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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County
Deadra Jefferson, Circuit Court Judge for Post-Conviction Relief
George C. James, Circuit Court Judge for Criminal Trial

ERIC ANCRUM,

PETITIONER,

V.

THE STATE,

RESPONDENT.

Appellate Case No.: 2017-002544

Brief of Petitioner Pursuant to *White v. State*

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STATEMENT OF ISSUES ON APPEAL

Did the trial court err in instructing the jury that actual knowledge of the presence of an item is evidence of the Petitioner ' s intent to control its disposition or use.

STATEMENT OF THE CASE

Petitioner was indicted at the June 2006 term of the Charleston County Grand Jury for trafficking cocaine (more than 400 grams) (2006-GS-10-4066), possession with intent to distribute cocaine within proximity of a school (2006-GS-10-4069), manufacturing cocaine base crack (2006-GS- 1 0- 4070), possession of a firearm during the commission of a violent crime (2006-GS-10-4071), and manufacturing cocaine base crack within proximity of a school (2006-GS-10-4188). He was also indicted at the October 2006 term for trafficking cocaine base (200-400 grams) (2006-GS-10-9674) and PWID - cocaine base within proximity of a school (2006-GS-10-9675). App. 29-75.

John D. Delgado, Esquire and William N. Nettles (hereinafter collectively referred to as "Trial Counsel"), represented the Petitioner. On October 8, 2007, the Petitioner proceeded to trial, after which the jury found him guilty of each charge except possession of a firearm. The Honorable George C. James sentenced him to confinement for fifteen (15) years for manufacturing cocaine base and life without parole (LWOP) for each of the other five offenses. The sentences were to run concurrently. App. 878, l.15—App.879, l. 24.

Due to a clerical error, Trial Counsel did not file a timely Notice of Appeal. App. 81-82. Trial Counsel filed an untimely notice of appeal on behalf of Petitioner. Due to the failure of Trial Counsel to timely file the notice of appeal, the Court of Appeals dismissed Petitioner's direct appeal on October 24, 2007. App. 7-8.

On March 25, 2008, Petitioner filed his first PCR application, case number 2008-CP-10-1670. App. 22-28. For his first PCR Petitioner was represent by J. Stephen Schmutz, Esq. and Anthony P. LaMantia, III, Esq (hereinafter collectively referred to as (First PCR Counsel). App. 885.

On November 18, 2009, an evidentiary hearing was convened on Petitioner's First PCR before the honorable Kristi L. Harrington. App. 885 At the hearing, Petitioner alleged that he had not knowingly and intelligently waived his right to a direct appeal (hereinafter referred to as "*White v. State*[1] claim") and various other ineffective assistance of counsel grounds. The State agreed that Petitioner had not knowingly and intelligently waived right to a direct appeal, but disputed Petitioner's other PCR allegations. App. 966, ll. 9-22.

On November 18, 2009, Judge Harrington issued a form order granting Petitioner's belated direct appeal, but denying all other grounds alleged by Petitioner. App. 10. On the form order Judge Harrington wrote in the following:

> "Petitioners counsel is hereby directed to file a belated appeal under *White v. State* procedure."

App. 10.

On December 14, 2009, Judge Harrington issued a formal order granting Petitioner's belated direct appeal but denying all other allegations. App. 12-19. In the formal order, Judge Harrington wrote the following:

> Mr. Delgado indicated in his November 15, 2007 letter that Petitioner asked him to file a direct appeal and he inadvertently failed to file an appeal with the Office of the Attorney General or the Ninth Circuit Solicitor's Office. The State agreed that the Petitioner is entitled to a review of direct appeal issues as permitted by *White v. State*, 263 S.C. 110, 108 S.E.2d 35 (1974). In *White v. State*, our Supreme Court determined that, where the post-conviction relief judge finds the Petitioner did not freely and voluntarily waive his appellate rights, the Petitioner may petition the South Carolina Supreme Court for review of direct appeal issues. Based upon the agreement of the parties, this Court concludes the Petitioner is entitled to a review of his convictions pursuant to White v. State. In order to secure this review, however, the Petitioner must appeal from this Order...This Court advises the Petitioner that he must file a notice of intent to appeal within thirty (30) days from the receipt of written notice of entry of this Order to secure appropriate appellate review. His

[1] *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974).

> attention is also directed to Rules 203, 206, and 227[2] of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely served and filed.

App. 17-18.

First PCR Counsel filed a timely notice of appeal on Petitioner's behalf. On January 18, 2011, First PCR Counsel filed a Petition for Writ of Certiorari. App. 971-983 However, First PCR Counsel failed to file a separate *White v. State* brief as was required by Rule 243(i)(1), SCACR. App. 988, 992.This Court did not grant First PCR Counsel's Petition for Writ of Certiorari.

On June 12, 2017, Petitioner filed a second PCR application seeking the belated direct

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[2] The 2009 version of West's South Carolina Rules of Court, indicates that there was a Rule 227 of the SCACR. However, it appears that at some point in 2009 the numbering system for the rule was changed. As noted by the Supreme Court in footnote 3 of *Jones v. State*, 382 S.C. 589, 677 S.E.2d 20 (2009), Rule 227(i) SCACR is identical to Rule 243(i). Rule 243(i), SCACR states the following:

"(i) Special Procedures Where a *White v. State* Review Is Sought. Where the petition seeks review under *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), the following procedure shall be followed:

(1) When the post-conviction relief judge has affirmatively found that the right to a direct appeal was not knowingly and intelligently waived, the petition shall contain a question raising this issue along with all other post-conviction relief issues petitioner seeks to have reviewed. At the same time the petition is served, petitioner shall serve and file a brief addressing the direct appeal issues. This brief shall, to the extent possible, comply with the requirements of Rule 208(b). Respondent's return to the petition shall address the post-conviction relief issues, including whether the direct appeal was knowingly and intelligently waived. At the same time the return is due, respondent shall also serve and file a brief addressing the direct appeal issues. Within ten (10) days after service of respondent's brief, petitioner may file a reply brief on the direct appeal issues.

(2) When the post-conviction relief judge has found that the Petitioner is not entitled to a White v. State review, the petition shall raise the question of waiver of the right to a direct appeal along with all other post-conviction relief issues petitioner seeks to have reviewed. The petition shall also contain a "Statement of Issues on Appeal" listing the issues to be raised if a White v. State review is granted; this statement of issues shall comply with the requirements of Rule

appeal that was awarded to him by Judge Harrington in his first PCR, but was abandoned by First PCR Counsel. App. 984-987. By way of a consent order, the circuit court granted Petitioner a belated appeal. App. 989-993.

This appeal follows.

208(b)(1)(B). Briefing of the direct appeal issues will not be allowed unless certiorari is granted on the issue."

ARGUMENT

The Trial Court erred in instructing the jury that "actual knowledge" of the presence of an item "is evidence of the Petitioner ' s intent to control its disposition or use".

Relevant Facts

While executing a search warrant, law enforcement found Petitioner and a co-Petitioner in an apartment with cocaine, cocaine base, and two pistols. The apartment was leased by Contina Anderson. App. 600, ll. 1-2. Petitioner was charged with trafficking cocaine (more than 400 grams), possession with intent to distribute cocaine within proximity of a school, manufacturing cocaine base crack, possession of a firearm during the commission of a violent crime, manufacturing cocaine base crack within proximity of a school, trafficking cocaine base (200-400 grams) and PWID - cocaine base within proximity of a school. App. 29-75.

At trial, Petitioner raised the defense of mere presence. App. 781, l. 18—App. 782, l.5 Although the charge conference was in chambers, Trial Counsel specifically inquired about a mere presence charge. App. 730, ll. 5-12.

The State countered the mere presence argument by arguing that Petitioner was in the apartment for an hour and fifteen minutes there for must of have known that the apartment was being used for drug trafficking. App. 748, l. 12—App. 749, l. 20.

Immediately after the mere presence language was given to the jury the trial court instructed the jury that actual knowledge is evidence of a intent to control. This charge was repeated several times including the following:

1. Actual knowledge of the presence of the crack cocaine is evidence of the Petitioner's intent to control its disposition or use. App. 829 ll. 20-21.

2. Actual knowledge of the presence of the cocaine is evidence of the Petitioner's intent to control its disposition or use. App. 833, ll. 21-23.

3. Actual knowledge of the presence of the cocaine is evidence of the Petitioner's intent to control its disposition or use. App. 833, ll. 21-23.

4. Actual knowledge of the presence of a firearm is evidence of the intent to possess it. App. 838, ll.7-9.

After the initial charge the jury asked for clarification on several terms including possession and dominion. App. 856. The jury found Petitioner guilty of all charges.

Instructing the jury that "actual knowledge" is evidence of intent to control and/or possess negates the mere presence charge which trial counsel sought.

The mere presence of a Petitioner in an area containing drugs, even "coupled with knowledge of the drugs," is insufficient to prove possession. *Goldsmith v. Witkowski*, 981 F.2d 697, 701 (4th Cir. 1992). Evidence showed that Appellant was present in the apartment where the drugs and gun were found. Furthermore, Petitioner's defense was that he did not have dominion and control of the drugs and gun. Therefore, Petitioner was entitled to a mere presence charge. *See State v. James*, 386 S.C. 650, 653, 689 S.E.2d 643, 645 (S.C. App. 2010) (noting a "mere presence" charge is generally available in cases of accomplice liability or where the Petitioner was present where contraband was found).

By instructing the jury that knowledge of the cocaine is evidence of control, the trial court essentially eviscerated the mere presence charge which was requested. *See State v. Cheeks*, 401 S.C. 322, 328, 737 S.E.2d 480, 484 (2013) ("We agree with appellant that [actual knowledge of the presence of drugs is strong evidence of intent to control its disposition or use] both improperly weighs the evidence, and that it largely negates the mere presence charge."). The word "is" in the "actual knowledge" charge, rendered this instruction completely controlling as it demanded that the

jury translate knowledge into possession, and thus proof of intent to control the drugs. The language substitutes evidence of dominion and control with evidence of knowledge, rendering the mere presence charge constitutionally defective. *Cf Goldsmith*, 981 F.2d at 701 ("[T]he due process protections of *Jackson*,[3] in our view would require invalidation of convictions based solely on evidence of mere presence").

Although the charge conference was in chambers, Trial Counsel specifically inquired about a mere presence charge. App. 730, ll. 5-12. However, this request was negated by the "actual knowledge" charge.

The "actual knowledge" is evidence of an intent to control and/or possess is a presumption that negates due process.

The United States Supreme Court has held the following:

> "[T]he trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act. It often is tempting to cast in terms of a 'presumption' a conclusion which a court thinks probable from given facts. . . . [But] [we] think presumptive intent has no place in this case. A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. **A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition.** A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime."

Morissette v. United States, 342 U.S. 246, 274-275, 72 S. Ct. 240, 255 (1952) (emphasis added).

The "actual knowledge" charge given in this case is an unconstitutional presumption. The term "is evidence" permits "the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition." *See Morissette, supra.* Therefore, this

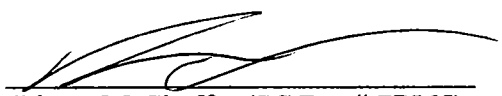
[3] *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979).

charge violated Petitioner's right to a trial by jury, right to be presumed innocent, and his right to due process.

CONCLUSION

Petitioner respectfully requests that this Court reverse his convictions and vacate his sentences.

Respectfully submitted,



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