

6

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of General Sessions

William H. Seals, Circuit Court Judge

Appellate Case No. 2016-001954
Trial Court Case No. 2016-GS-21-00415

RECEIVED

FEB 28 2018

SC Court of Appeals

The State of South Carolina.....Respondent,

v.

MYRON A. CANNON,

.....Appellant.

FINAL BRIEF OF APPELLANT

Elizabeth A. Franklin-Best
Blume Franklin-Best & Young, LLC
900 Elmwood Avenue, Suite 200
Columbia, South Carolina 29201
(803) 765-1044
betsy@blumelaw.com

Attorney for Appellant, Myron Cannon.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

RELEVANT FACTS 1

ARGUMENTS 5

 I. The circuit court judge erred when he denied Cannon's motion for a directed verdict because the State failed to adduce substantial circumstantial evidence to prove that Cannon was guilty of trafficking in cocaine base and possession with intent to distribute cocaine. 5

 II. The circuit court judge erred by allowing Officer Nida to testify to the street value of the drugs that were found in the car Cannon was driving because that testimony was irrelevant and was unduly prejudicial to Cannon pursuant to Rule 403. 6

CONCLUSION 8

TABLE OF AUTHORITIES

FEDERAL CASES

United States v. Morin, 627 F.3d 985 (5th Cir. 2010) 6

STATE CASES

State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004) 5

State v. Halyard, 274 S.C. 397, 400 S.E.2d 841 (1980) 5

State v. Heath, 370 S.C. 326, 635 S.E.2d 18 (2006) 5

State v. Huckabee, 419 S.C. 414, 798 S.E.2d 584 (Ct. App. 2017) 7

State v. Jackson, 395 S.C. 250, 717 S.E.2d 609 (Ct. App. 2011) 5

State v. Lee, 191 Ariz. 542, 959 P.2d. 799 (1998) (*en banc*) 7

State v. Stanley, 365 S.C. 24, 615 S.E.2d 455 (Ct. App. 2005) 5

OTHER

South Carolina Rules of Evidence, Rule 401 6

South Carolina Rules of Evidence, Rule 403 3, 6,7

STATEMENT OF THE CASE

Myron A. Cannon was tried for trafficking in cocaine base, possession with intent to distribute cocaine, failure to stop for a blue light, and resisting arrest in Florence County before the Honorable William H. Seals and a jury. Appellant was represented by Grant B. Smaldon. The State was represented by John C. Jepertinger. He was convicted on all counts and was sentenced to 25 years' incarceration. This appeal timely follows.

RELEVANT FACTS

On September 12, 2015, Cannon was drinking and driving a car that he had rented. Scared of being arrested for Driving Under the Influence, Cannon did not stop his car when signaled to do so by law enforcement. He wrecked the car in a bean field and left the scene. The charges against him pertain to the contents of the car-- crack cocaine and cocaine. Although he did not testify, Cannon's defense was that he lacked knowledge that the drugs were in the car.

After the jury was sworn, the trial court conducted a suppression hearing based on law enforcement's recovery of the drugs from Cannon's car. The State called Officer Brooks Urqhart to testify. He testified that as he came upon the stopped car, he saw the driver's side door was open. He testified that he saw a bag of drugs in the driver's seat and more drugs on the floorboard near one of the pedals. He did not touch anything, and brought the suspected drugs to the attention of Officer Bazen. ROA. 20-21.

Corporal Brazen testified. He stated that he observed Corporal Urqhart standing next to an abandoned Dodge Charger in the bean field. ROA 22. He also testified that he saw a clear plastic bag on the edge of the driver's seat, and also a clear plastic bag on the

floorboard near the brake pedal. He retrieved them, and placed them into evidence. ROA 23.

The State also called Wayne Anthony Drummond. ROA. 24. Drummond is no longer employed with the Florence County Sheriff's Office. ROA 25-26. He testified that he intended to pull the white Dodge Charger over for speeding, but that the car sped up instead of stopping. ROA 26. He testified that he recognized Cannon as the person who fled from the car. Drummond was the first person at the scene, and he testified that he stopped the white car by ramming his patrol car into it. ROA 27.

Without hearing argument, the judge denied Cannon's motion to suppress the drugs. ROA 29.

Before the jury, law enforcement again testified to the events of that day. Officer Bazen testified that law enforcement took various objects into its possession from the wrecked car, including a black and silver scale, an AT&T flip phone, a Verizon LG cell phone, two thumb drives, and a Samsung cell phone. Law enforcement did not conduct any forensic testing on the items. ROA 70, ll. 6-8; 20. On cross-examination, Officer Bazen admitted that he did not find any drugs or paraphernalia on Cannon, nor did he see him run from the car. ROA 72-73. Bazen also confirmed that law enforcement did not conduct any testing for fingerprints, or touch DNA. ROA 74, ll. 11-16. Also, no video was taken. ROA 75, ll. 20-21. The State did not present any evidence as to who the phones belonged to, or what was contained on the thumb drives. Law enforcement never investigated who the car was rented to even though they knew it was not Cannon's car.

The State called Detective Mitchell Hansen to testify. ROA 79. He is the forensic drug chemist for the Florence County Sheriff's Department. ROA 79. Hansen testified that the powder substance he weighed was 6.92 gram. ROA 83, ll. 3-5. The crack cocaine weighed 38.19 grams. ROA 83, l. 15. Over objection, the State introduced the cocaine and crack cocaine into evidence. Defense counsel did not object to the introduction of the SLED report. ROA 84, ll. 4-13.

The State also called Sergeant Joe Nida to testify. ROA 86. He works for the Florence Police Department and did not have any connection with this case. ROA 87. The Solicitor sought to qualify Nida as an expert "in the field of retail value of cocaine and crack cocaine in the general area." ROA 88, l. 23- 87, l. 1. Defense counsel objected on the basis of relevance and pursuant to Rule 403. ROA 89, ll.3-4. The judge denied the motion:

THE COURT: All right, I'm going to overrule it and find the information needed is beyond that of an ordinary jury.

He does have the requisite knowledge and skill. His testimony is reliable.

I grant your motion.

ROA 89, ll. 5-10.

Nida then testified that a gram of crack cocaine is worth \$100. ROA 89, ll. 17-18. He extrapolated that the value of the cocaine allegedly found in Cannon's possession was worth \$4,511. ROA 90, l. 18. After Nida's testimony, the State rested its case.

Defense counsel motioned for a directed verdict:

MR. SMALDON: Yes, Your Honor. At this time I would make a motion for a directed verdict as to all charges. Alternately, and more specifically, on the trafficking charge and possession with intent to distribute charge.

Your Honor, I make those motions because there is no evidence from the State that was presented-- they have presented no evidence that Mr. Cannon had dominion and control-- dominion or control over the drugs.

The only evidence that has been presented by them was that he was merely present at the scene with some drugs.

ROA 94, ll. 9-18.

The trial court denied the motion. ROA 94, ll. 23-24. Defense counsel renewed the objection after Cannon was advised of his right to testify and the defense rested its case.

ROA 103, ll. 12-16.

During its closing argument, the State argued that the value of the drugs found in the car militates against Cannon's defense that the drugs may have been accidentally left there by someone else:

Folks, we're not talking about a ten or twenty that falls out of a pocket. Forty-five Hundred Dollars-- I don't know where you guys are from but Forty-five Hundred Dollars is a lot of money to me, and I just don't believe that anyone else would leave Forty-five Hundred Dollars in the car.

You can say, well, this is crack and cocaine, but what it really is in State's exhibit 1 is money. This represents money.

The bottom line is that why people traffick (sic) drugs is for filthy lucre, for profit, and I just don't believe that someone would leave it in this vehicle.

ROA 104, l. 24- 103, l. 10.

Cannon was then convicted and sentenced to 25 years in prison.

ARGUMENTS

I. The circuit court judge erred when he denied Cannon's motion for a directed verdict because the State failed to adduce substantial circumstantial evidence to prove that Cannon was guilty of trafficking in cocaine base and possession with intent to distribute cocaine.

The trial court judge erred by not granting Cannon's motion for a directed verdict because "there [was] a failure of competent evidence tending to prove the charge." Rule 19(a), SCRCrimP. A trial court should grant a directed verdict motion when the evidence presented merely raises a suspicion of guilt. *State v. Cherry*, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004). As this Court has noted in other cases, "possession requires more than mere presence." *State v. Jackson*, 395 S.C. 250, 255, 717 S.E.2d 609, 611 (Ct. App. 2011); *State v. Stanley*, 365 S.C. 24, 43, 615 S.E.2d 455, 465 (Ct. App. 2005). According to the South Carolina Supreme Court, the "State must show a defendant had dominion and control, or the right to exercise dominion and control over the [illegal substance]." *State v. Heath*, 370 S.C. 326, 329, 635 S.E.2d 18, 19 (2006) (quoting *State v. Halyard*, 274 S.C. 397, 400, 264 S.E.2d 841, 842 (1980)).

In this case, the State failed to prove that Cannon had constructive possession of the drugs. Law enforcement knew that the car was a rental, but they never sought to find out who had previously rented it. There were also a number of other items in the car they never investigated and which may have shown other items belonging to someone else in the car. Additionally, law enforcement never attempted to obtain fingerprints or touch DNA from the drugs found in the car. In short, there is a failure of proof to connect Cannon to the drugs other than they were present in the car when he left the scene, and

were visually apparent to law enforcement after the car had been wrecked in a bean field. Discovered after a car wreck, it is completely feasible that the drugs were dislodged upon impact. The State failed to show that Cannon had knowledge of the drugs found in his rental car, and the trial court erred by denying Cannon's directed verdict motion. Respectfully, Cannon asks this Court to reverse his convictions and enter a judgment of acquittal.

II. The circuit court judge erred by allowing Officer Nida to testify to the street value of the drugs that were found in the car Cannon was driving because that testimony was irrelevant and was unduly prejudicial to Cannon pursuant to Rule 403.

The purported street-value of the drugs found in Cannon's rental car was improperly admitted into evidence. The circuit court judge erred by allowing the testimony. First, the testimony was irrelevant because it lacked any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. SCRE, Rule 401. Whether the drugs were worth \$4500 or \$45 does not make it any or less likely that Cannon knowingly had the drugs in his rental car. Instead, the evidence had the effect of interjecting improper character evidence into this trial by suggesting that the monetary value of these drugs shows that Cannon is a big-time drug dealer. Its admission, then, was unduly prejudicial under SCRE, Rule 403.

This evidence is dangerously similar to drug courier profiling evidence because the purpose of the evidence was to argue that no one would "accidentally" leave such a large amount of money in a car. But this kind of evidence has been roundly criticized and is largely inadmissible. See *United States v. Morin*, 627 F.3d 985 (5th Cir. 2010) (Drug

courier profiling testimony is generally not admissible as substantive evidence of guilt because its potential for including innocent citizens as profiled drug couriers). And see *State v. Lee*, 191 Ariz. 542, 959 P.2d. 799 (1998) (*en banc*) (noting a significant majority of jurisdictions have condemned the use of drug courier profile evidence as substantive proof of guilt, and reversing conviction because the State used drug courier profiling evidence to show that defendant had knowledge that drugs were in suitcase).

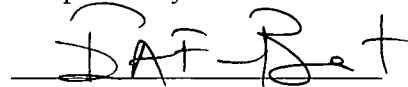
In *State v. Huckabee*, 419 S.C. 414, 798 S.E.2d 584 (Ct. App. 2017), this Court reversed appellant's conviction because the State improperly elicited criminal profiling testimony that was excludable under Rule 403, SCRE because it suggested appellant's guilt on an improper basis. The same is true here. By interjecting a financial element into this case, when the street-value of the drugs is not an element of the crime, nor was it probative of any issue in the case, the jury was left to speculate that Cannon was a big-time drug dealer. And the Solicitor's closing argument capitalized on this improper inference during his closing argument when he stated the only reason people traffic in drugs is for "filthy lucre, for profit" and then argued that was a reason to discount Cannon's defense. Since the monetary value of the drugs was not an element, nor probative of any issue, it is clear that the State offered this evidence, by way of his "expert" status, in order to prejudice Cannon. This Court should not sanction this kinds of arguments in a case where the burden is on the State to prove that Cannon had actual knowledge of the drugs in the car. This error is far from harmless. Respectfully, this Court should reverse Cannon's convictions, and remand for a new trial.

Under the circumstances of this case, where Cannon's defense was that he did not have knowledge of the drugs in his rental car, the admission of this evidence was not harmless. Respectfully, Cannon ask this Court to reverse his convictions.

CONCLUSION

Respectfully, Cannon asks this Court to reverse his convictions and enter a judgment of acquittal with respect to Argument I, and reverse his convictions and remand for a new trial with respect to Argument II.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "EAF-Best", written over a horizontal line.

Elizabeth A. Franklin-Best
Blume Franklin-Best & Young, LLC
900 Elmwood Avenue, Suite 200
Columbia, South Carolina 29201
(803) 765-1044
betsy@blumelaw.com

February 28, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APPEAL FROM FLORENCE COUNTY
Court of General Sessions

FEB 28 2018

SC Court of Appeals

William H. Seals, Circuit Court Judge

The State of South Carolina.....Respondent,

v.

Myron Cannon.....Appellant.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b),
SCACR.


Elizabeth Franklin-Best
Blume Franklin-Best & Young, LLC
900 Elmwood Avenue, Suite 200
Columbia, South Carolina 29201
(803) 765-1044
betsy@blumelaw.com

Attorney for Appellant, Myron Cannon.

February 28, 2018.