STATE OF SOUTH CAROLINA

COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY

COURT OF GENERAL SESSIONS

The Honorable Alexander Macaulay, Circuit Court Judge

Indictments Nos. 2011-GS-32-2259, 2011-GS-32-2261

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

v.

Benjamin J. Newman ..... Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On June 5, 2011 Appellant Benjamin Newman was arrested in Lexington County on charges of Trafficking in cocaine, 100 g or more, but less than 200 g, Trafficking in ice, crank or crack - 200 g or more, but less than 400 g, Trafficking in cocaine, 400 g or more, and Trafficking in marijuana, 10 lbs or more, but less than 100 lbs - 1st offense.

On October 15-17, 2012 the Appellant appeared before the Court of General Sessions of Lexington County for a jury trial on indictments 2011-GS-32-02259, Trafficking in marijuana, 10 lbs or more, but less than 100 lbs - 1st offense, and 2011-GS-32-0261, Trafficking in cocaine, 400 g or more.

The case was heard by the Honorable Alexander McCaulay. The Appellant was ultimately convicted on both indictments on October 17, 2012, and received a sentence of Twenty Five (25) years incarceration in the South Carolina Department of Corrections on Indictment 2011-GS-32-0261 and Ten (10) years incarceration in the South Carolina Department of Corrections on Indictment 2011-GS-32-0259 both sentences running concurrently.

On October 23, 2012 the Appellant filed and served his Notice of Intent to Appeal his conviction. A request for transcript was timely filed by Appellant's counsel.

On January 4, 2013 a notice was filed that extended the deadline to produce the trial transcript until February 1, 2013. On February 4, 2013 a notice was filed that extended the deadline to produce the trial transcript until March 1, 2013. On March 4, 2013 a notice was filed that extended the deadline to produce the trial transcript until April 1, 2013. The trial transcript was received by counsel on April 5, 2013.

On April 18, 2013 Appellant's counsel filed a motion to grant an extension to file the Appellant's Initial Brief; said request was granted by Order on April 23, 2013. The extension to file the Appellant's Initial Brief was granted until June 5, 2013.

ARGUMENT

1. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SUPPRESS THE DRUG EVIDENCE OBTAINED AS A RESULT OF AN UNLAWFUL SEARCH

A review of the issues dealing with searches is helpful in making a correct assessment as to whether the drug evidence introduced in the Appellant's trial should have been introduced into evidence or not.

> **The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.**
>
> **U.S. Const. Amend IV.**

The crux of the err committed by the Trial Judge lies in the allowance of evidence obtained from the search of the premises without securing a search warrant, or following additional appropriate Constitutional guidelines.

A) Did the Trial Court err when it denied the Appellant's motion to suppress the drug evidence obtained as a result of an unlawful search conducted prior to the procurement of a search warrant?

As previously stated, the Fourth Amendment to the United States Constitution ensures that a person shall be protected from unlawful search and seizure. Section 17-13-140 of the S.C. Code Ann., reflects this same standard provided by our United States Constitution. State v. Covert, 368 S.C. 188, 628 S.E.2d 482 (Ct. App., 2006); State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000). The failure of the State to obtain a search warrant is more than a procedural mistake;

this failure amounts to a violation of the Appellant's Constitutional protections.

In the present matter, the Court was in error when it failed to suppress the drug evidence obtained by a search of 433 Longview Rd, in Lexington County prior to the procurement of a search warrant. Agents of the Lexington County Multi-Agency Narcotics Task Force (NET team) conducted an undercover operation utilizing a confidential informant to allegedly broker a drug transaction with the Appellant on June 5, 2011. (R. p 25, l. 8-13) The Lexington County SWAT team entered the premises at 433 Longview Rd. only to find the Appellant outside the home in the rear portion of the property. (R. p 31, l. 21-25, p.32, l. 1-5) Subsequent to the arrest of the Appellant, Agent Tracy obtained a search warrant for the premises. (R. p 32, l. 10-25) The actual search warrant was obtained and delivered a significant period of time after the arrest of the Appellant. (R. p 39, l. 10-22).

During the pretrial hearing on the Appellant's motion to suppress drug evidence, several officers testified before the Court regarding the circumstances surrounding the arrest, search, and subsequent search warrant for 433 Longview Rd. During the pretrial hearing Agent Slice with the NET team testified that during the interim between the arrest of the Appellant and the signing of the Search Warrant, no search was conducted (R. p 41, l. 5-10). This testimony was however contradicted by the evidence from an audio recording made by another officer. The audio recording contains a conversation amongst the NET team officers stating that "officers were searching around for cocaine prior to the search warrant being there." (R. p. 247, l. 5-7) The audio recording in its entirety was offered as an exhibit (Court's Exhibit 7) during the pretrial hearing (R. p 42, l. 5-24). Officer Carver, also with the NET team, testified that he along with agents Barnes and Setree were sitting inside the residence for a period of time waiting on the

search warrant, however nobody was looking around or searching. (R. p 90, l. 5-23) Agent Setree contradicts the testimony of the previous officers stating that their was something "chaotic about this whole search thing" and that officers were in fact searching all around for drug evidence. (R. p 97, l. 19-25, p 98, l. 1-23 and R. p 106, l. 20-23) Additionally, Agent Setree testified that the drug evidence in question was located by Agent Barnes (R. p 107, l. 21-23), the same Agent Barnes, that Agent Carver specifically states was not looking around or searching at all. Agent Barnes further testified that she went in search of the drug evidence in response to statements made by Agent Carver prior to them re-entering the dwelling. (R. p 296, l. 21-25, p. 297, l. 1-11)

The testimony offered from the State's witnesses was at best contradictory. The admissions by Agent Setree and those from the audio tape, which is the only evidence not diminished by shifting recollections and elapsed time, confirm that there was in fact searching inside and out to locate cocaine evidence.

In State v. Vice, the Court examined the entry into a dwelling and a subsequent search prior to the obtaining of a search warrant on the basis that speed was of the essence, much like in the present matter, and the Court found that where the location is secured it would be inappropriate and reversible error to allow a search and the product of that search into evidence at a trial. State v. Vice, 259 S.C. 30, 190 S.E.2d 510 (1972) *See also* Stoner v. California, 376 U.S. 483 (1964) In the present matter, the location was secured by the Lexington County SWAT team as well as the NET team and there were no exigent circumstances requiring a speedy warrant-less search.

In addition to claiming no search was conducted, the State further argued that the drug

evidence was only located while searching for items in plain view, and was not an item recovered in accordance with the subsequent search warrant. Both, the claims that there was no search and secondarily, that if there was a search it was only conducted for items in plain view are both inconsistent with the actual Return filed with the search warrant. On the actual Search Warrant and Return (Court Exhibit 1), within the inventory of items seized, it clearly states that Agent Barnes discovered and seized the drug evidence as part of the search authorized by the actual search warrant. Specifically, the Return states that the "quantity of off-white material consistent w/ cocaine located in area by kitchen by Tucker (Barnes)," not in a backpack in that was in plain view as previously testified by Agent Setree. (R. p 8) Agent Barnes further admitted to specifically going to "look" for the cocaine in a specific area upon direction from statements made by Agent Carver. (R. p 297, l. 1-4) She continued to "look" for "several minutes." (R. p 306, l. 24-25) The Appellant maintains that several minutes of "looking" without a warrant is in fact a search and should have resulted in a suppression of the discovered drug evidence.

B) Did the Trial Court's failure to suppress the unlawfully seized drug evidence constitute substantial prejudice to the Appellant?

The long standing precedent established in Wong Sun v. United States, created the term of art: "fruit of the poisonous tree." Specifically, evidence obtained as a result of an illegal police action, a search or seizure, must be excluded barring a specifically carved exception. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1963) *See also* State v. Jihad, 347 S.C. 12, 553 S.E.2d 249 (2001).

The Appellant acknowledges that a second prong exists when addressing wrongfully obtained, and subsequently admitted evidence, in that upon appeal he must make a showing that the admission of the evidence created irreparable and reversible harm. This question is particularly important to the issues addressed by the Appellant upon appeal. Absent the admission of the drug evidence, it is the Appellant's position that the Jury would have lacked sufficient direct or circumstantial evidence to return a guilty verdict. Additionally, baring the admission of the drug evidence, the State would not have been able to survive a directed verdict challenge made by the Appellant.

The admittance of said evidence created an irreparable harm to the Defendant and denied him Due Process of law. The actions of the Court should be reversed and a new trial ordered without the admission of any items obtained from unlawful search of the premises.

2. THE TRIAL COURT ERRED IN FAILING TO GRANT THE APPELLANT'S MOTIONS FOR A DIRECTED VERDICT

On appeal, when considering the Trial Court's refusal to grant a Defendant's directed verdict motion it must view the evidence in the light most favorable to the State. State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001). Ultimately, the State relied substantially upon circumstantial evidence presented through directly conflicting testimony. The Trial Court erred in denying the Appellant's motions for directed verdict when made at the conclusion of testimony both the State's and the Appellant's cases. (R. p 324, l.21-25, p 325, l. 1-25, p 326, l. 1-10, p 337, l. 12-25, and p 338, l. 1-7) During a trial, the Trial Court, in a directed verdict motion, must be concerned with the existence or nonexistence of evidence. State v. Cherry, 361

S.C. 588, 606 S.E.2d 475 (2004). Pertinent to this matter, in State v. Edwards, the Court reminds that the trial court should not hesitate to grant a Defendant's motion where the evidence presented by the State merely raises suspicion of guilt. State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989). In the present matter the State did not present evidence sufficient to prove more than a suspicion of guilt, establish that the Appellant had dominion or control over the alleged drug evidence, nor establish more than mere presence.

In order to return a conviction on Indictments 2011-GS-32-2259 and 2011-GS-32-2261 the State must prove that Appellant did knowingly and intentionally possess a controlled prescribed amounts of specific controlled substance, to wit: marijuana not less than Ten pounds, nor more than One Hundred pounds S.C. Code Ann. § 44-53-370 (e)(1)(a)(1) (1976) and cocaine in excess of Four Hundred grams in violation of S.C. Code Ann. § 44-53-370 (e)(2)(e) (1976). (R. p 17, l. 1-4) In order to overcome its burden and sustain a conviction under the aforementioned code sections it requires proof of possession, either actual or constructive, coupled with knowledge of its presence. State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999) *rehearing denied, certiorari denied.*

A directed verdict should be granted when evidence presented by the State only establishes circumstances that are suspicious, but ultimately falls short of providing a basis upon which a jury could reasonably determine the Defendant's guilt. State v. Arnold, 351 S.C. 302, 569 S.E.2d 379 (Ct. App 2002) Further, the State bears the burden of demonstrating that the Defendant was not only at the scene of a crime, but actually committed the criminal act to withstand a directed verdict challenge. State v. Schrock, 283 S.C. 129, 32 S.E.2d 450 (1984)

In the present matter with the evidence taken most favorably for the State, Appellant is placed merely at the scene where drugs were found, no direct testimony was offered that he fully possessed a sufficient amount of either marijuana or the cocaine to satisfy the statute. The evidence offered by the State does no more than raise a circumstantial suspicion and fails to meet the required burden to go to a jury, even when evidence is considered in the light most favorable to the prosecution. The circumstantial link between the Appellant and alleged dominion and control over items found in a backpack and duffle bag, both of which were brought to the scene by the NET team or their agents, and which were not presented as evidence at trial leaves a nebulous connection, one that fails to uphold the State's appropriate threshold to withstand a directed verdict motion.

If the Court were to accept the idea that evidence was reasonably sufficient to establish a real possibility that the Appellant could have constructively possessed the controlled substances, by way of dominion and control, the second element of the Statute is still lacking. For a conviction, a second prong requires that possession must be "coupled with knowledge of its presence." As stated, the State's evidence fails to place the backpack containing the drugs in the possession of the Appellant. In State v. Taylor the Court found a Defendant who was negligent in the possession of, but without knowledge could not be convicted under the statute. State v. Taylor, 323 S.C. 162, 473 S.E.2d 817 (Ct. App. 1996).

In making this argument, the Appellant maintains that any drug evidence discovered and seized was done so through an illegal warrant-less search in violation of the Appellant's constitutional and statutory rights. Further, in making this argument, the Appellant notes that only evidence presented at the actual trial, and not testimony taken in pretrial hearings outside the

presence of the jury can be used to successfully withstand a directed verdict motion.

During the trial, the only witness presented by the State who was actually present with the Appellant at the time he allegedly possessed the drug evidence was Agent Carver. Testimony offered by Agent Carter stated that outside the residence, where the initial alleged encounter between Agent Carver and the Appellant took place, no drug evidence was on the person or in the possession of the Appellant, and the only illegal substances present were specifically under the dominion and control of the State's Agent. (R. p 196, l. 3-6) It is further testified that the Appellant never took possession or control of the "duffle bag" containing the alleged marijuana either outside or inside the premises. (R. p 197, l. 3-18, p 203, l. 22-25, p 204, l. 1) As it relates to the cocaine evidence, the only testimony offered by Agent Carter is at first that it was removed from a cardboard box on the counter. (R. p 198, l. 21-25) In later testimony, Agent Carter backtracks and states he only "thought it was on the counter." (R. p 206, l. 20-22) Ultimately, it is testified that the cocaine evidence was actually located in the book bag which was brought to the location by Agents of the State. (R. p 204, l. 19-23, R. p 216, l. 13-22, and R. p 264, l. 3-5) Agent Carver at no point indicates he witnessed the Appellant place the cocaine into the back pack, nor did he observe the Appellant even have an opportunity to do so. Additionally, when examining who searched the backpack prior to its arrival at the premises with the NET team, no testimony was offered regarding verification of its contents. The only testimony offered was that, Agent Laney, who did not testify, allegedly searched Mr. Ainsworth's vehicle where the bag was located prior to arrival. (R. p 243, l. 21-25)

Ultimately, the State failed to satisfactorily produce any testimony or evidence that any and all drug evidence which was recovered did not in fact come with and remain in possession of

the NET team or its Agents. The only consistent evidence presented by the State specifically relating to the Appellant actually possessing, or asserting dominion and control, over any controlled substance was that the Appellant allegedly did examine a small portion of marijuana offered to him by Agent Carver. (R. p 198, l. 5-11) However, there was no testimony nor proof offered establishing this unknown amount of marijuana was a sufficient amount to satisfy the weight requirements of the Statute for trafficking in marijuana.

Totaling all circumstantial evidence presented by the State in its case in chief, at best, places the Appellant at a residence, where a quantity of controlled substances were located within bags which the State's Agents brought to the location. This demonstration of mere presence accompanied by, at best, a suspicion of guilt should have been insufficient to withstand a directed verdict motion.

CONCLUSION

The Trial Judge erred by failing to suppress the unlawfully obtained drug evidence as a product of an unlawful search without a search warrant. This error failed to protect the Appellant's Constitutional and Statutory rights and ultimately denied him due process and did not allow him to receive a fair trial.

Further, the Trial Judge was in error by failing to grant the Appellant's Motions for Directed Verdict both at the end of the State's case and at the conclusion of the Appellant's case. Even considered in a light most favorable to the State, evidence which was presented was grossly insufficient to support a finding of guilt.

Respectfully submitted,

July 26, 2013

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CERTIFICATE OF COUNSEL

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

July 26, 2013

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PROOF OF SERVICE

I certify that I have served the **Final Brief** on the Respondent by depositing copies of it in the United States Mail, postage prepaid, on July 26, 2013, addressed to Rick Hubbard, Deputy Solicitor, 205 East Main Street, Lexington, South Carolina 29072, Dale Scott, Deputy Solicitor, PO Box 516, Greenwood, SC 29649; and Jennifer Ellis Roberts, Assistant Attorney General and Alan Wilson, Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, South Carolina 29211-1549.

I further certify that all parties required to be served have been served.

Dated: July 26, 2013

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