

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh

Appellate Case Number: 2018-001202

Lower Case Number: 2016-CP-07-2267

Dwayne Chisolm,..... Petitioner

v.

State of South Carolina,.....Respondent

PETITION FOR A WRIT OF CERTIORARI

James A. Brown, Jr.
Law Offices of Jim Brown, P.A.
1600 Burnside St, Suite 100
P.O. Box 592
Beaufort, South Carolina 29901
(843) 470-0003
Attorney for Petitioner

Other Counsel of Record:

Christian Aaron Saville
Assistant Attorney General
Office of the Attorney General
PO Box 11549
Columbia, SC 29211-11549
(803) 734-3970
Attorney for Respondent

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QUESTION PRESENTED FOR REVIEW

Did the trial court err by finding trial court's performance met constitutional standards despite trial counsel's failure to object to a jury instruction, defining constructive possession, as a prohibited charge on the facts?

REASONS JUSTIFYING A GRANT OF CERTIORARI

This Court should grant this Petition because the constructive possession jury instruction provided, without objection from trial counsel, erroneously equates control over a premises with possession of an item of contraband. This overly broad definition creates a substantial risk that innocent persons will be convicted of criminal possession merely through possessory interests in property. Finally, a holding consistent with this Petition will cause no prejudice to the State of South Carolina or to the administration of the justice system.

STATEMENT OF THE CASE

As a matter of procedural context, the Petitioner, Dewayne Chisolm, was arrested on or about May 19, 2010 and charged with crimes stemming from the search of his home. App, p. 20, l. 16-25. Specifically, the Petitioner was charged with Trafficking Crack Cocaine, 100-200 grams; Possession with Intent to Distribute Crack Cocaine; Possession of a Weapon During the Commission of a Violent Crime and Possession of a Firearm with an Obliterated Serial Number. App, p. 1-8. Following a jury trial concluding on October 23, 2014, the Petitioner was convicted of all four charges and sentenced to terms of 25 years, 15 years, 5 years and 5 years to be served concurrently. App, p. 79-82.

Following his conviction and the denial of his direct appeal, the Petitioner filed an application for post-conviction relief. App, p. 83-92. The Petitioner then retained undersigned

counsel who filed an amended application for post-conviction relief. App, p. 93-98. At the January 31, 2018 PCR merits hearing, the Petitioner, through counsel, expressly waived all claims asserted in the application except for Claim D which challenged his trial counsel's failure to object to jury instructions as improper charges on the facts. App, p. 111, l. 13- p. 113, l. 19.

The denial of the relief as to the Ground D allegation is the only matter now before this Court. As presented at the merits hearing, the factual basis for the Petitioner's claim rested upon the jury instruction portions of the trial transcript. App, p. 120, l. 3- p. 122, l. 25. Specifically, the Petitioner drew the Court's attention to the jury instructions concerning constructive possession provided by the trial judge and the absence of any objection made by Petitioner's trial counsel.

Outside of this portion of the trial transcript, no witnesses or other facts were presented by either the Petitioner or Respondent. At the conclusion of the hearing, the PCR Court asked the Respondent to draft an order denying the claim for relief. App, p. 142, l. 6-18 & p. 144-145. Also, at the direction of the PCR Court, Petitioner submitted a proposed jury instruction regarding constructive possession which was consistent with his argument. App, p. 142 & p. 146-147.

After the Order of Dismissal was signed, the Petitioner then filed a Motion to Alter or Amend pursuant to Rule 59. App, p. 148-149, p. 153-163, & p. 164-166. Following consideration of the arguments presented in the Rule 59 Motion, the PCR Court then decided to grant the Rule 59 Motion, in part, and rewrite the portion of the Order which characterized the nature of the Petitioner's argument to the PCR Court. App, p. 167-169. However, the PCR Court did not change the ultimate judgment and the Petitioner's application was dismissed.

A Notice of Appeal was filed and served and this Petition follows. App, p. 170-171.

STATEMENT OF THE FACTS

It is undisputed that all four criminal counts involved the element of possession. It is also undisputed that the element of possession at issue in the trial concerned the definition of “constructive possession.” The trial court charged her definition of constructive possession at least three times before the jury began deliberations. App, p. 51- p. 55.

The trial court recharged this instruction twice after deliberations began in response to two notes provided by the jury. App, p. 61, l. 1- page 64, line 9. There was no objection made by Petitioner’s trial counsel to these instructions. App, p. 60, l. 4-8; p. 62, l. 21-25; & p. 63, l. 15- p. 64, l. 9. Specifically, there was no argument presented to the trial court that the court’s jury instruction constituted an improper charge on the facts.

Finally, there was no evidence presented suggesting that the failure to object resulted from a trial strategy.

STANDARD OF REVIEW

The “standard of review in post-conviction relief (PCR) cases depends on the specific issue before” the reviewing court: it will defer to a PCR court's findings of fact and “will uphold them if there is evidence in the record to support them”; but will review “questions of law *de novo*, with no deference to trial courts”. State v Smalls, 810 SE2d 836, at 839 (SC 2018).

ARGUMENT

Trial counsel was ineffective in failing to object to jury instructions, defining constructive possession, as an improper charge on the facts. The PCR court erred by concluding that the trial’s court’s instruction regarding constructive possession was not a charge on the facts and by

finding that trial counsel needed to be clairvoyant to object to the jury charge defining constructive possession. Notwithstanding these rulings, the constructive possession jury instruction at issue constitutes a charge on the facts and had trial counsel objected to the instruction as a violation of Article V, Section 21, there is a reasonable likelihood that the outcome of the proceedings would have been different.

Law Concerning Claims of Ineffective Assistance of Counsel

There are two components for a court to analyze in a claim of ineffective assistance of counsel (IAC). Strickland v. Washington, 466 U.S. 668 (1984). First, the reviewing court must determine if the acts and omissions of counsel fell below an objective standard of performance. Second, the reviewing court must determine if it is reasonably likely that the outcome of the trial would have been different had counsel not performed deficiently.

The South Carolina Supreme Court recognizes that a claim of ineffective assistance of counsel might involve a trial lawyer's failure to object to an infirm jury instruction. In Dawson v State, this Court granted certiorari to consider the denial of post-conviction relief arising from claimed ineffectiveness related to failure to object to an "Allen charge." 572 SE2d 445 (SC 2002)(rehearing denied, 2002). The Dawson Court reversed the lower court finding that trial counsel's failure to object to the trial court's jury instruction rendered the performance at trial deficient and that there was a reasonable likelihood this deficiency effected the outcome. Id., at 448.

It should be noted that the Dawson Court found an unduly coercive instruction to be prejudicial without reference to any of the underlying evidence submitted at trial. Id. In fact, the Dawson Court found prejudice even though the jury's deadlock was 11-1 in favor of guilt. The

opinion in Dawson does not even reference the crimes for which Dawson was convicted. Id., at 447-448.

Thus, South Carolina appellate law recognizes a post-conviction claim may arise from trial counsel's deficiency in failing to object to an erroneous jury instruction.

Prohibition Against Judicial Charges on the Facts

In South Carolina, the state constitution prohibits a trial judge from instructing a jury regarding the facts of the case¹. Specifically, SC Constitution Article V, Section 21 states: "Judges shall not charge juries in respect to matters of fact, but shall declare the law." This constitutional prohibition has been in place for more than 100 years. See State v Dill, 26 SE 567 (SC 1897)(Citing the same provision then found at SC Constitution Article V, Section 26).

In State v Stukes, the South Carolina Supreme Court addressed for the second time in 10 years a challenge to a "corroboration" jury instruction then frequently provided in criminal sexual conduct cases. State v Stukes, 787 SE2d 480 (SC 2016). Specifically, the jury instruction at issue in Stukes was taken directly from statutory language found at SC Code Section 16-3-657 which indicated that "the testimony of a victim...need not be corroborated...". Stukes, at 482. Despite the fact that the instruction correctly stated the law and the fact that the South Carolina Supreme Court affirmed use of this instruction in 2006, the Stukes Court found the instruction was improper because it could be considered as placing greater credibility in the testimony of the alleged victim than others.

¹A similar prohibition does not exist in the federal system where trial judges are allowed to comment on the facts during jury instructions as long as the comments do not serve to direct a verdict as to any element of the criminal charge. See Quercia v US, 289 US 466 (1933) and US v Gaudin, 515 US 506 (1995).

The Stukes Court specifically noted that the jury returned with questions related to this instruction. Stukes, at 482. The Court also noted that the jury returned a verdict almost immediately after the court recharged the jury following its questions. Stukes, at 482 & 483. The Stukes Court's restatement of the Article V, Section 21 prohibition is that "it is not within the province of the court to express an opinion to the jury on its view of the facts." Stukes, at 483.

Applying these principles to the case at bar, the jury instruction provided by the trial court constituted a prohibited charge on the facts such that trial counsel should have objected to the trial court's instructions. During the trial, the trial judge charged the jury as follows:

"Constructive possession is when a person has dominion or control or the right to exercise dominion or control over either the object or the premises on which the object is located."

"...possession may be inferred from the circumstances, and may be imputed to anyone who has the power and intent to control the disposition and use of the object. In other words, possession of an object or the premises gives rise to an inference that the person charged has both the power and intent to control the use and disposition of the object."

"Proof of possession requires more than proof of mere presence at the place where the controlled substance is found. Ladies and gentlemen, the State must prove the defendant had both the power, that is actual or constructive control, and the intent to control its disposition or use."

App, p. 50, l. 25- p. 51, l. 24.

"Constructive possession means that someone has the dominion and control or the right to exercise dominion or control over either the crack cocaine itself or the property on which the crack cocaine was found."

"A defendant must have knowledge, and possession may be inferred when a substance is found on the property under the defendant's control."

App, p. 52, l. 19- p. 53, l. 2

“...constructive possession means that a person has the dominion and control or the right to exercise dominion or control over either the object itself or the property on which the object is found”

“A defendant’s knowledge and possession may be inferred when a handgun is found on the property under a defendant’s control.”

App, p. 55, l. 22- p. 56, l. 5

App, p. 60, l. 24 (Jury out to deliberate at 12:52)

“Please describe again constructed (sic) possession.”

App, p. 61, l. 6-7 (Jury in with note at 1:46)

“Constructive possession means that the defendant had dominion and control, or the right to exercise dominion or control, over either the drugs themselves or the property on which the drugs were found.”

“The defendant’s knowledge and possession may be inferred when a substance is found on the property under the defendant’s control.”

App, p. 62, l. 1-9

App, p. 62, l. 19 (Jury out to deliberate at 1:51)

“Jurors sent a second note out, to which the court wrote her response”

“Defendant objected to sending just the constructive possession portion of

the charge back. So, the Court is sending the entire jury charge back.”

App, p. 63, l. 15 - p. 64, l. 2

App, p. 65, l. 2 (Jurors return with verdict at 2:58)

Despite the court’s repeated statements equating dominion and control over the premises with dominion and control over the gun and drugs, trial counsel never once raised an objection to these instructions.

The trial court’s statements equalizing the fact the Petitioner exercised dominion and control over the home with proof that the Petitioner exercised dominion and control over the drugs and gun are improper because the statement attributes evidentiary significance as to Petitioner’s dominion and control over the home. This type of weighing invades the province of the jury and is prohibited by the state constitution. In fact, this statement specifically directs the jury as to the factual significance of one piece of evidence, dominion and control of the home, to the inquiry over dominion and control of the objects found in the home which was the sole issue at trial.

This type of instruction is different than an instruction which merely discusses a legal principle. Here, the trial court stated the relationship between dominion control over the home and the objects at issue in various counts. While the trial court at times referred to this equivocation as an inference, the trial court also expressly stated that “constructive possession *means*”... dominion and control over “the property on which the object (or crack cocaine or drugs) were found.” App, p. 52, l. 19; p. 55, l. 22; & p. 62, l. 1.

This is not an inference allowing the jury to disregard this statement of evidentiary

significance. Instead, this is a pointed statement of law repeatedly made to the jury. If the jurors properly followed the trial court's instruction that she was the absolute final word as to the law, then a reasonable juror could conclude that the phrase "means" is one of absolute equivocation between constructive possession of the item in question and dominion and control over the premises on which the item was located.

Deficient Performance

Trial counsel should have objected to these comments but did not do so. There is no strategic advantage obtained through this failure. The State presented no evidence suggesting any strategy as to the failure to object.

The PCR court found that irrespective of the propriety of the jury instruction, trial counsel was not deficient for failing to object. In fact, the PCR court found ruling otherwise would have required trial counsel to be held to a "standard of clairvoyance" as to future court rulings in order to have raised this objection. App, p. 162. This reasoning is wrong because the prohibition against trial judges commenting on the facts has been in place for well over 100 years. See State v Dill, 26 SE 567 (SC 1897)(Citing the same provision then found at SC Constitution Article V, Section 26).

The PCR court noted that the South Carolina Supreme Court's opinion in State v Adams specifically countenanced the use of the contested instruction. App, p. 159-160 & State v. Adams, 352 SE2d 483 (SC 1987). However, Adams does not control the issue before this Court because the actual holding of the Adams case only concerned an objection to the burden shifting nature of a different jury instruction. Adams, at 486. The Adams Court, while striking down the instruction at issue there and suggesting future use of the language of which the Petitioner now

complains, did not address any objections as to the jury instruction constituting an improper charge on the facts.

Petitioner's suggested treatment of the Adams holding is akin to the state Supreme Court's treatment of the statutory language in Stukes. In Stukes, the Court found that the even though the statutory language remained a correct statement of law, it was error to instruct the jury as to this statement. Likewise, in the case at bar, the holding in Adams might remain a correct statement of law (that the constructive possession jury instruction does not shift the burden of proof) *and* the statement of law constitute an improper comment on the facts if charged to the jury as an instruction.

Thus, trial counsel had no objective reason for failing to object to the contested jury charge.

Prejudice/Reasonable Likelihood of a Different Outcome

Concerning the prejudice prong, it must be noted that the jury was instructed regarding constructive possession three times during the charge provided before deliberations began. The jury's subsequent focus on the issue of constructive possession appears in the various notes sent to the trial judge during deliberations. At this point, the jury was twice again provided the challenged jury instruction from the trial judge, including a written copy, just minutes before returning a verdict convicting the Petitioner of all counts as charged. App, p. 63, l. 15- p. 65, l. 5 & Stukes, *infra*.

Finally, the trial court compounded the prejudice caused by the erroneous jury charge drawing attention in a note to the jury that the "Defendant objected to sending just the constructive possession portion of the charge back. So the Court is sending the entire jury charge

back.” App, p. 63, l. 15- p. 64, l. 2. This comment was made during the fifth and final time the trial court provided the contested jury instruction. And similar to Stukes, just minutes after receiving this final instruction in the context of the Court’s comments, the jury in the case at bar rendered a verdict of guilt as to all of the Petitioner’s indictments. App, p. 63, l. 15- p. 65, l. 5.

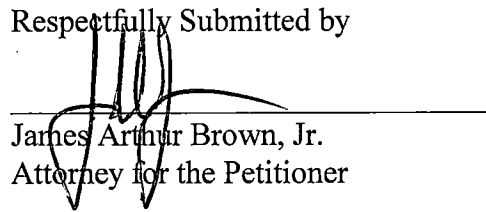
This comment ignores the very policy behind the Article V, Section 21 prohibition: “the ease with which a judge may, even unintentionally, influence a jury.” State v. Campbell, 374 SE2d 668, at 669 (SC 1988)(internal citations omitted). The following discussion in Campbell is equally applicable here: “[i]t has long been recognized that even a slight remark, apparently innocent in its language, may, when uttered by the court, have a decided weight in shaping the opinion of the jury. Vested as the trial judge is, with superior authority, disinterested, and possessing experience not available to the ordinary layman, jurors, as a rule, are anxious to catch his view, upon which to found their conclusions.” Campbell, at 669. The quick verdict against the Petitioner immediately following the trial court’s response to the jury notes suggests, like Campbell, that the jury caught the “view” of the trial court in the case at bar.

Thus, it is reasonably likely that the outcome of the trial would have been different had a sustained objection been made. If trial counsel would have objected and the judge overruled this objection, then it is reasonably likely that the appellate courts would have reversed the convictions. This demonstrates the prejudice resulting from the ineffective lawyering.

CONCLUSION

For the reasons stated above, this Court should grant this Petition, vacate the Petitioner's convictions and sentences, and remand this matter for a new trial.

Respectfully Submitted by



James Arthur Brown, Jr.
Attorney for the Petitioner

October 10, 2018
Beaufort, SC

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

R. Lawton McIntosh

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S.C. SUPREME COURT

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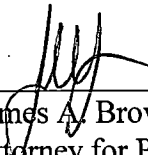
Dwayne Chisolm,.....Petitioner

v.

State of South Carolina,.....Respondent

PROOF OF SERVICE

Counsel for Dwayne Chisolm hereby certifies that he has prepared and served a Petition for Writ of Certiorari and the Appendix on this 10th day of October, 2018, upon the State, by depositing a copy, postage pre-paid, in the United States Mail, addressed to Attorney for Respondent, Christian Saville, Office of the Attorney General, PO Box 11549, Columbia, SC 29211-11549, (803) 734-3970.



James A. Brown, Jr.
Attorney for Petitioner

October 10, 2018

Law Offices of Jim Brown, PA
1600 Burnside St., Suite 100
P.O. Box 592
Beaufort, South Carolina 29901
(843) 470-0003

Law Offices of Jim Brown, P.A.

1600 Burnside Street, Suite 100 • P.O. Box 592

Beaufort, SC 29901-0592

Phone: (843) 470-0003 Fax: (843) 470-0004

jimbrownlaw@hargray.com

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October 10, 2018

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Dwayne Chisolm v. State of South Carolina - 2018-001202

Mr. Shearouse:

Please find enclosed for filing in the above referenced matter the following: an original and six (6) copies of the Petition for Writ of Certiorari and two (2) copies of the Appendix. One copy of the Appendix is unbound. Also included is the Proof of Service for the same. Please contact me if you have any questions or concerns.

Sincerely,


Jim Brown

w/ enclosures as indicated

cc: Christian Saville, Office of the Attorney General, w/ one copy of each
Dwayne Chisolm, w/ one copy of each