STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

C. Victor Pyle, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANDREW DAVION BURNSIDE,

APPELLANT

APPELLATE CASE NO. 2012-212039

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

Whether the trial court erred in refusing to grant a directed verdict to the drug and weapon charges against appellant when the evidence was insufficient to show that he had dominion and control over the drugs and the weapon?

STATEMENT OF THE CASE

Appellant was convicted of possession of cocaine with intent to distribute, possession of a controlled substance with intent to distribute, distribution of crack cocaine, trafficking in crack cocaine, and displaying a handgun after a jury trial held before the Honorable C. Victor Pyle on May 15, 2012. Active sentences totaling twenty-five (25) years were imposed. Scott Robinson, Esquire, was trial counsel. Lisa Bentley, Esquire, was the assistant solicitor.

This appeal follows.

ARGUMENT

The trial court erred in refusing to grant a directed verdict to the drug and weapon charges against appellant because the evidence was insufficient to show that he had dominion and control over the drugs and the weapon.

Deputy Walters with the Greenville County Sheriff's Office testified that they received a crime stopper's complaint about a trailer park on 120 Old Bleachtry Road. They started an investigation around November 10, 2010. (R. 12, line 9 – R. 13, line 15). Lot #7 in the trailer park was subject to their investigation because they noticed a lot of traffic going in and out. They would arrest people for traffic violations after they left the trailer and search them to find drugs. They would then use these people as informants. (R. 14, line 15 – R. 15, line 23). Deputy Walters sent an informant to Lot 7 on November 10 and as a result of his activity, they obtained a search warrant and executed it on November 17. (R. 15, line 24 – R. 18, line 1).

On cross-examination, Deputy Walters said neither appellant, nor the co-defendant, were charged with distributing crack to the informant. (R. 23, lines 5 – 17). The informant never said he made a purchase from the co-defendant or appellant. (R. 24, lines 4 – 8). He never identified appellant as the one he sold to. (R. 27, line 24 – R. 28, line 2).

Deputy Swift testified that he actually helped execute the search warrant. The door to the mobile home was braced by a two-by-four and it took them a while to get inside. (R. 33, line 23 – R. 34, line 7). Once inside, he found the co-defendant, Shumate, inside the bathroom standing over the toilet that had just been flushed. (R. 36, lines 7 – 11). Appellant was found in a bedroom at the end of the hall. (R. 49, lines 4 – 6).

On cross-examination by the co-defendant, Deputy Swift said when he searched him, he found no drugs and no money. (R. 57, lines 6 – 12). On cross-examination by appellant, Swift said

he found no drugs around or near appellant. (R. 59, lines 4 – 6). Some digital scales were found in a closet, but this was not near appellant or the co-defendant. (R. 60, lines 19 – 24).

Master Deputy Brown testified as to his participation in the search. He said they found appellant in a back bedroom partially under the bed. (R. 76, lines 15 – 24). He said they found about eighteen (18) grams of crack cocaine, three (3) grams of powder cocaine, and various prescription type pills. (R. 77, line 14 – R. 78, line 1). He said in his opinion the trailer was used primarily for the distribution of narcotics. (R. 80, lines 20 – 21).

On cross-examination, Brown testified that there were no drugs found in the room appellant was in. He did not have anything to tie the items they found to either appellant or the co-defendant. (R. 86, line 14 – R. 87, line 2). On cross-examination, Deputy Lansford also testified that he did not see either defendant with anything. (R. 103, lines 21 – 25).

Jerry Drummond testified that he was close friends with both defendants. (R. 105, lines 19 – 24). He said the water bill for Lot 7 was in his name and he used the trailer as a bachelor pad. He said he rented the trailer from Billy Rhodes. He said appellant would come over from time to time and bring females. The co-defendant would never stay there, but he would visit. Appellant would also just visit from time to time. Most of the bills for the trailer were split up among Drummond, appellant, the co-defendant, and a few more people. Drummond said he moved out of the trailer about two weeks before November 3 because he was incarcerated as an habitual offender. (R. 107, line 2 – R. 110, line 11). He said that he sold crack cocaine to appellant and the co-defendant in the past. (R. 114, line 23 – R. 115, line 2).

At the conclusion of the State's case, defense counsel moved for a directed verdict because the State only presented evidence of mere presence which just raised a suspicion. Nothing tied

appellant to the drugs. The trial judge denied the motion. (R. 147, line 20 – R. 148, line 3). That ruling was in error.

Due process as guaranteed by the Fourteenth Amendment requires "that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." Jackson v. Virginia, 443 U.S. 307, 316, 99 S.Ct. 2781, 2787 (1979).

Our Court has held:

> [T]he trial judge is concerned with the existence or non-existence of evidence, not with its weight; and, although he should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury if there be any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. [Emphasis added].

State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924, 926 (1955); State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989), cert. denied, 493 U.S. 895, 110 S.Ct. 246 (1989).

In applying this standard, our Court has held that evidence which is "sufficient to raise a strong suspicion of the guilt of the accused" is not sufficient to constitute "any evidence form which the guilt of the accused may be fairly and logically deduced." State v. Totherow, 263 S.C. 275, 210 S.E.2d 228, 230 (1974). See, also, State v. Turner, 117 S.C. 470, 109 S.E. 119, 120 (1921). The motion for a directed verdict should be granted, therefore, "where evidence merely raises a suspicion of guilt, or is such to permit the jury to merely conjecture or to speculate as to the accused's guilt." State v. Brown, 267 S.C. 311, 227 S.E.2d 674, 677 (1976), citing State v. Matarazzo, 262 S.C. 662, 207 S.E.2d 93,

cert. denied, 420 U.S. 945 (1974). "If the evidence is consistent with both innocence and guilt it cannot support a conviction." United States v. Varoz, 740 F.2d 772, 775 (10th Cir. 1984); United States v. Ortiz, 445 F.2d 1100, 1103 (10th Cir 1971). Guilt is only to be found when there is a "rationally supportable state of near certitude." Evans-Smith v. Taylor, 19 F.3d 899, 906 (4th Cir 1994).

In this case the State was required to prove constructive possession which requires a showing that appellant had dominion and control over the drugs or the premises where they were found as well as knowledge of the drugs being present. State v. Hudson, 277 S.C. 200, 284 S.E.2d 773 (1981). The State did not prove knowledge of the drugs and dominion and control over the premises where the drugs were found. Sitting in an apartment where drugs are found and having knowledge of those drugs is not sufficient to show that a defendant has dominion and control over those drugs for purposes of proving possession of those drugs. Goldsmith v. Witkowski, 981 F.2d 697 (4th Cir. 1993). A defendant's mere presence in a location where drugs are found is insufficient to prove constructive possession. State v. Heath, 370 S.C. 326, 635 S.E.2d 18 (2006); State v. Tabory, 260 S.C. 355, 196 S.E.2d 111 (1973).

CONCLUSION

A directed verdict should be granted to appellant on all charges.

Respectfully submitted,

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of June, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

June 13th, 2013

Robert M. Pachak
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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 13th day of June, 2013.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 13th day of June, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.