide copies of any prior search warrants and did not show her any video evidence from the controlled buy. Sweat said he had his incident report during his testimony before Judge Tucker but did not leave a copy with her and did not recall her asking for one. He agreed the supplemental oral information was necessary to get the search warrant because the affidavit itself was aimed at protecting the CI's identity. (R.p.101-p.116).

Under further examination by the parties and the trial court, Sweat explained he made clear to Judge Tucker that the prior searches of this residence had nothing to do with Appellant

but were merely provided as background information. He insisted that everything he said at the suppression hearing was also presented to Judge Tucker, but he could not remember her specific questions during his testimony. Sweat testified he did not tell Judge Tucker anything about Appellant's case beyond what was in the incident report, the video, and information about the CI. He explained that at the time he was seeking issuance of the search warrant he believed the CI was reliable because the controlled buy verified the information the CI had previously given to police. (R.p.116-p.134).

Next, the State called LCSO Deputy Brian Bridges to the stand. Bridges was involved in the execution of the search warrant and prepared the search warrant return, which listed the items seized. On cross-examination Bridges testified he was the officer who gave the return to Judge Copeland. He said he showed the search warrant to the occupants of the house and explained the police were there to conduct a search, but he acknowledged nobody actually handed them copies of the search warrant at the time it was executed. Bridges testified that even though the warrant states he states he "left a copy of the warrant with Terrance Stewart," he in fact gave the warrant to Sergeant Matthew Veal and had Veal give the warrant to Appellant at the jail. (R.p.134-p.144).

Appellant then called Judge Glynda Tucker to the stand. She identified her signature on the January 21, 2015 search warrant and noted it appeared to be the original warrant, which was returned to Judge Copeland rather than to her. Judge Tucker testified she typically keeps a record or log of the name and reason she issues each warrant, but upon searching her office she could not find any records in regard to Appellant's case. She said she has no independent recollection of who sought the warrant or what oral testimony they offered in support of the request. Judge Tucker acknowledged the statute requiring that she keep a record along with a

copy of the returned search warrant and supporting affidavit for a period of three years but repeated she did not have any record or log about this search warrant. (R.p.145-p.154). Under further examination, Judge Tucker clarified that she did in fact have a copy of the search warrant in her records but did not find any other records or a log of warrants that were issued. She testified it is very common to swear in some oral testimony to supplement a search warrant affidavit and that she does not issue a search warrant unless she is confident there is sufficient probable cause. Judge Tucker said she gets as much information as she can and asks the officer questions if something does not make sense, only issuing a warrant when she has a clear understanding of the probable cause. (R.p.154-p.159).

At the conclusion of the testimony, the parties argued their respective positions. Appellant argued the trial court should suppress the evidence because the affidavit itself did not establish probable cause. He further argued that the court should not consider any possible oral testimony to supplement the affidavit because any such information should have been discoverable but was not disclosed as required by Judge Addy's July 13, 2015 Order. Finally, Appellant argued the evidence should be suppressed because Judge Tucker's failure to comply with the section 17-13-141 requirement that she keep records demonstrates she could not be neutral and detached. (R.p.160-p.165). The solicitor conceded the search warrant affidavit alone was insufficient to establish probable cause; however, he argued that under a Fourth Amendment analysis, the sworn oral testimony provided to Judge Tucker was more than enough and that probable cause was "abundantly clear." He argued there was no Rule 5 or Brady violation where everything Sweat testified he conveyed to Judge Tucker was included in the materials disclosed to the defense. (R.p.165-p.169). Appellant replied that the trial court's focus must be on what Judge Tucker was actually told, which could only be revealed from a recording of the

proceeding, her notes or records from the proceeding, or her memory, and not simply from what Sweat testified he told Judge Tucker. He argued that without evidence of the actual oral supplementation, there was no probable cause, and the motion to suppress should be granted. (R.p.170).

Judge Hocker ruled that even though the written affidavit from Sweat was deficient, the oral testimony offered to Judge Tucker to supplement that affidavit, which Judge Hocker found was properly established by testimony at the suppression hearing, was sufficient to show probable cause supporting issuance of the search warrant. Judge Hocker further found that because Appellant could not establish prejudice from Judge Tucker's failure to comply with the ministerial acts in the search warrant statutes, he was not entitled to suppression based on her non-compliance. (R.p.171-p.172).

At the end of the pretrial hearing, counsel for Appellant advised Judge Hocker that Appellant wanted to address the court. He was placed under oath and advised of his Fifth Amendment rights and then proceeding to lodge several complaints against his attorneys and how they handled the suppression motion. Appellant moved to relieve counsel. Judge Hocker granted the motion and relieved Mr. Howe and Ms. McNeill from further representation, but advised Appellant his oral ruling on the motion to suppress was now the law of the case and would be followed by a written order denying the motion. (R.p.177-p.200).

On July 31, 2015, Judge Hocker issued an order denying Appellant's motion to suppress. He noted the State conceded the written affidavit lacked sufficient specificity but relied on oral supplementation testimony given by Officer Sweat to the magistrate prior to the issuance of the search warrant. Judge Hocker described the substance of that oral supplementation based on testimony offered by Officer Sweat at the suppression hearing and concluded: "The written

Affidavit and the supplemental oral testimony established sufficient probable cause for the Search Warrant to have been issued.” Judge Hocker also concluded: “The fact of another Magistrate accepting the search Return and the fact that the Magistrate was not able to produce a Log of the search were both ministerial acts, thus requiring a showing of prejudice by the Defendant and none were shown.” (R.p. 529-533).

Motion to Dismiss: Section 44-53-410 and Double Jeopardy

Appellant filed a pretrial motion to dismiss the heroin charges against him on grounds the prosecution was barred by S.C. Code § 44-53-410, which provides: “‘If a violation of this article is a violation of Federal law or the law of another state, the conviction or acquittal under Federal law or the law of another state for the same act is a bar to prosecution in this State.’” Attached to the motion was a copy of a March 25, 2015 transcript of Appellant’s sentencing hearing in the United States District Court for the District of Greenville, which was held before the Honorable Henry M. Herlong, Jr., Senior United States District Judge. (R.p. 534; R.p. 1-68). He also filed a brief in support of his motion arguing prosecution was prohibited because the state heroin charges were based on the same acts “tried” in federal court as part of a sentencing proceeding for which he was given an enhanced sentence for his unrelated federal conviction. Appellant claimed the findings by the federal district court that he was dealing drugs in Laurens County counted as a “conviction” within the meaning of the statute and, therefore, the State was precluded from further prosecuting him. (R.p. 535-536). The State submitted a written response. Relying primarily on Witte v. United States, 515 U.S. 389 (1995), Kahn v. State, 694 A.2d 485 (Md. Ct. App. 1996), and principles of double jeopardy, the State argued the prosecution was not barred by double jeopardy or the statute because the statute is not applicable

where Appellant was neither “prosecuted” for the State charges in the federal sentencing hearing, nor “convicted” of those charges during that hearing. (R.p. 537-542).

On March 28, 2016, the same day the memorandum and response were filed, a hearing was convened at the Laurens County Courthouse before the Honorable Donald B. Hocker. (R.p.202). Appellant was present and was represented by C. Rauch Wise, Esquire. The State was represented by Assistant Solicitors Scott and Boykin. At the hearing, Appellant explained that during the Federal sentencing proceeding testimony was taken from Sergeant Matthew Veal about the facts behind the State heroin charges, which resulted in the Federal judge making “a very specific finding that . . . [Appellant] did commit these acts.” He argued these findings of fact were the equivalent of a conviction, and therefore should enjoin the State from prosecuting him in state court based on both double jeopardy grounds and under the state statute. (R.p.205-p.208). The State responded by explaining exactly what happened in Federal court and arguing it was not a “conviction” for purposes of section 44-53-410 or double jeopardy. The solicitor referenced the cases cited in his written response in support of his argument. The trial court clarified it was dealing with a double jeopardy issue and not just an issue with the statute and both parties agreed. (R.p.208-p.215). They continued to argue their respective sides and then engaged in a discussion regarding whether a denial of the motion would be immediately appealable. Ultimately, Judge Hocker ruled he was denying the motion to dismiss. (R.p.216-p.231).

On March 28, 2016, Judge Hocker issued a written order denying Appellant’s motion to dismiss. Based on the cases cited by the State, the court held that “double jeopardy would not attach at the time of sentencing in the federal case and therefore not bar a later prosecution on

unrelated charges in state court that were considered in determining the sentence in federal court. Consequently, Section 44-53-410 would not bar prosecution of these state charges.” (R.p. 543-544).

Trial

On December 12, 2016, the case was called for trial. Judge Hocker presided over jury qualification and selection and the following day, on December 13, 2016, the Honorable Frank Addy, Jr., took over from Judge Hocker and presided over the remainder of the trial. (R.p.233-p.238). At the outset, Appellant asked to put a few matters on the record in regard to the previous pretrial hearings. In regard to the motion to suppress, Appellant argued Judge Hocker’s written order failed to address two particular issues that were argued by Mr. Howe at the hearing. First, Appellant argued the criteria for appellate review when a search warrant affidavit is supplemented with oral testimony should hinge on what the magistrate heard rather than what the officer said. He claimed that here, where the magistrate had taken no notes and did not remember what she heard, probable cause had not been established by the State. Second, Appellant argued he was entitled to suppression because the officer failed to comply with section 17-13-150 of the Code because he did not give a copy of the search warrant to the occupants of the house at the time of the search. The trial judge said he wanted to review the transcripts of the pretrial suppression hearing and asked Appellant for authority to support his first proposition. Appellant responded that he had none. (R.p.238-p.242). In regard to the motion to dismiss, Appellant explained he simply wanted to make the court aware of the procedural history and of his failed attempt to take the double jeopardy issue up on immediate appeal. He conceded that pretrial issue had been addressed by Judge Hocker and there was no further response needed from the State. (R.p.242-p.243).

After dealing with a number of other pretrial motions, the jury was sworn, the trial judge gave brief preliminary instructions, and the parties gave opening statements. (R.p.243-p.269). The State then presented its case-in-chief. First, the State called Sergeant Matt Veal to the stand. He described the police procedures for making a controlled buy and the use of CIs. Veal also explained the January, 2015 investigation into heroin sales in Fountain Inn and how that investigation led to Lawrence Cheatham, an individual who had overdosed on heroin and was willing to serve as a CI. Veal then provided a detailed description of the actual controlled buy where Cheatham purchased heroin from Appellant from the residence at 35 Hue Circle in Laurens County. He explained how Cheatham was searched, wired for video and audio recording, and given documented funds to make the purchase, and how he returned from Appellant's residence with five small bags containing a substance field tested to be heroin. (R.p.269-p.296).

Next, the State called officer Steven Sweat to the stand. He gave testimony similar to the testimony given at the suppression hearing. Sweat described the January 21, 2015 controlled buy, whereby the LCSO used Mr. Cheatham to purchase heroin from Appellant at his 35 Hue Circle address. Sweat identified Appellant in the courtroom as the person he saw outside the residence just before the purchase. (R.p.296-p.307). The State then called Lawrence Cheatham to the stand. He admitted he was a heroin addict and then described the incident where he almost died from taking some bad heroin and was found unconscious by the police. Cheatham explained he was charged with possession of drug paraphernalia and then agreed to work with the police as a CI. (R.p.307-p.312).

Cheatham described meeting with Sergeant Veal on January 21, 2015, and the procedure they followed to set up the controlled buy from his heroin supplier, Cheddar. He identified the

video recording of the buy and it was admitted into evidence and played for the jury. Cheatham then identified Appellant in the courtroom as the man he knew as Cheddar and as the man appearing in the video who sold him heroin. (R.p.312-p.316). On cross-examination, Cheatham was questioned about minor inconsistencies in his testimony and the consideration he was being given in exchange for assisting the police and testifying for the State. (R.p.316-p.327).

Next, the State recalled Sergeant Veal to the stand. He testified he obtained a search warrant for Appellant's residence based on the controlled buy, and then executed the search of 35 Hue Circle pursuant to that warrant on January 22, 2015, the morning after the buy, at approximately 7:00 a.m. The police found Appellant, Appellant's girlfriend Tondalai Coleman, and her children inside the residence. Using a diagram, Veal described the layout of the residence and noted where various people and items were found during the search. Appellant was on the couch and asked if he could put on some clothes, and indicated the pants on the floor were his. Veal picked up the pants and checked them for contraband before giving them to Appellant. He found \$1,123 in the pockets of the pants, which included the five documented twenty-dollar bills that had been used in the controlled buy the day before. Veal placed Appellant under arrest and continued the search. The police found a large bag of greyish powder which turned out to be heroin, a tinfoil ball full of pills which turned out to be oxycodone, a set of black digital scales with a powdery residue, a pistol wrapped in a green towel, and \$2,730 in cash. (R.p.328-p.346). On cross-examination Veal acknowledged none of the items were sent for DNA or fingerprint analysis. (R.p.346-p.350).

The State then called David Craig, the evidence custodian for Laurens County, to establish a portion of the chain of custody for the items seized from the residence. (R.p.350-p.358). Next, the State called Appellant's girlfriend, Tondalai Coleman, to the stand. She

explained she lived in the trailer with Appellant and their two children. Coleman said she never heard anybody call Appellant “Cheddar” and did not have any information or knowledge he was distributing drugs from their house. She then identified an audio recording of a phone conversation she had with Appellant while he was in jail, and that recording was admitted into evidence and played for the jury. Coleman explained that in that recording, she expressed concern about being charged for the drugs and Appellant responded that he would say they were his. (R.p.358-p.381). The State then recalled Officer Sweat to complete the chain of custody (R.p.382-p.387). Finally, the State called SLED forensic drug analyst Shana Sorrells as an expert in forensic toxicology and drug analysis to give an opinion about the substances recovered in the controlled buy and the subsequent search. She said the substance in the large bag and the five small plastic bags was a mixture of heroin and fentanyl, and that the pills were oxycodone. She explained the difference between heroin and fentanyl and their relative potency, and then gave the specific weights of the drugs that were found. (R.p.388-p.404). The following morning, the State rested and Appellant advised the court he would not be putting up any evidence so that he would get the last closing argument. (R.p.406-p.410).

Charge Conference

After a short break, the trial court convened a charge conference and asked the parties if they had any concerns or suggestions about the court’s intended jury instructions. First, Appellant took issue with the constructive possession charge and constructive possession being defined in part as “the right to exercise dominion and control over property where the drugs were found.” He argued this was not a proper definition and complained that under this definition he could be guilty of possession of drugs simply because they were found in his office even if he was in the courtroom when the drugs were found. Second, Appellant took issue with the portion

of the constructive possession charge that suggests a defendant's knowledge and possession can be inferred when the drugs are found in property under the defendant's control. He argued this inference elevated control of the property above other facts, and therefore constituted an improper charge on the facts. In support of his argument, Appellant cited two cases which discuss the use of the word "inference" in the civil context. (R.p.411-p.413). Third, Appellant asked the trial court to charge possession with intent to distribute (PWID) heroin as a lesser included offense of trafficking in heroin. He noted that section 44-53-370(e) includes specific language making PWID a lesser included offense of trafficking and therefore, he was automatically entitled to the charge. The solicitor responded that the threshold weight of the heroin found in the residence was what made the offense trafficking rather than PWID and that because that weight was never in dispute the lesser included offense should not be charged. The State maintained the statute did not change the general controlling law that a lesser included offense should only be charged if there is evidence in the record to support finding the defendant guilty of only the lesser charge, and here there was no such evidence. (R.p.415-p.431). The trial judge commented to the solicitor: "[Y]ou realize you will be giving [Appellant], under the court's opinion, a fairly strong appellate issue if the Court were to decline to give him what he wants." (R.p.431, lines 15-18). However, the court ultimately held:

Solicitor, you've convinced me. The Court wants guidance from the Supreme Court. This is the first issue - - the first time that this issue has been presented to me. The Court will give the State what the State has requested over the objection of Mr. Wise. We will not instruct on what I would otherwise instruct on and that is the lesser included offense of PWID and we'll let it go on up if he is convicted, in fact, of that offense.

(R.p.432, lines 3-10). The trial court also ruled it was declining Appellant's request to remove the inference charge and would give the standard charge on constructive possession. (R.p.432, lines 15-21). At the conclusion of the charge conference, the defense rested. (R.p.432-p.433).

The State then presented its closing argument, followed by Appellant. The solicitor described the evidence presented at trial, including testimony from the chemist that the heroin found on top of Appellant's refrigerator weighed 23.83 grams. (R.p.434-p.446). Appellant responded by attacking Cheatham's credibility, questioning the lack of forensic evidence tying Appellant to the drugs found in his residence, and suggesting reasons the jury should find the State had not met its burden of proof; however, he did not challenge or otherwise question the amount of heroin found during the search. (R.p.447-p.458).

Jury Charges

The trial judge then charged the jury on the State's burden of proof, the presumption of innocence, reasonable doubt, the roles of the judge and jury, direct evidence, circumstantial evidence, credibility of witnesses, expert witnesses, the defendant's right not to testify, the elements of the crimes, criminal intent, actual possession, constructive possession, mere presence, and the necessity of a unanimous verdict. (R.p.458-p.474). In regard to the role of the jury, the trial judge charged:

Again, you are the sole and exclusive judges of the facts in this case. A trial judge cannot intimate, state, comment on, or make any statement to a jury about the facts. Since you, the jury, are the sole judges of the facts, you're not to infer from what I said during the progress of this trial in ruling upon the admissibility of evidence or otherwise or anything that I say to you now during the course of these instructions that I have any opinion about the facts of this case. Ladies and gentlemen, the law does not permit me to have any opinion about the facts. This is a matter solely for you to determine.

(R.p.462, lines 6-16). In regard to possession, the trial court charged the jury as follows:

Now, ladies and gentlemen, in terms of the possession.-- or, sorry. In terms of the trafficking heroin charge and the possession with intent to distribute oxycodone and the possession of oxycodone charges, I'm going to define with you how the law defines possession. To prove possession, ladies and gentlemen, the State must prove beyond a reasonable doubt the Defendant had knowledge of, power over and the intent to control the

disposition or use of the drugs involved. Possession may be either actual or constructive. Actual possession means that the drugs involved were in the actual physical custody of the Defendant. **Constructive possession means that the Defendant had dominion and control or the right to exercise dominion and control over either the drugs itself or the property upon which the drugs were found.** Mere presence I instruct you -- I instruct you that mere presence at the scene where the drugs were found is not enough to prove possession. **The Defendant's knowledge and possession may be inferred when a substance is found on the property under the Defendant's control. However, this inference is simply an evidentiary fact to be taken into consideration by you along with the other evidence and to be given the weight you think it deserves.** I instruct you, ladies and gentlemen, that two or more persons may have joint possession of a drug. Additionally, mere presence at the scene where the drugs were found is not enough to prove possession. **The Defendant's knowledge and possession again may be inferred when the substance is found on the property under the Defendant's control. Again, this is merely an evidentiary fact to be taken into consideration by you with the other evidence and give it the weight you think it should deserve.**

(R.p.468, line 16-p.469, line 21) (emphasis added). Appellant renewed his objections to the constructive possession charge as well the trial court's refusal to charge PWID heroin as a lesser included offense of trafficking heroin. (R.p.474, lines 9-21).

Verdict and Sentencing

At the end of trial, after deliberating for approximately thirty minutes, the jury found Appellant guilty of trafficking in heroin, distribution of heroin, and the lesser included offense of simple possession of oxycodone. Appellant renewed all pretrial motions and motions made during the course of the trial, and he moved for a new trial. The trial court denied the motions, ruling specifically that it would not change the pretrial rulings made by Judge Hocker and that it would deny Appellant's motion to dismiss due to the police officers' failure to give a copy of the search warrant to the occupants of the home at the time of the search. The trial judge then sentenced Appellant to twenty-five (25) years' imprisonment for trafficking in heroin, ten (10) years' concurrent imprisonment for distribution of heroin, and five (5) years' concurrent

imprisonment for possession of oxycodone – third offense, for an aggregate sentence of twenty-five (25) years' imprisonment. (R.p. 511-519; R.p.475-p.488).

ARGUMENT

I.

The trial court properly denied Appellant's motion to suppress evidence discovered in the search of his residence because the supplemental oral information offered by the requesting officer in support of the search warrant affidavit provided a substantial basis upon which the magistrate could conclude there was a fair probability drugs and other incriminating evidence would be found inside the residence.

Appellant argues the trial court erred in failing to suppress items seized from his residence because 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 to supplement the affidavit. While recognizing the longstanding principle that a written affidavit may be supplemented by an oral statement given under oath, Appellant appears to argue that the only competent proof of the substance of the oral supplementation must come from the issuing magistrate's memory, and may not come from the officer who provided the oral supplementation. He contends: "[W]hat the magistrate heard controls and not what the officer thought the magistrate heard." (Brief of Appellant, p.6-p.8). The State disagrees and submits Appellant's argument is entirely without merit.

The duty of the reviewing court is simply to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed under the totality of the circumstances. This review consists of consideration of the information in the search warrant affidavit and the information in any oral testimony presented to the magistrate to supplement the affidavit. Contrary to Appellant's contention, the review does not, and should not, hinge on what the magistrate can specifically remember about his or her decision to issue the warrant, but instead must depend upon what information was brought to the magistrate's attention. State v. Gore, 408 S.C. 237, 247-49, 758 S.E.2d 717, 722-23 (Ct. App. 2014), cert. dismissed as

improvidently granted, State v. Gore, 414 S.C. 577, 780 S.E.2d 261 (2015). Given the affidavit and supporting oral testimony in this case, there was a substantial basis for concluding probable cause existed to issue a search warrant for Appellant's residence. Appellant's convictions should be affirmed.

Standard of Review

In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless they are clearly erroneous. State v. Brown, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012), cert. denied, ___ U.S. ___, 133 S. Ct. 2779 (2013); State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion. Brown, 401 S.C. at 87, 736 S.E.2d at 265; State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. Brown, 401 S.C. at 87, 736 S.E.2d at 265; State v. Jennings, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011); State v. Morris, 376 S.C. 189, 205-06, 656 S.E.2d 359, 368 (2008). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence. Wilson, 345 S.C. at 6, 545 S.E.2d at 829. Thus, when reviewing a Fourth Amendment search and seizure case, an appellate court must affirm the trial court's ruling if there is any evidence to support it; the appellate court may reverse only for clear error. Brown, 401 S.C. at 87, 736 S.E.2d at 265.

Law / Analysis

The Fourth Amendment to the United States Constitution protects people from unreasonable searches and seizures and provides that no warrants shall be issued except upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized. U.S. Const. amend. IV. The South Carolina Constitution provides similar protection against unreasonable searches and seizures and unreasonable invasions of privacy. S.C. Const. art. I, § 10. Thus, the touchstone of these provisions is reasonableness. See Florida v. Jimeno, 500 U.S. 248, 250 (1991) (“The touchstone of the Fourth Amendment is reasonableness.”). A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property. Brown, 401 S.C. at 88, 736 S.E.2d at 266; State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 327 (2011). The Fourth Amendment itself provides no remedy for a violation of the warrant requirement. Davis v. United States, 564 U.S. 229, 231 (2011). However, the United States Supreme Court has fashioned a judicially-created remedy, the exclusionary rule, which is a deterrent sanction by which the prosecution is barred from introducing evidence obtained in violation of the Fourth Amendment. Id.; Brown, 401 S.C. at 88, 736 S.E.2d at 266.

A search warrant may issue only upon a finding of probable cause. State v. Herring, 387 S.C. 201, 212, 692 S.E.2d 490, 495 (2009). In South Carolina, an affiant seeking to obtain a search warrant must present a sworn affidavit to a judge presenting grounds sufficient to establish probable cause in order to justify the issuance of the warrant. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348-49 (1999); see S.C. Code Ann. § 17-13-140 (“A warrant issued hereunder shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for the warrant.”); see also

Illinois v. Gates, 462 U.S. 213, 238 (1983) (identifying probable cause as “a fair probability that contraband or evidence of a crime will be found”). Oral testimony may also be used to supplement search warrant affidavits which are facially insufficient to establish probable cause. State v. Jones, 342 S.C. 121, 128, 536 S.E.2d 675, 678-79 (2000); State v. McKnight, 291 S.C. 110, 113, 352 S.E.2d 471, 472 (1987). In State v. Williams, this Court explained probable cause as it relates to the issuance of a search warrant:

In order to justify the issuance of a search warrant, probable cause must be shown, but the term ‘probable cause’ does not import absolute certainty. In determining whether there is sufficient evidence to sustain a finding of probable cause, each case stands on its own facts. The evidence need not be sufficient to support a conviction, or a verdict of guilty, or to establish guilt beyond a reasonable doubt; nor need the proof be positive, it being enough if it is such as to induce in the mind of the issuing officer an honest belief that the facts set forth exist, or as would lead a man of prudence to believe that the offense has been committed.

262 S.C. 186, 189, 203 S.E.2d 436, 437-38 (1974) (citation omitted).

In deciding whether to issue a search warrant, the issuing judge must “make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the ‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.” Gates, 462 U.S. at 238; see Herring, 387 S.C. at 212, 692 S.E.2d at 495-96 (quoting Gates for this proposition). In making the probable cause determination, “[issuing judges] are concerned with probabilities and not certainties.” State v. Sullivan, 267 S.C. 610, 617, 230 S.E.2d 621, 624 (1976). 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. Gore, 408 S.C. at 247, 758 S.E.2d at 722. This review, like the determination by the magistrate, is governed by the “totality of the circumstances” test. Jones, 342 S.C. at 126, 536

S.E.2d at 678; Herring, 387 S.C. at 212, 692 S.E.2d at 495. The appellate court should give great deference to a magistrate's determination of probable cause. Jones, 342 S.C. at 126, 536 S.E.2d at 678.

While recognizing the longstanding principle that a written affidavit may be supplemented by an oral statement given under oath, Appellant appears to argue that the only competent proof of the substance of the oral supplementation must come directly from the issuing magistrate and may not come from the officer who provided the oral testimony to the magistrate. He contends: "As the probable cause determination is to be made by the magistrate, logic would dictate that what the magistrate heard controls and not what the officer thought the magistrate heard." (Brief of Appellant, p.6-p.8). Yet, this is an artificial distinction that is not recognized in this State's jurisprudence, likely because it defies logic.

There is no basis for treating oral information differently from written information. The inquiry focuses on what information was brought to the magistrate's attention and whether that information is sufficient to determine whether the magistrate had a substantial basis for concluding probable cause existed. Gore, 408 S.C. at 247-48; 758 S.E.2d at 722. In the case of an affidavit the focus is not on "what the magistrate read" as opposed to "what the officer thought the magistrate read" as Appellant's theory would suggest. Instead, the focus is properly on the substantive information in the affidavit, however that information can be shown by the State to the reviewing court. Whether the magistrate has an independent recollection of the information in the affidavit is of no moment because the written affidavit itself supplies that information. Similarly, whether the magistrate has an independent recollection of the information in the oral testimony is of no moment where the testimony offered at the suppression hearing supplies that information. Appellant argues: "When the issuing magistrate does not

recall the supplemental testimony, then there is simply no basis by which a court could conclude that the magistrate made an independent determination that probable cause existed.” Yet there is a basis by which a court could make this conclusion—consideration of the testimony the requesting officer gave to the reviewing court, under oath, which details the testimony he or she gave to the issuing magistrate. We know what information was brought to the magistrate’s attention and we know the magistrate determined it was sufficient to issue the search warrant. This provided an ample basis for the trial court’s review and for this Court to affirm.

Here, the information in the search warrant affidavit coupled with the supplemental oral testimony from the requesting officer provided the issuing judge with a probable cause basis to believe heroin or other incriminating evidence connected to Appellant’s drug dealing would be found in his residence. See Gore, 408 S.C. at 249, 758 S.E.2d at 723 (“Given the affidavit and the supporting oral testimony, we conclude there was a substantial basis for concluding probable cause existed to issue a search warrant.”). It reliably established there was a reasonable probability heroin and other incriminating evidence would be discovered in Appellant’s residence; therefore, the issuing judge had a substantial basis upon which to make a finding of probable cause. Appellant’s convictions should be affirmed.

II.

The trial court properly denied Appellant's motion to suppress evidence discovered in the search of his residence because he failed to establish he was prejudiced by the magistrate's apparent failure to follow the statutory procedures in § 17-13-141 regarding the keeping of records related to the issuance of search warrants.

Appellant argues the trial court erred in failing to suppress the items seized from his residence where the magistrate failed to comply with the requirements of S.C. Code § 17-13-141 that she keep a record of the returned search warrant and her reason for issuing the warrant. He contends he was prejudiced by the magistrate's failure to keep these records because it prevented him from knowing what the officer told the magistrate and what the magistrate heard, and as a result, prejudiced his attempt to establish the warrant was not issued based on probable cause. (Brief of Appellant, p.8-p.9). The State disagrees and submits Appellant's argument is without merit because he failed to show he was prejudiced by the noncompliance.

Law / Analysis

The South Carolina Code provides:

(A) Every judicial official authorized to issue search warrants in this State shall keep a record along with a copy of the returned search warrant and supporting affidavit and documents for a period of three years from the date of issuance of each warrant. The records shall be on a form prescribed by the Attorney General and reflect as to each warrant:

....

(4) Reason for issuing warrant.

S.C. Code Ann. § 17-13-141 (2014). At the suppression hearing, Judge Tucker testified that although she did have a copy of the search warrant in her records, she could not find any other records or a log of warrants that were issued. (R.p.145-p.159). Judge Hocker noted that being unable to locate records was not necessarily the same as failing to keep records; nevertheless, he

found that because Appellant could not establish prejudice from Judge Tucker's failure to comply with the ministerial acts in the search warrant statutes, he was not entitled to suppression based on her non-compliance. (R.p.171-p.172).

In the context of the application of the exclusionary rule, the exclusion of evidence should be limited to violations of constitutional rights and not to statutory violations, at least where the appellant cannot demonstrate prejudice at trial resulting from the failure to follow statutory procedures. State v. Chandler, 267 S.C. 138, 226 S.E.2d 553 (1976). Indeed, statutory violations do not warrant the suppression of evidence unless the defendant can show he was prejudiced by the violation. State v. Wise, 272 S.C. 384, 386, 252 S.E.2d 294, 295 (1979). As explained in argument I above, Appellant knew what the officer told the magistrate to supplement the search warrant affidavit because Officer Sweat gave detailed testimony at the suppression hearing describing the testimony he gave to the magistrate. He further testified this testimony consisted of the same information set out in the written incident report Sweat prepared before he appeared before the magistrate, and which he relied upon and referred to when making his sworn testimony to Judge Tucker. This incident report was given to Appellant as part of pretrial discovery well before the suppression hearing. Appellant suffered no prejudice from the magistrate's inability to locate the records described in section 17-13-141 of the Code because, at the time of the suppression hearing, he knew the substance of the information the State gave to the magistrate when requesting the search warrant. Appellant's convictions should be affirmed.

III.

The trial court properly declined Appellant's request to charge the jury on possession with intent to distribute heroin as a lesser included offense of trafficking in heroin because no evidence was presented at trial from which it could be inferred the lesser, rather than the greater, offense was committed.

Appellant argues the trial court erred in failing to charge possession of heroin with intent to distribute as a lesser included offense of trafficking in heroin when § 44-53-370 of the Code makes it a statutory lesser included offense. The State disagrees and submits Appellant's argument is entirely without merit. No evidence was presented at trial from which the jury could infer that the lesser included offense of PWID, rather than trafficking, was committed. The trial judge properly declined to charge PWID heroin and Appellant's convictions should be affirmed.

Standard of Review

The law to be charged is determined from the evidence presented at trial. State v. Rivera, 389 S.C. 399, 404, 699 S.E.2d 157, 159 (2010); State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009). "No instruction should be given by the trial judge, at the request of the appellant, which tenders an issue which is not presented or supported by the evidence." State v. Weaver, 265 S.C. 130, 137, 217 S.E.2d 31, 34 (1975). "A trial judge is required to charge the jury on a lesser-included offense if there is evidence from which it could be inferred the lesser, rather than the greater, offense was committed." State v. Green, 397 S.C. 268, 289, 724 S.E.2d 664, 674 (2012); State v. Watson, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002). The trial court only commits reversible error if it fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 838, 849 (1993).

Law / Analysis

In 1989, the South Carolina Code did not explicitly recognize PWID as a lesser included offense of trafficking. See S.C. Code Ann. § 44-53-370(e) (Supp. 1989). However, in examining the structure of section 44-53-370, our supreme court concluded in an opinion issued January 2, 1990, that the Legislature intended PWID to be a lesser included offense of trafficking based upon possession. Matthews v. State, 300 S.C. 238, 241, 387 S.E.2d 258, 259-60 (1990). Thus, the court held “when there is conflicting evidence as to whether the amount of marijuana involved is sufficient to invoke the trafficking statute, both charges should be submitted to the jury.” Id. As a corollary, the court held: “Where, however, the undisputed evidence is that the amount involved exceeds the minimum trafficking amount, then only the trafficking charge should be submitted to the jury.” Id. Shortly thereafter, the Legislature amended section 44-53-370 to add the following language: “The offense of possession with intent to distribute described in Section 44-53-370(a) is a lesser included offense to the offenses of trafficking based upon possession described in this subsection.” S.C. Code Ann. § 44-53-370(e) (Supp. 1990); See 1990 Act No. 604, Section 17, eff. June 25, 1990. This language remains a part of the Code today. S.C. Code Ann. § 44-53-370(e) (Supp. 2016).

Although the offense date preceded this legislative amendment, our supreme court again considered the issue of whether the jury must be charged with PWID as a lesser included offense of trafficking after the effective date of the amendment. State v. Grandy, 306 S.C. 224, 411 S.E.2d 207 (1991). Relying on Matthews, it repeated the holding that: where the undisputed evidence is that the amount involved exceeds the minimum trafficking amount, only the trafficking charge should be submitted to the jury. Grandy, 306 S.C. at 227, 411 S.E.2d at 208. Even when considering an offense date after the noted legislative change, our courts have

consistently followed this same rationale. See Sellers v. State, 362 S.C. 182, 190, 607 S.E.2d 82, 86 (2005) (“A defendant is not entitled to a lesser-included charge of possession with intent to distribute when there is evidence that the amount involved exceeded minimum for trafficking.”); State v. Raffaldt, 318 S.C. 110, 456 S.E.2d 390 (1995) (“Where all the evidence indicates the defendant was dealing in quantities of cocaine over ten grams, the defendant is only entitled to charges on trafficking, not distribution or possession.”); State v. Peay, 321 S.C. 405, 408, 468 S.E.2d 669, 671 (Ct. App. 1996) (“It is undisputed officers recovered 515 grams of cocaine when Peay was arrested. Because the amount of cocaine involved in this case indisputably exceeded the minimum amount necessary to sustain a conviction for trafficking (ten grams), the trial court correctly refused Peay’s request to charge possession with intent to distribute as a lesser included offense.”).

The trial court did not err in denying Appellant’s request to charge the lesser included offense of PWID heroin. There is no evidence tending to show Appellant is guilty of only the lesser crime. The only reasonable inference to be drawn from the totality of the evidence was that Appellant either trafficked in heroin, or was not guilty. Appellant’s convictions should be affirmed.

IV.

The trial court properly denied Appellant's motion to dismiss his charges pursuant to section 44-53-410 of the South Carolina Code because he did not previously receive a "conviction or acquittal under Federal law . . . for the same act."

Appellant argues the trial court erred in failing to dismiss his charges on the basis the state prosecution was 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. He contends that when, during his sentencing proceeding in federal district court on an unrelated charge, Judge Herlong found, for federal sentencing purposes, that Appellant had committed the same acts he was now on trial for in state court, that finding was the equivalent of receiving a federal conviction and therefore should act as a bar to prosecution for those acts in South Carolina under section 44-53-410. (Brief of Appellant, p.11-p.14). The State disagrees and submits Appellant's argument is without merit because he did not receive a "conviction" under Federal law which would trigger the application of section 44-53-410.

Law / Analysis

In regard to violations of our laws concerning narcotics and other controlled substances, the South Carolina Code provides: "If a violation of this article is a violation of a Federal law or the law of another state, the conviction or acquittal under Federal law or the law of another state for the same act is a bar to prosecution in this State." S.C. Code Ann. § 44-53-410 (2002) (emphasis added). In State v. Rice, our supreme court held section 44-53-410 is a limitation on the prosecutorial rights of the executive branch and not on the authority of the judicial branch, and that as a result, it does not raise an issue of subject matter jurisdiction. State v. Rice, 348 S.C. 417, 420, 559 S.E.2d 360, 361-62 (2001). Because the issue was not preserved for review, the Court did not address the merits of whether the dismissal of a federal charge with prejudice

for a violation of the Speedy Trial Act would be considered an “acquittal” for purposes of section 44-53-410 such that it should have barred the state prosecution for the same act. Id. In a subsequent case, however, the Court was able to address the application of section 44-53-410 as a prosecutorial bar, and considered the statute as a corollary to the double jeopardy clauses of the federal and state constitutions. State v. Harris, 351 S.C. 643, 648-51, 572 S.E.2d 267, 270-72 (2002) (“We hold that the re-entry into a continuing conspiracy subsequent to the defendant’s arrest is, for purposes of double jeopardy, the formation of a new agreement. Accordingly, we find [Harris’] participation, subsequent to his May 1991, arrest constituted a new offense for which he could be prosecuted.”). Yet, Harris also does not directly address Appellant’s claim because in Harris the defendant pled guilty to the federal charge so there was no question it was a “conviction” for purposes of section 44-53-410.

In the case now before this Court, Appellant pled guilty, on November 18, 2014, to a federal charge of conspiracy to distribute 100 grams or more of heroin. On January 22, 2015, while out on bond and awaiting sentencing, Appellant was arrested in Laurens County for the charges now before this court on appeal. There is no dispute the acts underlying the November 2014 federal conviction are not the same acts for which Appellant was arrested in Laurens County. On March 25, 2015, Appellant appeared before the Honorable Henry M. Herlong, Jr., in the United States District Court for the District of South Carolina, Greenville Division, for sentencing. (R.p.1-p.3). During the sentencing hearing, Judge Herlong heard testimony from Sergeant Matthew Veal of the the LCSO regarding Stewart’s pending South Carolina charges. (R.p.51-p.59). Judge Herlong determined Veal was credible and found Appellant was dealing drugs and had a weapon in possession in the presence of children. (R.p.59). He therefore took the pending charges into consideration on Appellant’s federal sentence on two grounds. The first

involved “acceptance of responsibility”, which is a tool under the federal sentencing guidelines that can reduce a defendant’s offense level by up to three levels. U.S.S.G. § 3E1.1. Judge Herlong found that since Appellant had been selling drugs after his federal guilty plea he had lost his acceptance of responsibility and elected not to reduce his offense level. (Fed.Tr.p.59). The second involved an upward variance from the sentencing guideline range under 18 U.S.C. § 3553(a). Judge Herlong decided that the range of 97 to 121 months was not appropriate for Appellant considering his recent criminal conduct in Laurens County, therefore, he varied upward in the sentence. (R.p.67). When considering the appropriate sentence, Judge Herlong noted the statutory range for the offense was 5 to 40 years, with supervised release of at least 4 years, and that the sentencing guidelines set a range of 97 to 121 months imprisonment with four years of supervised release. (R.p.60).

Appellant argues “there is no dispute that the exact same act upon which the trafficking heroin and the sale of heroin are the same acts tried in federal court when the sentence of [Appellant] was doubled because of these acts.” However, the Laurens County acts were clearly not “tried” in federal court. Nevertheless, Appellant argues the findings by Judge Herlong should count as a “conviction” within the meaning of section 44-53-410. In support of this argument he cites to S.C. State Bd. of Dental Examiners v. Breeland, 208 S.C. 469, 38 S.E.2d 644 (1946), and its language that “[C]onviction in its legal sense, is the determination of guilt in a criminal prosecution.” Yet, in Breeland our supreme court was determining whether a conviction in general sessions court was conclusive proof of the defendant being “guilty” for purposes of the statute allowing revocation of a dental license. In other words, they were looking at the definition of “conviction” to determine if that conviction counts as a finding of guilt. Appellant now wants to flip this analysis to suggest a finding of “guilt” by the Board of Dental

Examiners, or in his case, by a Federal Judge in a sentencing proceeding, counts as a “conviction” for purposes of barring prosecution under section 44-53-410 or the double jeopardy clauses. He argues that section 44-53-410 is penal in nature, and as such, it must be strictly construed against the State and in his favor. Appellant claims there was an adjudication of guilt by Judge Herlong in a criminal proceeding in which a witness for the State gave sworn testimony and which resulted in doubling the punishment he otherwise would have received. He contends Judge Herlong’s consideration of his pending heroin charges in order to impose a higher sentence on his federal charge, within the statutorily authorized range, effectively imposed punishment for the pending charge conduct for double jeopardy purpose and, therefore, should bar the subsequent prosecution on the pending charges. (Brief of Appellant, p.12-p.13).

The United States Supreme Court has held it does not. Specifically, the Court held that consideration of an uncharged act of cocaine importation in order to impose a higher sentence on marijuana charges within the statutorily authorized range did not impose “punishment” for the cocaine conduct for double jeopardy purposes and, thus, did not bar the subsequent prosecution on cocaine charges. Witte v. United States, 515 U.S. 389, 406 (1995). Similarly, the Court of Special Appeals of Maryland rejected a nearly identical claim made by a defendant charged with theft and conspiracy to commit theft. Khan v. State, 694 A.2d 485, 488-93 (Md. Ct. Sp. App. 1997) (holding that a federal court’s use of state law indictments to enhance defendants’ sentences for federal convictions was not “punishment” of crimes charged in state law indictment for double jeopardy purposes; that testimony of state prosecutor at federal sentencing hearing as to existence of state law indictments did not constitute “prosecution” of state law indictments for double jeopardy purposes; and that state’s prosecution of defendants did not violate due process). Here, Appellant was sentenced by Judge Herlong within the federal

statutory range of 5 to 40 years' imprisonment. Thus, Judge Herlong's use of his pending state charges to enhance Appellant's federal sentence within that range was not "punishment" for double jeopardy purposes. Likewise, Judge Herlong's findings based on consideration of the state charges and the testimony from Sergeant Veal was not a "conviction" for double jeopardy purposes and therefore does not bar prosecution under section 44-53-410. Appellant's convictions should be affirmed.

V.

The trial court properly charged the jury that “The Defendant’s knowledge and possession may be inferred when a substance is found on the property under the Defendant’s control” because, when read as a whole, the jury charge contained the correct definitions and adequately covered the current and correct law of South Carolina.

Appellant argues the trial court erred in charging the jury that: “The Defendant’s knowledge and possession may be inferred when a substance is found on the property under the Defendant’s control.” He contends this 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 South Carolina Constitution. (Brief of Appellant, p.14-p.20). The State disagrees and submits Appellant’s argument is without merit.

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 evidentiary fact to be taken into consideration by you along with other evidence and to be given the weight you think it deserves.” (R.p.469, lines 7-13; lines 16-21). Furthermore, the entire jury charge, when read as a whole, contained the correct definition of possession and it adequately covered the current and correct law of South Carolina. The jury charge was neither erroneous nor prejudicial; therefore, Appellant’s convictions should be affirmed.

Law / Analysis

“An appellate court will not reverse the trial judge’s decision regarding a jury charge absent an abuse of discretion.” State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)). “To warrant reversal, a trial judge’s refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant.” Id. at 479, 697 S.E.2d at 583. Further, a court may not comment on the facts of the

case in its jury instructions. See S.C. Const. art. V, § 21 (“Judges shall not charge juries in respect to matters of fact, but shall declare the law.”).

A trial court is required to charge the current and correct law of South Carolina. State v. Rayfield, 369 S.C. 106, 119, 631 S.E.2d 244, 251 (2006); Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 73 (2004). “A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.” Mattison, 388 S.C. at 478, 697 S.E.2d at 583 (citations omitted). Jury instructions must be considered as a whole and, if as a whole, they are free from error, any isolated portions which might be misleading do not constitute reversible error. State v. Jackson, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989). On review of a jury charge, an appellate court considers the charge as a whole in view of the evidence and issues presented at trial. State v. Lee Grigg, 374 S.C. 388, 406, 649 S.E.2d 41, 50 (Ct. App. 2007). A trial court’s decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied. State v. Wharton, 381 S.C. 209, 213, 672 S.E.2d 786, 788 (2009).

Prior Decisions

Appellant first argues the challenged jury charge is factually incorrect and is not supported by the law of South Carolina. He claims the historical basis for so instructing the jury is simply not supported by a logical reading of the prior case law in South Carolina, taking particular issue with State v. Adams, 291 S.C. 132, 352 S.E.2d 483 (1987). Appellant acknowledges the oft quoted language from Adams that: “The proper charge on constructive possession is to instruct the jury that the defendant’s knowledge and possession may be inferred if the substance was found on premises under his control.” However he complains this statement is only supported by a citation to State v. Hudson, 277 S.C. 200, 284 S.E.2d 773 (1981), where

Hudson itself does not support such a charge. He argues Hudson merely held that if a defendant is exercising dominion and control over the premises, then the case should be submitted to the jury, not that the inference should be charged to the jury when submitted. (Brief of Appellant, p.14-p.15). Appellant has misconstrued the relevant cases.

In Adams, our supreme court did not merely approve the inference charge. It also explained that in conjunction with the inference charge, the trial court should charge the jury it is free to accept or reject this permissive inference depending on its view of the evidence. Adams, 291 S.C. at 135-36, 352 S.E.2d at 486. Here, the trial court charged both. (R.p.469). Furthermore, although Appellant correctly notes Hudson was a directed verdict case and was not specifically about the jury charge, Adams was about the jury charge, and it referenced Hudson's recognition of the permissive inference, which itself was recognizing the inference set forth seven years earlier in State v. Ellis, 263 S.C. 12, 207 S.E.2d 408 (1974). In Adams, our supreme court put an end to the practice of trial courts using a modification of the Ellis directed verdict inference language to charge the jury that items "must be deemed to be in the constructive possession of the person controlling the house in the absence of evidence to the contrary." Adams, 291 S.C. at 135, 352 S.E.2d at 486. The court held this instruction impermissibly shifted the burden of proof to the appellant to disprove possession, but then corrected this problem by directing trial courts to charge both the inference and that it is merely permissive. Id. at 135-36, 352 S.E.2d at 486. Again, this is precisely what the trial court did in Appellant's case. (R.p.469).

Appellant next contends the challenged jury charge is similar to the federal statutory presumption of knowledge of illegal importation from the mere fact that the defendant possessed a small amount of marijuana, a presumption rejected by the United States Supreme Court in

Leary v. United States, 385 U.S. 6 (1969). He argues the inference charge should similarly be rejected by this Court because such information is not within the specialized judicial competence or completely commonplace. (Brief of Appellant, p.15-p.16). However, unlike the statutory presumption in Leary, our permissive inference does nothing to relieve the State of the burden of proving a defendant knowingly and intentionally possessed the drugs. Furthermore, the Court in Leary struggled with the lack of empirical data to support the presumption itself. As noted repeatedly by our supreme court in the context of a directed verdict: “Where contraband materials are found on premises under the control of the accused, this fact in and of itself gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury.” Hudson, 277 S.C. at 203, 284 S.E.2d at 774. This inference is inherently rational without need for direct or circumstantial data regarding whether a person controlling a premises generally has knowledge and possession of materials found on that premises. Yet, it is not information that is “completely commonplace” in the context of constructive possession, a concept which we define for jurors in South Carolina. Thus, there is both a basis in fact to support the inference, and a rational basis to explain the permissive inference to the jury. Doing so does not violate due process.

Appellant goes on to attack the inference by claiming “the reasonable assumption is that the jury used the inference if they believed the case were close simply because that is what they were instructed to do.” He claims that when the jury decides a close case, the jurors will use the inference to persuade themselves that the case has been proven beyond a reasonable doubt, which will lessen the State’s burden of proof in violation of the principles established in In re Winship, 397 U.S. 358 (1970). Appellant argues that when the only means the State has to win a case is to tell the jury it may infer guilt from the proof of certain facts, the State has not proven

its case beyond a reasonable doubt. Finally, he relies on two out-of-state cases, State v. Brunson, 905 P.2d 346 (Wash. 1995) and Commonwealth v. Bujanowski, 613 A.2d 1227 (Pa. Super. 1992), in an attempt to bolster his attack. (Brief of Appellant, p.16-p.17). The State submits Appellant's attempt to vilify and exaggerate the impact of the challenged inference charge strains credulity.

Appellant's assumption that the inference charge only has an impact in close cases is essentially an acknowledgement that it could not have been prejudicial in this case. The evidence against Appellant was strong. Appellant was identified by both a police officer and Mr. Cheatham as the person at the residence who sold heroin in the controlled buy. A recording of that controlled buy was introduced into evidence. A day after the controlled buy, the money used was found in the pocket of Appellant's pants along with over \$1,000 in additional cash. Large quantities of heroin and oxycodone, digital scales, more cash, and a gun were also found in the residence where Appellant was discovered sleeping on the couch. Appellant admitted in a jail phone call that he would say the drugs were his. Thus, the permissive inference charge could not have influenced the jury to lessen or disregard the burden of proof. This is particularly true where the trial court clearly and consistently instructed the jury on that burden of proof. In reviewing the jury charge as a whole, it stayed true to the constitutional stature of the reasonable doubt standard of criminal law described in Winship.

In regard to Brunson, the State submits it actually supports the validity of the inference charge given in Appellant's case. In Brunson, the Supreme Court of Washington, in an en banc opinion, found the pattern inference of intent instruction, "In prosecution for burglary, any person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein," to be a constitutionally sound

permissive inference rather than an unconstitutional mandatory inference. Brunson, 905 P.2d at 349-50. In doing so, the Washington Court noted: (1) it allowed the trier of fact to either infer the elemental fact from proof by the prosecutor, or reject the inference; (2) the language in the instruction was clearly discretionary; and (3) no proof existed that the jury considered the inference to the exclusion of all other evidence. Id. Here, the knowledge and possession inference is clearly permissive as well and, therefore, the charge is constitutional. Similar to Brunson, our inference is constitutional if knowledge and possession more likely than not flow from a substance being found on property under the defendant's control. They do. In regard to Bujanowski, Appellant's claim that the inference is intended to make it easier to convict the guilty is simply not true. No one is asking this Court or the trial court to charge this inference in order to increase the conviction rate. It is simply a correct statement of South Carolina law, and it is constitutional. The complete and correct jury charge on the burden of proof and the presumption of innocence protects against the possibility of this permissive inference leading to the conviction of the innocent.

Charge on the Facts

Appellant next argues the permissive inference charge is a charge on the facts in violation of the South Carolina Constitution. However, as explained above, it was simply a declaration of the law as it exists in South Carolina. The charge given here did not instruct the jury as to the importance of certain facts to the exclusion of others because it included language explaining it is to be taken into consideration along with the other evidence and given the weight the jury thinks it deserves. (R.p.469).

Appellant relies on two early twentieth century civil cases in support of his contention that any jury instruction that tells the jurors some fact can be "inferred" is impermissible. In

Yarborough v. Southern Ry., 78 S.C. 103, 58 S.E. 936 (1907), there was evidence of a conspicuously posted sign forbidding all persons to place cotton on the premises of the company until tendered and accepted for shipment. Because it was for the jury to say whether the paper was so posted as to give notice to all shippers, our supreme court found the charged inference which would have allowed the jurors to disregard making this determination became an unconstitutional comment on the facts. In Finch v. Atlanta & C. Air Line Ry., 87 S.C. 190, 69 S.E. 208 (1910), the trial court instructed the jury it could infer negligence of the railroad company merely because there was an injury or death and, being the only party to know how it happened, had not come forward to explain. Our supreme court found the constitution does not allow the presiding judge to single out any particular act or omission of the defendant, and instruct the jury that, if that appears, then it may infer that the defendant was negligent. Finch, 69 S.E. at 209. Although the inference charges in these two cases were found improper, they were problematic not merely because they charged an inference, but because they were lacking in any explanatory language that the inference was permissive and could be given whatever weight the jury decided. Thus, they suffered from the same infirmity identified in Adams. Here, the trial court charged the jury that the inference was no different from any other evidentiary fact, eliminating the potential prejudice recognized by the decisions in Yarborough and Finch.

Appellant also complains that the inference charge is unfair by asking: “Why is the State the only party to achieve such an inference charge?” (Brief of Appellant, p.19). However, this complaint rings hollow, considering criminal defendants are given the strongest inference of all—the presumption of innocence. Finally, Appellant relies on two cases where our supreme court held jury charges requested by a defendant were improper charges on the facts, arguing the inference charge given by the trial judge here is equivalent. However, in State v. Hartley the

improper jury charge—that the absence of motive “is to be duly considered by you in weighing the question of guilt”—would effectively have told the jury that particular evidence is entitled to receive weight or consideration. 307 S.C. 239, 241, 414 S.E.2d 182, 184 (1992). Here, the inference charge is clearly permissive because the jurors were told they alone determine what weight to give the evidentiary fact. No such instruction was requested in Hartley. Likewise, in State v. Bagwell the improper charge—that the testimony of a co-defendant was to be “received by the jury with caution and should be scrutinized by the jury with great caution”—would equate to the judge intimating an opinion as the weight or sufficiency of testimony. 201 S.C. 387, 23 S.E.2d 244, 249 (1942). Again, the permissive inference charge here gave no such opinion.

More recently, in State v. Stukes, our supreme court held that instructing the jury on a statute providing that testimony of the victim need not be corroborated in prosecutions for criminal sexual conduct was an impermissible charge on the facts and, therefore, was unconstitutional. 416 S.C. 493, 499, 787 S.E.2d 480, 483 (2016). In Stukes, the Court found that: “By addressing the veracity of a victim’s testimony in its instructions, the trial court emphasizes the weight of that evidence in the eyes of the jury. 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. Here, again, the jury charge emphasized it was a permissive inference which could be accepted or rejected because it was to be given only the weight the jury thought it deserved. (R.p.469). The offending language in Stukes included no such caveat and instead simply pronounced: “The testimony of a victim in a criminal sexual conduct prosecution need not be corroborated by other testimony or evidence.” Thus, the permissive inference charge here did not amount to a charge on the facts.

Further ameliorating any possible prejudice, the trial court in Appellant's case also charged the jury, prior to giving the inference charge, as follows:

Again, you are the sole and exclusive judges of the facts in this case. A trial judge cannot intimate, state, comment on, or make any statement to a jury about the facts. Since you, the jury, are the sole judges of facts, you're not to infer from what I said during the progress of this trial in ruling on the admissibility of evidence or otherwise or anything that I say to you now during the course of these instructions that I have any opinion about the facts of this case. Ladies and gentlemen, the law does not permit me to have any opinion about the facts. This is a matter solely for you to determine. As jurors it's your duty to determine the effect, value, weight and truth of the evidence presented during trial.

(R.p.462, lines 6-18) (emphasis added). This general charge, when read in conjunction with the specific explanation that the inference was permissive, completely removed any danger that the charge unconstitutionally lessened the burden of proof or commented on the facts.

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 evidentiary fact to be taken into consideration by you along with other evidence and to be given the weight you think it deserves." (R.p.469). Furthermore, the entire jury charge, when read as a whole, contained the correct definition of possession and it adequately covered the current and correct law of South Carolina. The jury charge was neither erroneous nor prejudicial; therefore, Appellant's convictions should be affirmed.

VI.

The trial court properly charged the jury that “Constructive possession means that the Defendant had dominion and control over either the drugs itself or the property upon which the drugs were found” because, when read as a whole, the jury charge contained the correct definitions and adequately covered the current and correct law of South Carolina.

Appellant argues the trial court erred in instructing the jury “Constructive possession means that the Defendant had dominion and control over either the drugs itself or the property upon which the drugs were found” because such a charge eliminates any mens rea of possession of the drugs when found on the property of the defendant. He contends the charge eliminated the requirement of knowledge that the drugs are on the premises and essentially tells the jury that if a defendant has dominion and control over the property, he possesses the drugs. (Brief of Appellant, p.20-p.22). The State disagrees and submits Appellant’s argument is without merit.

Possession requires more than simple knowledge. Indeed, the charge given by the trial court prior to giving the portion of the jury charge Appellant challenges in this appeal was as follows: “to prove possession, ladies and gentlemen, the State must prove beyond a reasonable doubt the defendant had knowledge of, power over and the intent to control the disposition or use of the drugs involved.” (R.p.468, lines 20-24). Thus, even if the challenged charge arguably eliminates the requirement of knowledge, it does not eliminate the requirement of intent, thereby preserving a mens rea for the crime. 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 the intent to control the disposition or use of the drugs. Both are needed to prove possession, constructive or otherwise. Appellant states: “As no firm foundation exists in South Carolina for such a charge, this Court should correct the error.” In other words, he 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. When read as a whole, the jury charge contained the correct definitions and adequately covered the current and correct law of South Carolina. Appellant's convictions should be affirmed.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

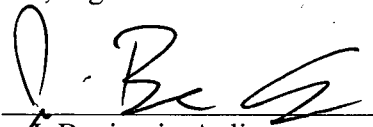
Respectfully submitted,

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

BY:


J. Benjamin Aplin
S.C. Bar No. 8729

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
December 27, 2017

STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APPEAL FROM LAURENS COUNTY
Donald B. Hocker, Circuit Court Judge
Frank R. Addy, Jr., Circuit Court Judge

DEC 29 2017
SC Court of Appeals

Appellate Case No. 2016-002524

THE STATE, ... RESPONDENT,

v.

TERRANCE EDWARD STEWART, ... APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies this Final Brief of Respondent complies with Rule 211(b),
SCACR.

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

BY:


J. Benjamin Aplin
S.C. Bar No. 8729

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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