

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

The State, Respondent,

v.

Terrance Edward Stewart, Appellant.

Appellate Case № 2016-002524

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Appeal from Laurens County  
Frank R. Addy, Jr., Circuit Judge

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Unpublished Opinion № 2019-UP-209  
Submitted April 1, 2019 - Filed June 5, 2019

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Petition for Rehearing

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**RECEIVED**  
JUN 20 2019  
SC Court of Appeals

Pursuant to Rule 221 of the South Carolina Appellate Court Rules, Terrance Edward Stewart, the Appellant above named, hereby requests this Court rehear this matter based upon the following:

1. This Court erred in holding that what the issuing magistrate heard is not important and the only consideration should be given to what the officer said he told the issuing magistrate. The decision to issue an arrest warrant is made by the issuing magistrate and not the arresting officer. When a magistrate testified they do not recall what, if any, information was given orally, this Court is forced to look only to the four corners of the warrant. As the magistrate did not recall any information being given, this Court cannot say the magistrate even heard the oral supplementary testimony. This Court has no basis for determining what weight was given the testimony by the issuing magistrate. To permit the unverified testimony of the officer is to

simply water down the protections of the Fourth Amendment. “Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.” *Johnson v. United States*, 333 U.S. 10, 13–14 (1948). The holding in this case simply circumvents the requirement of the Fourth Amendment that probable cause be drawn by the neutral and detached magistrate only and not law enforcement.

2. This Court erred in failing to find that Terrance Edward Stewart was not prejudiced by the failure of the magistrate who issued the search warrant to keep proper records. Had the magistrate complied with the records requirement, then there would have been an adequate record to establish if the warrant was issued on probable cause. To hold when the magistrate does not perform their statutory obligation to permit a defendant to know the actual basis for the issuance of the search warrant, a defendant is required to prove prejudice is to simply make the record keeping requirement a nullity. The purpose of the record keeping is to protect the rights of the defendant. To now require a defendant, whose statutory rights were violated by the failure to keep records, to show prejudice, places an impossible burden on a defendant. No defendant will ever be able to use that which does not exist to show prejudice.

3. This Court erred in concluding that the only thing the federal Judge did as a result of the testimony about the Laurens charges is take away acceptance of responsibility. The record at the federal sentencing is clear the federal judge elected to depart upward because he found that Mr. Stewart in fact was guilty of selling drugs in Laurens County after he entered his guilty plea in federal court. Trial counsel at the federal sentencing noted that the acceptance of responsibility had been taken away in the revised pre-sentencing report. Rec. on App. at 51, 11

12-13. The federal sentencing court did an upward departure, which is separate and distinct from taking away the acceptance of responsibility. As the judge stated “I would not do an upward departure except for the Laurens County conduct, which I am going to depart upward for that reason.” Rec. on App. at 66, 17-9

Before the upward departure, Mr. Stewart was looking at a federal sentence of 97 to 121 months. Rec. on App. at 60, 11 21-23. Had Mr. Stewart retained his acceptance of responsibility, his sentencing range would have been 78 to 97 month. The sentence Mr. Stewart received was 145 months. Including the points taken away for acceptance of responsibility, he was given about 67 months more because the judge found he was guilty of the charges in Laurens County.

This Court erred in holding “The federal court’s inquiry was not into whether Stewart was guilty of the state charges but rather into whether he failed to accept responsibility for his federal charges by continuing to involve himself in drug activity.” *State v. Stewart*, Op. No 2019-UP-209 (S.C.Ct.App. filed June 5, 2019) at 8. When a judge makes a factual finding as to guilt or innocence and imposes a punishment based upon that finding, a defendant has been convicted. The finding by the federal judge was a conviction within the meaning of S. C. Code § 44-53-410. The federal judge then increased his punishment based on that conviction. In this case the federal judge did more than take away the acceptance of responsibility.

4. The Court erred in failing to consider the fact that the inference charge in this case, which the Court found not to be a charge on the facts, to be virtually identical to the inference charge in *Yarborough v. Southern Ry.*, 78 S.C. 103, 58 S.E. 936 (1907) and *Finch v. Atlanta and C Airline Ry.*, 87 S.C. 190, 69 S.E. 208 (1907). In these cases our Supreme Court held such an inference charge to be a violation of Article V, § 21 of the Constitution of the State of South

Carolina. This Court is required to follow the prior decisions of our Supreme Court. If the Court is not following the decision, this Court should then be required to explain why two cases holding a charge as to an inference to violation of our Constitution are not applicable to this case. This Court erred in not following the two cases cited by Mr. Stewart. This Court further erred in not explaining why the two cases holding a charge as to an inference is unconstitutional does not apply to this case.

5. This Court erred in holding that the charge to the jury was proper that “defined constructive possession as ‘dominion and control over either the drugs or the property upon which the drugs were found.’” *Id.* at 9. The charge in this case said, “Constructive possession means that the Defendant had dominion and control or the right to exercise dominion and control over *either* the drugs itself *or the property upon which the drugs were found.*” Rec. on App. at 469, ll 2-5 (emphasis added). The holding in *Adams* stated “The proper charge on constructive possession is to instruct the jury that the defendant's knowledge and possession may be inferred if the substance was found on premises under his control.” *State v. Adams*, 291 S.C. 132, 135, 352 S.E.2d 483, 486 (1987). *Adams* never approved a charge that said constructive possession means dominion and control over either the drugs *or* the property upon which the drugs were found. The charge as given in this case completely eliminated a need for the State to prove an intent on the part of Mr. Stewart other than an intent to control the house. All the State needed to prove was that Mr. Stewart had dominion and control over the property where the drugs were found. In its opinion, this Court never discusses the fact that such a charge eliminated any mens rea by Mr. Stewart as to knowledge of the drugs being present. The charge in very clear language said constructive possession is proven when the State prove Mr. Stewart had dominion and control

over his home. That fact was virtually undisputed.

When taken as a whole, the charge in this case is even more confusing. The trial judge clearly told the jury constructive possession does not mean actual knowledge of the drugs, but knowledge that one has dominion and control over the home where the drugs are found. The fact that the trial judge instructed the jury that he is to have no opinion as to the facts of the case, would simply lead an average juror to the conclusion that the law, not the judge, either permits them to use the inference to find Mr. Stewart guilty or requires it.

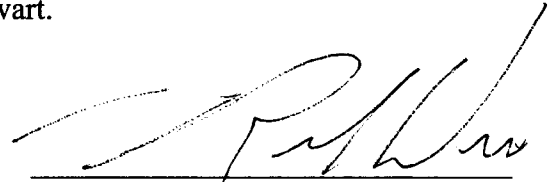
6. In its opinion, this Court correctly notes that the legislature added a provision that possession with intent to distribute is a lesser included offense based upon possession. All this means is that possession with intent to distribute is not a lesser included when the trafficking charge is based upon a conspiracy allegation. As noted in the Reply brief *Sellers v. State*, 362 S.C. 182, 607 S.E.2d 82 (2005) is not applicable as the *Sellers* case was tried before the South Carolina legislature amended the law in 2000. The decision of the legislature to make possession with intent to distribute a lesser included offense may be a good decision, a bad decision or a foolish decision. However, as long as the law passed by the legislature is a constitutional law, this Court and the trial courts are required to follow it. The legislature has the constitutional authority to make possession with intent to distribute a lesser included offense of trafficking, As the legislature has in fact mandated that possession with intent to distribute to be a lesser included offense of trafficking, this Court must follow it. It is no answer to say it is not a lesser included if the fact require it. The legislature had to have known that was the law before they amended the statute. If that is all the legislature intended to accomplish, there was no need for the amendment. If they intended to codify the law prior to 2000 as to lesser included offenses,

they elected a very broad statute to achieve that result. The only conclusion to be drawn from the amendment is the legislature intended for possession with intent to distribute be included in all trafficking charges based on possession.

### CONCLUSION

For the foregoing reasons, this Court should rehear this matter and issue an opinion reversing the conviction of Terrance Edward Stewart.

June 19, 2019



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THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

APPEAL FROM LAURENS COUNTY  
Court of General Sessions  
Hon. Donald B. Hocker, Jr., Circuit Judge  
Hon. Frank R. Addy, Jr., Circuit Judge

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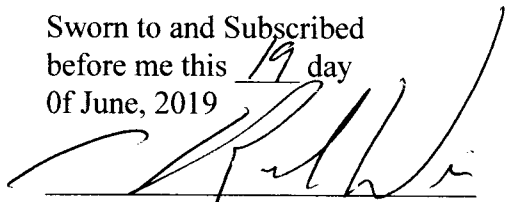
vs.

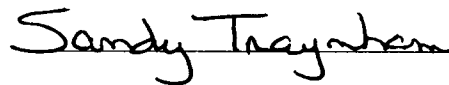
Terrance Edward Stewart ..... Appellant

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, Sandy Traynham who, after being duly sworn, deposes and says that she is the Secretary for C. Rauch Wise, Attorney for the Appellant in the above entitled case. That on June 19, 2019, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the PETITION FOR REHEARING in the above case addressed to Donald J. Zelenka, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211.

Sworn to and Subscribed  
before me this 19 day  
Of June, 2019

  
Notary Public for South Carolina  
My Commission Expires: 12/2/2019



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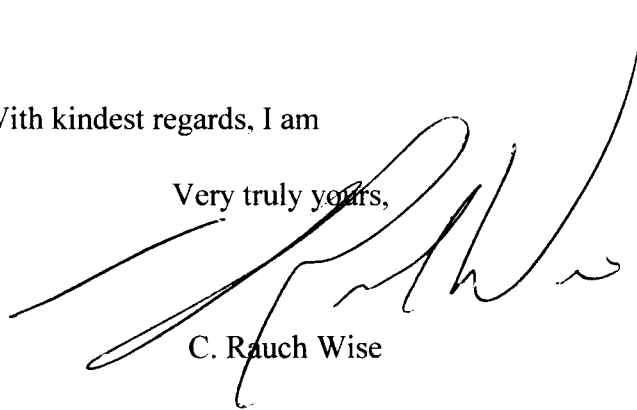
Re: State v. Terrance Stewart, Appellate Case No. 2016-002524,  
Unpublished Opinion No. 2019-UP-209

Dear Ms. Kitchings:

I am enclosing herewith for filing the original and six copies of the Petition for Rehearing together with the original Affidavit of Service regarding the above matter. Your help is greatly appreciated.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink, appearing to read 'C. Rauch Wise', is written over the typed name. The signature is fluid and cursive.

C. Rauch Wise

CRW/slt  
Enclosure