THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM OCONEE COUNTY
Court of General Sessions

R. Lawton McIntosh, Circuit Court Judge

Opinion No. 5534 (Filed February 7, 2018)
Appellate Case No. 2015-000981

The State, ... Respondent,

V.

Teresa Annette Davis, ... Petitioner.

PETITIONER FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies the Petition for Rehearing was made and ruled upon by the Court of Appeals on April 26, 2018.

STATEMENT OF ISSUES FOR REVIEW

I. Did the Court of Appeals Err in Affirming the Circuit Court's Denial of Petitioner's Motion to Sever Charges?

II. Did the Court of Appeals Err in Affirming the Circuit Court's denial of Petitioner's motion for a directed verdict on her possession with intent to distribute methamphetamine charge and her first degree burglary charge?

STATEMENT OF THE FACTS

On February 10, 2014, Douglas Paul drove by his mother's residence in Seneca, South Carolina. (App. pp. 188-192). Prior to February 10, 2014, Paul's mother moved into a nursing home and the house was placed on the market. (App. pp. 193-196). As Paul drove by the house, he noticed a car in the driveway that was not supposed to be there. (App. p. 192). Paul stopped and returned to the house to investigate. (App. p. 192). Paul looked in the car's windows and went to the front door of the house, which was locked. (App. pp. 192-193). Paul noticed the interior garage door into the house was open. (App. p. 193). Paul called his wife to bring a key to the house so he could gain entry into the house. (App. p. 193). Once he gained entry into the house, Paul noticed a back sliding glass door open and he heard noises from the second floor. (App. p. 194). Paul then called 9-1-1. (App. p. 195). After a sweep of the house was conducted by law enforcement, Paul entered the property and noticed that a number of items inside the residence had been shifted or moved. (App. pp. 198-200).

Paul informed law enforcement that his wife observed an individual who did not "look like he belong[ed]" in the neighborhood. (App. p. 195). Petitioner's brother was located a short distance from the house, detained, and brought back to the scene. (App. pp. 221-222).

Officer William Freestate of the Oconee County Sherriff's Department arranged for the vehicle in the driveway, which was determined to be registered to Petitioner's mother, to be towed from the property. (App. pp. 233-234). Officer Freestate conducted an inventory of the car. During his search of the vehicle, he discovered a black purse and small plaid bag on the driver's seat. (App. pp. 234-241). Petitioner's driver's license, lip gloss, and paperwork were recovered from inside the black purse. (App. p. 240). Inside the small plaid bag, law enforcement found two bags containing a crystal-like substance, which was eventually tested and later confirmed to be methamphetamine.

(App. pp. 241-242; 262).

After the house was searched, the vehicle inventoried and towed, law enforcement observed Petitioner on the roof of the house, clinging to the chimney. (App. pp. 244-245). Officers retrieved a ladder from the garage and assisted Petitioner down from the roof. (App. p. 245). Petitioner was placed in investigative detention. (App. p. 246).

Following Petitioner's arrest, she stated to law enforcement that she was dropping her friend off at the house. (App. p. 246). When asked why she was on the roof of the house, she responded that she was scared. (App. p. 246). When asked who the crystal-like substance belonged to, Petitioner stated that it belonged to her and that her brother did not do methamphetamine. (App. p. 247). Petitioner later recanted her statement that the drugs were hers and instead stated to law enforcement that the drugs were not hers. (App. p. 247).

Law enforcement were unable to recover any fingerprints from inside the house matching Petitioner. (App. p. 266).

Petitioner appealed to the Court of Appeals, arguing the Circuit Court erred in denying Petitioner's motion to sever the charges. Petitioner further argued the Circuit Court erred in denying the motions for directed verdict.

The Court of Appeals affirmed the Circuit Court's ruling on the motion to sever the charges and motions for directed verdict. With regard to the ruling on the motion to sever charges, the Court of Appeals held that while the Grand Jury issued two indictments against Petitioner, her arrest for PWID methamphetamine arose out of the police's inventory of the car at the scene of the burglary investigations; therefore, Petitioner's offenses originated from the same chain of events and require the same witnesses.

With regard to the motion for directed verdict on the methamphetamine charge, the Court of Appeals held that there was evidence—specifically, Petitioner's admission that the drugs were hers; Petitioner's acknowledgement that she drove the car to the home; and the location of Petitioner's purse and smaller plaid bag—in which a jury could reasonably deduce Petitioner's guilt. Finally, with regard to the denial of Petitioner's motion for directed verdict as to the burglary charge, the Court of Appeals held that Paul's testimony that his mother would return to the home if she was able and that he only placed the home on the market because the future was uncertain was evidence manifesting an intent of the mother to return to the home.

STATEMENT OF THE CASE

Petitioner Teresa A. Davis was indicted by a grand jury for first-degree burglary and possession with intent to distribute methamphetamine, second offense. (App. p. 119).

On April 23, 2015, Petitioner's case was called to trial in the circuit court. (App. p. 117). Petitioner was convicted, by a jury, as indicted. (App. pp. 113-116; 339). The court sentenced Petitioner to an aggregate term of eighteen years' imprisonment. (App. pp. 113-116; 344).

Petitioner appealed her conviction to the Court of Appeals. The Court of Appeals affirmed Petitioner's conviction and found the Circuit Court did not err in denying Petitioner's motion to sever her charges and motions for directed verdict. Petitioner timely filed her Petition for Rehearing, which was subsequently denied by the Court of Appeal.

This Petition for Writ of Certiorari follows.

LAW/ANALYSIS

I. The Court of Appeals Erred in Affirming the Circuit Court's Denial of Petitioner's Motion to Sever Her Charges

In the instant case, Petitioner was indicted for first-degree burglary and possession with intent to distribute methamphetamine, second offense. At trial, Petitioner moved to sever her charges on the grounds the charges were not closely related in kind or character. Petitioner further alleged the prejudicial effect of trying the charges together would be substantial to Petitioner. The court denied Petitioner's motion.

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

"The appellate court considers several factors when deciding whether the trial court's consolidation of charges was proper." State v. Rice, 368 S.C. 610, 614, 629 S.E.2d 393, 395 (Ct. App. 2006). Only when separate indictments are of the same general nature, involving connected transactions closely related in kind, place, and character, can a trial judge order the indictments be tried together. See State v. Sullivan, 277 S.C. 35, 44, 282 S.E.2d 838, 843 (1981) (noting where offenses charged in separate indictments are of same general nature, involving connected transactions closely related in kind, place, and character, trial judge has authority to order indictments tried together, absent a showing that defendant's substantive rights would be violated); see also State v. Simmons, 352 S.C. 342, 350, 573 S.E.2d 856, 860 (Ct. App. 2002) (stating joinder of charges proper if the chargers were of the same general nature and sprung from the same series of transactions, were committed by the same offender, and required the same proof). "Offenses are considered to be of the same general nature when they are interconnected." State v. Jones, 325 S.C. 310, 315, 479 S.E.2d

517, 519 (Ct. App. 1996). A motion for severance is addressed to the sound discretion of the trial court. State v. Walker, 366 S.C. 643, 656, 623 S.E.2d 122, 128 (Ct. App. 2005). An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. Id.

The Court of Appeals erred in affirming the Circuit Court's denial of Petitioner's motion to sever her charges. While the incidents leading to the charges occurred close in time, the charges were not of the same general nature or related in kind and character. The charges did not require proof by the same evidence or the same witnesses. The Court's Appeals, in affirming the ruling of the Circuit Court, seemingly ignored that the charges did not require proof by the same evidence or the same witnesses. Rather, Officer William Freestate was the only witness to testify regarding where the methamphetamine was found. Conversely, several other officers, who did not participate in the search of the vehicle where the drugs were found, testified regarding finding Petitioner on the roof of the home. Further, the drugs were found in the vehicle some time before Petitioner was discovered on the roof. Thus, the evidence in the record does not support the notion that Petitioner's charges were of the same general nature and closely related in kind, place, and character. See Sullivan, 277 S.C. at 44 , 282 S.E.2d at 843 (noting where offenses charges in separate indictments are of the same general nature, involving connected transactions closely related in kind, place, and character, trial judge has authority to order indictments tried together, absent a showing that defendant's substantive rights would be violated); see also Simmons, 352 S.C. at 350, 573 S.E.2d at 860 (Ct. App. 2002) (stating joinder of charges proper if the charges were of the same general nature and sprung from the same series of transactions, were committed by the same offended, and required the same proof).

Accordingly, the Court erred in affirming the Circuit Court's denial of Petitioner's motion

to sever her charges. Consequently, this Court should reverse the Court of Appeals and Circle Court's ruling.

II. The Court of Appeals Erred in Affirming the Circuit Court's Denial of Petitioner's Motions for Directed Verdict

"When ruling on a motion for directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). When reviewing a denial of a directed verdict, an appellate court views the evidence and all reasonable inferences in the light most favorable to the State. Id. The appellate courts can only find the case was properly submitted to the jury—and, therefore, the denial of defendant's directed verdict was proper—when there is any direct evidence or substantial circumstantial evidence reasonably tending to provide the guilt of the accused. Id.

The Circuit Court should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty. State v. Hernandez, 382 S.C. 620, 625, 677 S.E.2d 603, 605 (2009). "A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charges." State v. Galimore,396 S.C. 471, 475, 721 S.E.2d 475, 477 (Ct. App. 2012).

A. The Court of Appeals Erred in Finding the State Presented Sufficient Evidence Petitioner Had Control Over the Methamphetamine

At the close of the State's case, Petitioner moved for a directed verdict with regard to the PWID methamphetamine charge, arguing the State failed to prove Petitioner had control over the methamphetamine found in the vehicle since Petitioner was on the roof of the home at the time the drugs were discovered. The Circuit Court denied Petitioner's motion.

In affirming the Circuit Court's ruling, the Court of Appeal, in error, held the State present sufficient evidence in which a jury could reasonably deduce Petitioner's guilt.

Our law clearly provides that a trial court should grant a directed verdict when the evidence

merely raises a suspicion that the accused is guilty. Hernandez, 382 S.C. at 625, 677 S.E.2d at 305. To prove the crime of possession with intent to distribute, the State must establish the defendant possessed the drug, either actually or constructively. State v. Mollison, 319 S.C. 41, 45, 459 S.E.2d 88, 91 (Ct. App. 2005).

"Possession of any amount of controlled substance coupled with sufficient indicia of intent to distribute will support a conviction for possession with intent to distribute." State v. James, 362 S.C. 557, 562, 608 S.E.2d 455, 457 (Ct. App. 2004). Possession is an essential element of the crime of possession with intent to distribute narcotics. Possession may be actual or constructive. Actual possession occurs when the drugs are found to be in the actual physical custody of the person charged with possession, while constructive possession occurs when the person charged with possession has dominion and control over either the drugs or the premises upon which the drugs are found. See Mollison, 319 S.C. at 45, 459 S.E.2d at 91. A defendant's mere presence in or around location where the illegal substance is found is insufficient to prove constructive possession of the illegal substance. Id.

In State v. Heath, our Supreme Court found the evidence presented by the State was insufficient to establish that defendant was in constructive possession of the controlled substance where: (1) the controlled substance was found in car-washing mitt in outside recycling bin near back door of home owned by defendant's mother, (2) there was no direct circumstantial evidence that linked defendant to the controlled substance; and (3) the State presented no evidence that defendant could have exercised dominion and control over area where controlled substance was found. State v. Heath, 370 S.C. 326, 330, 635 S.E.2d 18, 19 (2006).

Contrary to the Circuit Court and Court of Appeal's holdings, the State failed to present direct or circumstantial evidence tending to prove Petitioner either actually or constructively possessed the

methamphetamine found in the vehicle. With regard to actual possession, the State did not present any evidence the methamphetamine was found on Petitioner's person. Therefore, the State failed to prove Petitioner actually possessed the methamphetamine.

Moreover, Officer William Freestate testified the car was registered to Lavina Davis, Petitioner's mother. Officer Freestate further testified that when he searched the vehicle, a purse, containing Petitioner's driver's license, was found on the driver's seat. However, Freestate stated he observed a plaid bag on the driver's seat next to the purse. It was in this small plaid bag that investigators discovered the methamphetamine. The State failed to present any evidence, direct or circumstantial, that would tend to prove Petitioner could have exercised dominion and control over the small plaid bag where the drugs were found. See Heath, supra.

Based on the foregoing, the Circuit Court erred in denying Petitioner's motion for a directed verdict on the PWID methamphetamine charge. Consequently, the Court of Appeals erred in affirming the Circuit Court's denial.

B. The State Failed to Present Evidence that the Home was Occupied at the Time of the Incident

At the close of the State's case, Petitioner moved for a directed verdict on her burglary charge, arguing there was no occupant or habitant of the home against whom the offense could have been committed. Petitioner noted for the court that the house was on the market and the owner of house had been moved into a nursing home at the time of the incident. The Circuit Court denied Petitioner's motion.

While recognizing South Carolina jurisprudence does not speak directly to the facts of the subject case, the Court of Appeals held that the Circuit Court properly denied Petitioner's directed verdict motion with regard to the burglary charge. Specifically, the Court held the State present sufficient evidence to create a jury question as to whether the home's occupant had intention to return

to the home.

In its opinion, the Court of Appeals focused on the owner's son's action as the power of attorney. The Court of Appeals noted that the son testified the owner's belongings remained in the home, the home was placed on the market because of the uncertain future of the owner, but it was the family's hope that the owner would return o the home at some point. The Court of Appeals properly noted that the record lacks direct evidence of the occupant's intent.

"A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and . . . (2) the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both[.]" S.C. Code Ann. § 16-11-311(A)(2) (2015). A dwelling house loses its status as such when the occupants or residents leave without the purpose of returning. "[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." State v. Ferebee, 273 S.C. 403, 405, 257 S.E.2d 154, 155 (1979) (internal citation omitted) (reversing defendant's conviction for burglary where the evidence showed there was no occupant or inhabitant against whom the offense could have been committed). "While authorities agree that the temporary absence of occupants will not prevent a resident from becoming the subject of a burglary it is required that such occupants leave with the purpose of returning in order for a breaking and entering during their absence to constitute burglary." Id. The rationale for requiring an occupant or resident to reside and sleep within the dwelling rests upon notion that burglary is an offense against habitation rather than against property. Id. (emphasis added).

In Ferebee, the Supreme Court found that a vacant apartment unit, abandoned a week prior by former tenants, was not a dwelling house for purposes of the burglary statute. The Court noted that the burglary statute required the apartment have an identifiable occupant sleeping or residing

therein. The Court also noted the statute required that the occupant leave with the purpose of returning in order for the apartment to be considered a dwelling. Conversely, in State v. Glenn, 297 S.C. 29, 374 S.E.2d 671 (1988), the Court determined there was sufficient evidence that occupant did not vacate the home, but left with the intention of returning where the occupant left over $10,000 worth or personal possessions in a mobile home and returned to the mobile home on numerous occasions to gather some possessions.

Here, the State failed to present direct or circumstantial evidence that the homeowner left the residence in issue with the intention of returning. By Paul's own admission, his mother, the homeowner, had been placed in a nursing home and had not lived at the residence for six-months prior to the incident. Paul further admitted the family placed the house on the market while the homeowner was in the nursing home.[1] While the homeowner's possessions remained at the residence, the State failed to prove the residence was more than a mere storage facility for such possessions. Unlike Glenn, the record does not indicate that the homeowner ever returned to the residence to periodically gather some possessions. Based on the foregoing, the State failed to present any evidence tending to prove the homeowner had any intention of returning to the residence.

The Court of Appeals erred in finding that Paul's testimony, particularly that the family hoped the owner would return to the home, is insufficient to establish a factual dispute as to the owner's intent on returning to the home. Notably, there was no direct testimony from the owner that she had intent to return or evidence tending to show she could ever return. See Ferebee, 273 S.C. at 405, 257

[1] Petitioner asks this Court to take judicial notice of the fact that the house was placed on the market and subsequently sold. Petitioner further asks this Court to take judicial notice that the homeowner never resided at the residence once she was placed in the nursing home. See Rule 201(f), SCRE ("Judicial notice may be taken at any stage of the proceeding."); see also Palmetto Homes, Inc. v. Bradley, 357 S.C. 485, 593 S.E.2d 480 (Ct. App. 2003) (finding appellate court may take judicial notice of rules not within the record on appeal).

S.E.2d at 155 ("[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."); Id. ("While authorities agree that the temporary absence of occupants will not prevent a resident from becoming the subject of a burglary it is required that such occupants leave with the purposes of returning in order for a breaking and entering during their absence to constitute burglary.").

Furthermore, unlike State v. Glenn, 1297 S.C. 29, 374 S.E.2d 671 (188), where the Court found sufficient evidence of an intent to return existed when the occupant left $10,000 worth of possession in the structure, such evidence—particularly the amount and value of possessions—is not present in the instant case. The instant case is also distinguishable from State v. Kautz, 39 P.3d 937, 939 (Or. Ct. App. 2002), where the prior owner kept tools and personal belongings at the home and worked at the home at least once a day. In the instant case, there is insufficient evidence that the owner or the son was working in the home to maintain the subject property. Rather, the only evidence was that the son checked on the house and kept on the utilities. This evidence is distinguishable from that in Kautz.

Accordingly, the State failed to present sufficient evidence to create a jury question as to the intent of the owner to return to the home. Accordingly, the Circuit Court erred, and the Court of Appeals erred in affirming, the denial of Petitioner's motion for a directed verdict on the burglary charge.

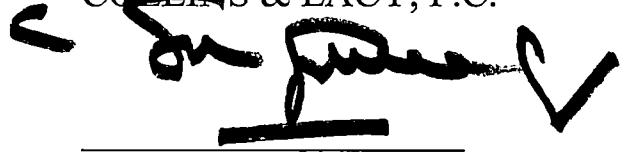
CONCLUSION

For the foregoing reasons, Petitioner's conviction and sentence should be reversed and this case remanded for a new trial.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

COLLINS & LACY, P.C.



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I hereby certify that I served a copy of the Writ of Certiorari upon all parties, by placing a copy in the United States mail, postage prepaid, to all counsel of record on May 29, 2018, addressed to the following:

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