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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2015-000981

The State, ...Respondent,

v.

Teresa Annette Davis, ...Appellant.

APPELLANT'S REPLY TO RESPONDENT'S RETURN TO APPELLANT'S PETITION FOR REHEARING

TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF APPEALS:

Pursuant to Rule 221 and 240 of the South Carolina Appellate Court Rules, Appellant Teresa Annette Davis ("Appellant") submits the following in reply to Respondent's ("the State's") Return to Petition for Rehearing.

LAW/ANALYSIS

I. The Charges Did Not Require Proof by the Same Evidence or the Same Witnesses

The Court held that while the grand jury issued two indictments against Appellant, her arrest for PWID methamphetamine arose out of the police's inventory of the car at the scene of the burglary investigation and, therefore, Appellant's offenses originated from the same chain of events and required the same witnesses.

The State, in its return, cites State v. Caldwell, 378 S.C. 268, 662 S.E.2d 474 (Ct. App. 2008), for the proposition that additional evidence from separate witnesses is not fatal to the joinder of charges. However, the facts in the instant case are distinguishable for Caldwell.

In Caldwell, appellant was indicated in three separate indictments which alleged appellant eavesdropped or peeped on the premises of a homeowners association, invading the privacy of three different young boys. Specifically, the State contended that on the same date, appellant eavesdropped or peeped on three young boys in the men's restroom at a swim meet held on the property. At trial, the three young boys testified on behalf of the State. Additionally, a

school teacher who was at the swim meet, as well as a party of one of the young boys and the arresting officer testified at trial.

Notably distinguishable in the instant case from Caldwell is that the three charges appellant was indicted for were the same charges arising on the same day at the same location. Here, Petitioner's charges were not the same. Rather, Petitioner was charged with PWID methamphetamine and first-degree burglary. Accordingly, the charges were not related in kind or of a similar nature, like appellant's charges in Caldwell.[1]

Moreover, Appellant's charges for burglary and PWID methamphetamine did not require proof by the same evidence or the same witnesses. Notably, Officer Freestate was the only witness to testify regarding where the methamphetamine was found, while other officers testified regarding finding petitioner on the roof of the home. Criminal charges may only be tried together when they (1) arise out of a single chain or circumstance; (2) are provable by the same evidence; (3) are of the same general nature; **and** (4) no real right of the defendant has been prejudiced. See State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996).

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[1] Notably, in Caldwell, appellant did not dispute that the indictments were of a similar nature.

Because the charges are not of the same general nature nor are the charges provable by the same evidence, the Circuit Court abused its discretion in denying Appellant's motion to sever the charges. Accordingly, this Court erred in affirming the Circuit Court's denial of Appellant's motion to sever.

II. The State Failed to Present Evidence That Petitioner Exercised Dominion and Control Over the Small Plaid Bag

The State contends the Court properly affirmed the Circuit Court's denial of Appellant's motion for directed verdict as to the PWID methamphetamine charge. The State avers it presented circumstantial evidence that could induce a reasonable juror to find Appellant guilty of PWID.

However, the State failed to prove that Appellant had possession over the small plaid bag which contained the methamphetamine, a critical element to the crime of PWID. See State v. Mollison, 319 S.C. 41, 45, 459 S.E.2d 88, 91 (Ct. App. 1995). Specifically, Appellant was not in actual possession of the methamphetamine at the time of her arrest. Furthermore, the vehicle in which the small plaid bag containing the methamphetamine was found was registered to Lavina Davis, Appellant's mother. There were no identifying papers or evidence linking the small plaid bag to Appellant. Indeed, the methamphetamine was not found in Appellant's purse which contained her

driver's license; rather, the small plaid bag was located on the driver's seat next to the purse.

Accordingly, because there was no direct or circumstantial evidence tending to show Appellant possessed the methamphetamine, the Court erred in affirming the Circuit Court's denial of Appellant's motion for directed verdict as to the PWID methamphetamine charge.

III. The State Failed to Present Evidence of the Owner's Intent to Return to the Home

The State maintains the Court did not err in affirming the Circuit Court's denial of Appellant's motion for a directed verdict on the burglary charge. Specifically, the State contends it presented sufficient evidence that the homeowner had intent to return to the residence and, therefore, the residence was occupied at the time of the burglary.

The State relies on State v. Evans, 376 S.C. 421, 656 S.E.2d 782 (Ct. App. 2008), where the Court of Appeals held that while occupants were unable to live at their secondary home or spend significant amounts of time at the home due to the wife's medical condition, the home constituted a dwelling because the owners intended to return to the home. The Court noted the family visited the home about once every two weeks or month, the utilities were on in

the home, and the home was ready to be lived in. Id. at 426, 656 S.E.2d at 784.

Importantly, no South Carolina court has addressed this issue with regard to the specific facts in this case, i.e., the owner residing at a nursing facility at the time of the incident. Indeed, the record lacks direct evidence of the owner's intent. While the Court relied on the owner's son's testimony that it was the hope of the family that the owner would return to the residence, there is no direct or circumstantial evidence establishing that the **owner intended** to return to the home. South Carolina case law is clear that it must be the **owner's** intent to return to the home. See State v. Glenn, 297 S.C. 29, 374 S.E.2d 671 (1988) ("[T]he test of whether a building is a dwelling house turns on whether the **occupant** has left with the intention to return.") (emphasis added). The record indicates it was the intent of the occupant's children for the occupant to return to the house. Indeed, the occupant's children testified to the same. (R. p. 80, lines 13-21). However, the State failed to present any evidence of the occupant's intention of returning to the home. Indeed, the occupant never returned to the residence and the house was subsequently sold. (R. p. 102, lines 14-24).

While the son may have been entitled to protect and enforce the owner's right as to the home, there still lacks evidence that the owner herself intended

to return; rather, the only evidence was the family's hope of her return. Without the intent of the owner established, the State failed to establish an essential element of the crime of burglary. State v. Ferebee, 273 S.C. 403, 405, 257 S.E.2d 154, 155 (1979) ("[A] house, although furnished as a dwelling house loses its character as such for the purpose of burglary, if the occupant leaves it without the intention to return.").

Because there is no evidence of the owner's intent to return to the residence, the Court erred in affirming the Circuit Court's denial of Appellant's motion for directed verdict as to the burglary charge.

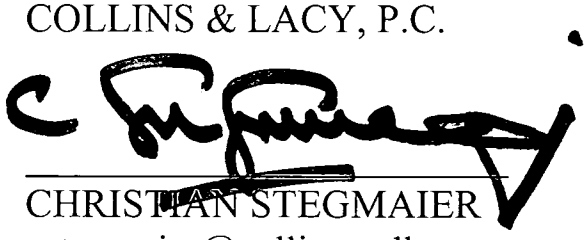
CONCLUSION

For the reasons stated herein, as well as those stated within Appellant's Petition for Rehearing, Appellant respectfully requests the Court reverse her convictions.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

COLLINS & LACY, P.C.



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April 13, 2018

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The State, ... Respondent,

V.

Teresa Davis, ...Appellant.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of Appellant's Reply to the State's Return to Appellant's Petition for Rehearing upon all parties, by placing a copy in the United States mail, postage prepaid, to all counsel of record on April 13, 2018, addressed to the following:

COUNSEL SERVED:
Mary Frances Jowers, Esquire
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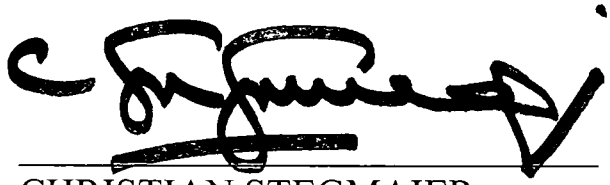
Respectfully submitted,
COLLINS & LACY, P.C.

By: 

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April 13, 2018

VIA HAND DELIVERY
The Honorable Jenny A. Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: ***The State v. Teresa Davis***
Appellate Case No. 2015-000981
C&L File No. 000517-01044

Dear Ms. Kitchings:

Please find enclosed the original and seven (7) copies of Appellant's Reply to Respondent's Return to Appellant's Petition for Rehearing in the above-referenced matter. Please file the original and return a clocked copy with our courier.

By copy of this letter and enclosure, we are serving same upon counsel for Respondent.

Thank you for your time and attention. Should you have any questions, please do not hesitate to contact us.

Respectfully,

Christian Stegmaier

CS/mmm
Enclosures
cc: David Spencer, Esquire
Mary Frances Jowers, Esquire
Robert Dudek, Esquire
Teresa Davis