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. 2018-000975

The State, ... Respondent,

V.

Teresa Annette Davis, ... Petitioner.

PETITIONER'S REPLY TO STATE'S RETURN TO PETITION FOR WRIT OF CERTIORARI

COLLINS & LACY, P.C.
Christian Stegmaier
Kelsey J. Brudvig
Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660 (voice)
(803) 771-4484 (facsimile)

and

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ROBERT M. DUDEK
Chief Appellate Defender
South Carolina Commission on
Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589
(803) 734-1343
Attorneys for Petitioner

Other Counsel of Record:

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General
S.C. Bar No. 68571

MARY FRANCES JOWERS
Assistant Deputy Attorney General
S.C. Bar No. 68413

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3996

CHRISTINA T. ADAMS
Solicitor, Tenth Judicial Circuit

Post Office Box 8002
Anderson, SC 29622
(843) 260-4046
Attorneys for Respondent

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Attorneys for Respondent

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LAW/ANALYSIS

I. Petitioner's Charges Did Not Require Proof by the Same Evidence or the Same Witnesses

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 investigation and, therefore, Petitioner'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]

The State also relies on State v. Rice, 368 S.C. 610, 629 S.E.2d 393 (Ct. App. 2006), for the proposition that the methamphetamine in the vehicle was necessary for a full presentation of the case without fragmentation. However, the reasoning for the presentation of the drug evidence in Rice is distinguishable for the instant case.

In Rice, Rice was indicted for murder and trafficking in cocaine. In response to Rice's motion to sever the charges, the State contended that the "drug transaction was the root of the murder itself." In other words, the State

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

maintained that the history of the drug transactions with the decedent was part of the motive of the murder.

However, in the case *sub judice*, the State has failed to present any evidence—and does not argue—that the burglary and PWID were interconnected. In other words, unlike in Rice, there is no connectivity of the two charges to show motive, intent, or otherwise.

Moreover, Petitioner'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).

Because the charges are not of the same general nature nor are the charges provable by the same evidence, the Court of Appeals erred in affirming the Circuit Court's denial of Petitioner's motion to sever the charges.

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

The State contends the Court of Appeals properly affirmed the Circuit Court's denial of Petitioner'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 Petitioner guilty of PWID.

However, the State failed to prove that Petitioner 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, Petitioner 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, Petitioner's mother. There were no identifying papers or evidence linking the small plaid bag to Petitioner. Indeed, the methamphetamine was not found in Petitioner's purse which contained her driver's license; rather, the small plaid bag was located on the driver's seat next to the purse, which out any documents or identification indicating the small plaid bag belonged to Petitioner.

Accordingly, because there was no direct or circumstantial evidence tending to show Petitioner either actually or constructively possessed the methamphetamine, the Court of Appeals erred in affirming the Circuit Court's denial of Petitioner'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 Circuit Court did not err in denying Petitioner'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 Evans 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 of Appeals cited to testimony of the owner's son, 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. (App. 191). 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. (App. 212).

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 Circuit Court erred in denying Petitioner's motion for directed verdict as to the burglary charge.

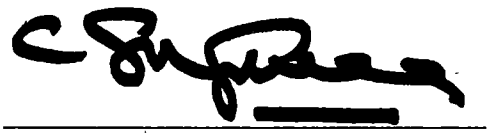
CONCLUSION

For the reasons stated herein, as well as those stated within the Petition for Writ of Certiorari, Petitioner respectfully requests the Court reverse her convictions.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

COLLINS & LACY, P.C.



CHRISTIAN STEGMAIER
cstegmaier@collinsandlacy.com
KELSEY J. BRUDVIG
kbrudvig@collinsandlacy.com
Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660 (voice)
(803) 771-4484 (facsimile)

ROBERT M. DUDEK
Chief Appellate Defender
South Carolina Commission
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PROOF OF SERVICE

I hereby certify that I served a copy of the Petitioner's Reply to Respondent's Return to Petitioner's Petition for Writ of Certiorari upon all parties, by placing a copy in the United States mail, postage prepaid, to all counsel of record on June 25, 2018, addressed to the following:

COUNSEL SERVED:
David Spencer, Esquire
Mary Frances Jowers, Esquire
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

Respectfully submitted,

COLLINS & LACY, P.C.

By: _____

CHRISTIAN STEGMAIER
cstegmaier@collinsandlacy.com
1330 Lady Street, Sixth Floor (29201)
Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660 (voice)
(803) 771-4484 (facsimile)

ROBERT M. DUDEK
Chief Appellate Defender
South Carolina Commission
on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589
(803) 734-1343

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COLLINS & LACY, P.C.

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