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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Laurens County
Hon. Donald B. Hocker, Circuit Court Judge
Appellate Case Tracking No. 2019-001584

The State, Respondent,

v.

Terrance Edward Stewart, Petitioner.

Opinion No. 2019-UP-209 (S.C. Ct. App. filed June 5, 2019)

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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II. The Court of Appeals correctly affirmed the trial court's denial of Appellant's motion to suppress evidence discovered in the search of his residence because he failed to establish he was prejudiced by the magistrate's apparent failure to follow the statutory procedures in § 17-13-141 regarding the keeping of records related to the issuance of search warrants.

III. The Court of Appeals correctly affirmed the trial court's denial of Appellant's request to charge the jury on possession with intent to distribute heroin as a lesser included offense of trafficking in heroin because no evidence was presented at trial from which it could be inferred the lesser, rather than the greater, offense was committed.

IV. The Court of Appeals correctly affirmed the trial court's denial of Appellant's motion to dismiss his charges pursuant to section 44-53-410 of the South Carolina Code because he did not previously receive a "conviction or acquittal under Federal law . . . for the same act."

V. The Court of Appeals correctly affirmed the trial court's jury instruction that "The Defendant's knowledge and possession may be inferred when a substance is found on the property under the Defendant's control" because, when read as a whole, the jury charge contained the correct definitions and adequately covered the current and correct law of South Carolina.

VI. The Court of Appeals correctly affirmed the trial court's jury instruction that "Constructive possession means that the Defendant had dominion and control over either the drugs itself or the property upon which the drugs were found" because, when read as a whole, the jury charge contained the correct definitions and adequately covered the current and correct law of South Carolina.

STATEMENT OF THE CASE

Procedural History

Terrance Edward Stewart (Appellant) was indicted at the June 2015 term of the grand jury for Laurens County for distribution of heroin (2015-GS-30-0957), trafficking in heroin (2015-GS-30-0958), and possession with intent to distribute (PWID) oxycodone (2015-GS-30-0959). He was initially represented by public defenders Claude H. "Chip" Howe, III, and Chelsea McNeill of the Eight Circuit Public Defender's Office; however, he was later represented at trial by C. Rauch Wise, Esquire. Respondent (the State) was represented by Assistant Solicitors C. Dale Scott, Margaret Boykin, and Jim Todd, all of the Eighth Circuit Solicitor's Office. On December 13-14, 2016, Appellant proceeded to trial by jury pursuant to which he was found guilty of trafficking heroin, distribution of heroin, and the lesser included offense of possession of oxycodone. He was sentenced by the Honorable Frank R. Addy, Jr., to twenty-five (25) years' imprisonment for trafficking in heroin, ten (10) years' concurrent imprisonment for distribution of heroin, and five (5) years' concurrent imprisonment for simple possession of oxycodone – third offense. (R.p.511-519; R.p.475-p.488). Appellant timely filed a notice of intent to appeal his convictions and sentence and subsequently submitted a Brief in support of his appeal.

The Court of Appeals affirmed the convictions and sentences. (App.1-10). Petitioner filed a timely Petition for Rehearing, which was denied by the Court of Appeals. (App.11-17).[1]

[1] For a complete discussion of the facts underlying this appeal, the State craves reference to the detailed summary of the facts found in its Final Brief of Respondent (Br. Resp. p.3-19) and the Court of Appeals opinion.

ARGUMENT

I. The Court of Appeals correctly affirmed the trial court's denial of Appellant's motion to suppress evidence discovered in the search of his residence because the supplemental oral information offered by the requesting officer in support of the search warrant affidavit provided a substantial basis upon which the magistrate could conclude there was a fair probability drugs and other incriminating evidence would be found inside the residence.

The Court of Appeals correctly found suppression was not warranted because the magistrate was presented sufficient testimony, in the affidavit and orally, to support the determination of probable cause to issue the warrant. Petitioner maintains suppression was required because the magistrate did not remember the oral testimony provided by the officer to support the written affidavit in establishing probable cause. The Court of Appeals correctly determined what the magistrate remembers is not dispositive and that evidence to support the determination by the magistrate of probable cause can come from testimony by the officer who sought the warrant.

The duty of the reviewing court is simply to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed under the totality of the circumstances. This review consists of consideration of the information in the search warrant affidavit and the information in any oral testimony presented to the magistrate to supplement the affidavit. Contrary to Appellant's contention, the review does not, and should not, hinge on what the magistrate can specifically remember about his or her decision to issue the warrant, but instead must depend upon what information was brought to the magistrate's attention. State v. Gore, 408 S.C. 237, 247-49, 758 S.E.2d 717, 722-23 (Ct. App. 2014), cert. dismissed as improvidently granted, State v. Gore, 414 S.C. 577, 780 S.E.2d 261 (2015). Given the affidavit

and supporting oral testimony in this case, there was a substantial basis for concluding probable cause existed to issue a search warrant for Appellant's residence.

Standard of Review

In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless they are clearly erroneous. State v. Brown, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012), cert. denied, ___ U.S. ___, 133 S. Ct. 2779 (2013); State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion. Brown, 401 S.C. at 87, 736 S.E.2d at 265; State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. Brown, 401 S.C. at 87, 736 S.E.2d at 265; State v. Jennings, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011); State v. Morris, 376 S.C. 189, 205-06, 656 S.E.2d 359, 368 (2008). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence. Wilson, 345 S.C. at 6, 545 S.E.2d at 829. Thus, when reviewing a Fourth Amendment search and seizure case, an appellate court must affirm the trial court's ruling if there is any evidence to support it; the appellate court may reverse only for clear error. Brown, 401 S.C. at 87, 736 S.E.2d at 265.

Law / Analysis

The Fourth Amendment to the United States Constitution protects people from unreasonable searches and seizures and provides that no warrants shall be issued except 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 South Carolina Constitution provides similar protection against unreasonable searches and seizures and unreasonable invasions of privacy. S.C. Const. art. I, § 10. Thus, the touchstone of these provisions is reasonableness. See Florida v. Jimeno, 500 U.S. 248, 250 (1991) ("The touchstone of the Fourth Amendment is reasonableness."). A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property. Brown, 401 S.C. at 88, 736 S.E.2d at 266; State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 327 (2011). The Fourth Amendment itself provides no remedy for a violation of the warrant requirement. Davis v. United States, 564 U.S. 229, 231 (2011). However, the United States Supreme Court has fashioned a judicially-created remedy, the exclusionary rule, which is a deterrent sanction by which the prosecution is barred from introducing evidence obtained in violation of the Fourth Amendment. Id.; Brown, 401 S.C. at 88, 736 S.E.2d at 266.

A search warrant may issue only upon a finding of probable cause. State v. Herring, 387 S.C. 201, 212, 692 S.E.2d 490, 495 (2009). In South Carolina, an affiant seeking to obtain a search warrant must present a sworn affidavit to a judge presenting grounds sufficient to establish probable cause in order to justify the issuance of the warrant. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348-49 (1999); see S.C. Code Ann. § 17-13-140 ("A warrant issued hereunder shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for the warrant."); see also Illinois v. Gates, 462 U.S. 213, 238 (1983) (identifying probable cause as "a fair probability that contraband or evidence of a crime will be found"). Oral testimony may also be used to supplement search warrant affidavits which are facially insufficient to establish probable cause. State v. Jones, 342 S.C. 121, 128, 536 S.E.2d 675, 678-79 (2000); State v. McKnight, 291 S.C.

110, 113, 352 S.E.2d 471, 472 (1987). In State v. Williams, this Court explained probable cause as it relates to the issuance of a search warrant:

> In order to justify the issuance of a search warrant, probable cause must be shown, but the term 'probable cause' does not import absolute certainty. In determining whether there is sufficient evidence to sustain a finding of probable cause, each case stands on its own facts. The evidence need not be sufficient to support a conviction, or a verdict of guilty, or to establish guilt beyond a reasonable doubt; nor need the proof be positive, it being enough if it is such as to induce in the mind of the issuing officer an honest belief that the facts set forth exist, or as would lead a man of prudence to believe that the offense has been committed.

262 S.C. 186, 189, 203 S.E.2d 436, 437-38 (1974) (citation omitted).

In deciding whether to issue a search warrant, the issuing judge must "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Gates, 462 U.S. at 238; see Herring, 387 S.C. at 212, 692 S.E.2d at 495-96 (quoting Gates for this proposition). In making the probable cause determination, "[issuing judges] are concerned with probabilities and not certainties." State v. Sullivan, 267 S.C. 610, 617, 230 S.E.2d 621, 624 (1976). An appellate court reviewing the decision to issue a search warrant should decide whether the magistrate had a substantial basis for concluding probable cause existed. Gore, 408 S.C. at 247, 758 S.E.2d at 722. This review, like the determination by the magistrate, is governed by the "totality of the circumstances" test. Jones, 342 S.C. at 126, 536 S.E.2d at 678; Herring, 387 S.C. at 212, 692 S.E.2d at 495. The appellate court should give great deference to a magistrate's determination of probable cause. Jones, 342 S.C. at 126, 536 S.E.2d at 678.

While recognizing the longstanding principle that a written affidavit may be supplemented by an oral statement given under oath, Appellant appears to argue that the only competent proof of the substance of the oral supplementation must come directly from the issuing magistrate and may not come from the officer who provided the oral testimony to the magistrate. He contends: "As the probable cause determination is to be made by the magistrate, logic would dictate that what the magistrate heard controls and not what the officer thought the magistrate heard." (Brief of Appellant, p.6-p.8). Yet, this is an artificial distinction that is not recognized in this State's jurisprudence.

There is no basis for treating oral information differently from written information. The inquiry focuses on what information was brought to the magistrate's attention and whether that information is sufficient to determine whether the magistrate had a substantial basis for concluding probable cause existed. Gore, 408 S.C. at 247-48; 758 S.E.2d at 722. In the case of an affidavit the focus is not on "what the magistrate read" as opposed to "what the officer thought the magistrate read" as Appellant's theory would suggest. Instead, the focus is properly on the substantive information in the affidavit, however that information can be shown by the State to the reviewing court. Whether the magistrate has an independent recollection of the information in the affidavit is of no moment because the written affidavit itself supplies that information. Similarly, whether the magistrate has an independent recollection of the information in the oral testimony is of no moment where the testimony offered at the suppression hearing supplies that information. Appellant argues: "When the issuing magistrate does not recall the supplemental testimony, then there is simply no basis by which a court could conclude that the magistrate made an independent determination that probable cause existed." Yet there is a basis by which a court could make this conclusion—consideration of the testimony the

requesting officer gave to the reviewing court, under oath, which details the testimony he or she gave to the issuing magistrate. We know what information was brought to the magistrate's attention and we know the magistrate determined it was sufficient to issue the search warrant. This provided an ample basis for the trial court's review and for this Court to affirm.

Here, the information in the search warrant affidavit coupled with the supplemental oral testimony from the requesting officer provided the issuing judge with a probable cause basis to believe heroin or other incriminating evidence connected to Appellant's drug dealing would be found in his residence. See Gore, 408 S.C. at 249, 758 S.E.2d at 723 ("Given the affidavit and the supporting oral testimony, we conclude there was a substantial basis for concluding probable cause existed to issue a search warrant."). It reliably established there was a reasonable probability heroin and other incriminating evidence would be discovered in Appellant's residence; therefore, the issuing judge had a substantial basis upon which to make a finding of probable cause. Accordingly, this Court should deny the Petition for Writ of Certiorari as to this issue.

II. The Court of Appeals correctly affirmed the trial court's denial of Appellant's motion to suppress evidence discovered in the search of his residence because he failed to establish he was prejudiced by the magistrate's apparent failure to follow the statutory procedures in § 17-13-141 regarding the keeping of records related to the issuance of search warrants.

The Court of Appeals correctly found suppression was not warranted because of the magistrate's ministerial failure to preserve records pursuant to S.C. Code Ann. § 17-13-141 (Supp. 2018). As the Court of Appeals found, Petitioner was not prejudiced by the failure.

Law / Analysis

The South Carolina Code provides:

> (A) Every judicial official authorized to issue search warrants in this State shall keep a record along with a copy of the returned search warrant and supporting affidavit and documents for a period of three years from the date of issuance of each warrant. The records shall be on a form prescribed by the Attorney General and reflect as to each warrant:
>
> . . . .
>
> (4) Reason for issuing warrant.

S.C. Code Ann. § 17-13-141 (2014). At the suppression hearing, Judge Tucker testified that although she did have a copy of the search warrant in her records, she could not find any other records or a log of warrants that were issued. (R.p.145-p.159). Judge Hocker noted that being unable to locate records was not necessarily the same as failing to keep records; nevertheless, he found that because Appellant could not establish prejudice from Judge Tucker's failure to comply with the ministerial acts in the search warrant statutes, he was not entitled to suppression based on her non-compliance. (R.p.171-p.172).

In the context of the application of the exclusionary rule, the exclusion of evidence should be limited to violations of constitutional rights and not to statutory violations, at least where the appellant cannot demonstrate prejudice at trial resulting from the failure to follow statutory procedures. State v. Chandler, 267 S.C. 138, 226 S.E.2d 553 (1976). Indeed, statutory violations do not warrant the suppression of evidence unless the defendant can show he was prejudiced by the violation. State v. Wise, 272 S.C. 384, 386, 252 S.E.2d 294, 295 (1979). As explained in argument I above, Appellant knew what the officer told the magistrate to supplement the search warrant affidavit because Officer Sweat gave detailed testimony at the suppression hearing describing the testimony he gave to the magistrate. He further testified this testimony consisted of the same information set out in the written incident report Sweat prepared before he appeared before the magistrate, and which he relied upon and referred to when making

his sworn testimony to Judge Tucker. This incident report was given to Appellant as part of pretrial discovery well before the suppression hearing. Appellant suffered no prejudice from the magistrate's inability to locate the records described in section 17-13-141 of the Code because, at the time of the suppression hearing, he knew the substance of the information the State gave to the magistrate when requesting the search warrant. The Petition for Writ of Certiorari should be denied as to this issue.

III. The Court of Appeals correctly affirmed the trial court's denial of Appellant's request to charge the jury on possession with intent to distribute heroin as a lesser included offense of trafficking in heroin because no evidence was presented at trial from which it could be inferred the lesser, rather than the greater, offense was committed.

The Court of Appeals correctly found Petitioner was not entitled to a lesser included charge on possession with intent to distribute because weight was not an issue and there is no evidence from which Petitioner could be guilty solely of the lesser included offense as opposed to the greater offense of trafficking.

Standard of Review

The law to be charged is determined from the evidence presented at trial. State v. Rivera, 389 S.C. 399, 404, 699 S.E.2d 157, 159 (2010); State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009). "No instruction should be given by the trial judge, at the request of the appellant, which tenders an issue which is not presented or supported by the evidence." State v. Weaver, 265 S.C. 130, 137, 217 S.E.2d 31, 34 (1975). "A trial judge is required to charge the jury on a lesser-included offense if there is evidence from which it could be inferred the lesser, rather than the greater, offense was committed." State v. Green, 397 S.C. 268, 289, 724 S.E.2d 664, 674 (2012); State v. Watson, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002). The trial

court only commits reversible error if it fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 838, 849 (1993).

Law / Analysis

In 1989, the South Carolina Code did not explicitly recognize PWID as a lesser included offense of trafficking. See S.C. Code Ann. § 44-53-370(e) (Supp. 1989). However, in examining the structure of section 44-53-370, this Court concluded the Legislature intended PWID to be a lesser included offense of trafficking based upon possession. Matthews v. State, 300 S.C. 238, 241, 387 S.E.2d 258, 259-60 (1990). Thus, the Court held "when there is conflicting evidence as to whether the amount of marijuana involved is sufficient to invoke the trafficking statute, both charges should be submitted to the jury." Id. As a corollary, the Court held: "Where, however, the undisputed evidence is that the amount involved exceeds the minimum trafficking amount, then only the trafficking charge should be submitted to the jury." Id. Shortly thereafter, the Legislature amended section 44-53-370 to add the following language: "The offense of possession with intent to distribute described in Section 44-53-370(a) is a lesser included offense to the offenses of trafficking based upon possession described in this subsection." S.C. Code Ann. § 44-53-370(e) (Supp. 1990); See 1990 Act No. 604, Section 17, eff. June 25, 1990. This language remains a part of the Code today. S.C. Code Ann. § 44-53-370(e) (Supp. 2016).

Although the offense date preceded this legislative amendment, this Court again considered the issue of whether the jury must be charged with PWID as a lesser included offense of trafficking after the effective date of the amendment. State v. Grandy, 306 S.C. 224, 411 S.E.2d 207 (1991). Relying on Matthews, it repeated the holding that: where the undisputed evidence is that the amount involved exceeds the minimum trafficking amount, only the

trafficking charge should be submitted to the jury. Grandy, 306 S.C. at 227, 411 S.E.2d at 208. Even when considering an offense date after the noted legislative change, our courts have consistently followed this same rationale. See Sellers v. State, 362 S.C. 182, 190, 607 S.E.2d 82, 86 (2005) ("A defendant is not entitled to a lesser-included charge of possession with intent to distribute when there is evidence that the amount involved exceeded minimum for trafficking."); State v. Raffaldt, 318 S.C. 110, 456 S.E.2d 390 (1995) ("Where all the evidence indicates the defendant was dealing in quantities of cocaine over ten grams, the defendant is only entitled to charges on trafficking, not distribution or possession."); State v. Peay, 321 S.C. 405, 408, 468 S.E.2d 669, 671 (Ct. App. 1996) ("It is undisputed officers recovered 515 grams of cocaine when Peay was arrested. Because the amount of cocaine involved in this case indisputably exceeded the minimum amount necessary to sustain a conviction for trafficking (ten grams), the trial court correctly refused Peay's request to charge possession with intent to distribute as a lesser included offense.").

The trial court did not err in denying Appellant's request to charge the lesser included offense of PWID heroin. There is no evidence tending to show Appellant is guilty of only the lesser crime. The only reasonable inference to be drawn from the totality of the evidence was that Appellant either trafficked in heroin, or was not guilty. Accordingly, the Petition for Writ of Certiorari should be denied on this issue.

IV. The Court of Appeals correctly affirmed the trial court's denial of Appellant's motion to dismiss his charges pursuant to section 44-53-410 of the South Carolina Code because he did not previously receive a "conviction or acquittal under Federal law . . . for the same act."

The Court of Appeals correctly found prosecution of Petitioner for his current drug charges was not barred by section 44-53-410 of the South Carolina Code. The Court properly

concluded the federal court's use of the charges underlying this appeal for sentencing purposes did not result in a "conviction or acquittal under Federal law" and therefore would not bar the current prosecution.

Law / Analysis

In regard to violations of our laws concerning narcotics and other controlled substances, the South Carolina Code provides: "If a violation of this article is a violation of a Federal law or the law of another state, the conviction or acquittal under Federal law or the law of another state for the same act is a bar to prosecution in this State." S.C. Code Ann. § 44-53-410 (2002) (emphasis added).

In the case now before this Court, Appellant pled guilty, on November 18, 2014, to a federal charge of conspiracy to distribute 100 grams or more of heroin. On January 22, 2015, while out on bond and awaiting sentencing, Appellant was arrested in Laurens County for the charges now before this Court on appeal. There is no dispute the acts underlying the November 2014 federal conviction are not the same acts for which Appellant was arrested in Laurens County. On March 25, 2015, Appellant appeared before the Honorable Henry M. Herlong, Jr., in the United States District Court for the District or South Carolina, Greenville Division, for sentencing. (R.p.1-p.3). During the sentencing hearing, Judge Herlong heard testimony from Sergeant Matthew Veal of the the LCSO regarding Stewart's pending South Carolina charges. (R.p.51-p.59). Judge Herlong determined Veal was credible and found Appellant was dealing drugs and had a weapon in possession in the presence of children. (R.p.59). He therefore took the pending charges into consideration on Appellant's federal sentence on two grounds. The first involved "acceptance of responsibility", which is a tool under the federal sentencing guidelines that can reduce a defendant's offense level by up to three levels. U.S.S.G. § 3E1.1. Judge

Herlong found that since Appellant had been selling drugs after his federal guilty plea he had lost his acceptance of responsibility and elected not to reduce his offense level. (Fed.Tr.p.59). The second involved an upward variance from the sentencing guideline range under 18 U.S.C. § 3553(a). Judge Herlong decided that the range of 97 to 121 months was not appropriate for Appellant considering his recent criminal conduct in Laurens County, therefore, he varied upward in the sentence. (R.p.67). When considering the appropriate sentence, Judge Herlong noted the statutory range for the offense was 5 to 40 years, with supervised release of at least 4 years, and that the sentencing guidelines set a range of 97 to 121 months imprisonment with four years of supervised release. (R.p.60).

Appellant argues "there is no dispute that the exact same act upon which the trafficking heroin and the sale of heroin are the same acts tried in federal court when the sentence of [Appellant] was doubled because of these acts." However, the Laurens County acts were clearly not "tried" in federal court. Nevertheless, Appellant argues the findings by Judge Herlong should count as a "conviction" within the meaning of section 44-53-410.

He argues that section 44-53-410 is penal in nature, and as such, it must be strictly construed against the State and in his favor. Appellant claims there was an adjudication of guilt by Judge Herlong in a criminal proceeding in which a witness for the State gave sworn testimony and which resulted in doubling the punishment he otherwise would have received. He contends Judge Herlong's consideration of his pending heroin charges in order to impose a higher sentence on his federal charge, within the statutorily authorized range, effectively imposed punishment for the pending charge conduct for double jeopardy purpose and, therefore, should bar the subsequent prosecution on the pending charges. (Brief of Appellant, p.12-p.13).

The Unites States Supreme Court has held it does not. Specifically, the Court held that consideration of an uncharged act of cocaine importation in order to impose a higher sentence on marijuana charges within the statutorily authorized range did not impose "punishment" for the cocaine conduct for double jeopardy purposes and, thus, did not bar the subsequent prosecution on cocaine charges. Witte v. United States, 515 U.S. 389, 406 (1995). The Court of Appeals correctly determined Witte was "directly on point" and "[g]iven the federal court's clear findings that Stewart's state charges were used only to reduce his acceptance of responsibility for unrelated federal charges, Stewart's argument on this issue lacks merit." Accordingly, this Court should deny the Petition for Writ of Certiorari on this issue.

V. The Court of Appeals correctly affirmed the trial court's jury instruction that "The Defendant's knowledge and possession may be inferred when a substance is found on the property under the Defendant's control" because, when read as a whole, the jury charge contained the correct definitions and adequately covered the current and correct law of South Carolina.

The Court of Appeals correctly found the trial court's jury instruction was a correct and proper statement of the law and did not impermissibly shift the burden of proof or comment on the facts of the case. When read as a whole rather than in isolation, the inference charge was not a charge on the facts because the trial court repeatedly emphasized to the jury that "this inference is simply an evidentiary fact to be taken into consideration by you along with other evidence and to be given the weight you think it deserves." (R.p.469, lines 7-13; lines 16-21). Furthermore, the entire jury charge, when read as a whole, contained the correct definition of possession and it adequately covered the current and correct law of South Carolina. The jury charge was neither erroneous nor prejudicial.

Standard of Review

"An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)). "In general, the trial court is required to charge only the current and correct law of South Carolina." Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). "'A request to charge a correct statement of the law on an issue raised by the indictment and the evidence presented at trial should not be refused.'" State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (quoting State v. Austin, 299 S.C. 456, 458, 385 S.E.2d 830, 831 (1989)).

"Judges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. art. V, § 21. "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Mattison, 388 S.C. at 478, 697 S.E.2d at 583 (citations omitted). "The law to be charged must be determined from the evidence presented at trial." State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "'In reviewing jury charges for error, [the Court] must consider the court's jury charge as a whole in light of the evidence and issues presented at trial.'" Brandt, 393 S.C. at 549, 713 S.E.2d at 603 (quoting State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2013)). "Jury instructions should be designed to enlighten the jury and aid it in arriving at a correct verdict." State v. Stukes, 416 S.C. 493, 498, 787 S.E.2d 480, 482 (2016) (citing State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987)). "Regardless of whether the charge is a correct statement of the law, instructions which confuse or mislead the jury are erroneous." Id.

Law/Analysis

Appellant first argues the challenged jury charge is factually incorrect and is not supported by the law of South Carolina. He claims the historical basis for so instructing the jury is simply not supported by a logical reading of the prior case law in South Carolina, taking particular issue with State v. Adams, 291 S.C. 132, 352 S.E.2d 483 (1987). Appellant acknowledges the oft quoted language from Adams that: "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." However he complains this statement is only supported by a citation to State v. Hudson, 277 S.C. 200, 284 S.E.2d 773 (1981), where Hudson itself does not support such a charge. He argues Hudson merely held that if a defendant is exercising dominion and control over the premises, then the case should be submitted to the jury, not that the inference should be charged to the jury when submitted. (Brief of Appellant, p.14-p.15). Appellant has misconstrued the relevant cases.

In Adams, this Court did not merely approve the inference charge. It also explained that in conjunction with the inference charge, the trial court should charge the jury it is free to accept or reject this permissive inference depending on its view of the evidence. Adams, 291 S.C. at 135-36, 352 S.E.2d at 486. Here, the trial court charged both. (R.p.469). Furthermore, although Appellant correctly notes Hudson was a directed verdict case and was not specifically about the jury charge, Adams **was** about the jury charge, and it referenced Hudson's recognition of the permissive inference, which itself was recognizing the inference set forth seven years earlier in State v. Ellis, 263 S.C. 12, 207 S.E.2d 408 (1974). In Adams, this Court put an end to the practice of trial courts using a modification of the Ellis directed verdict inference language to charge the jury that items "must be deemed to be in the constructive possession of the person

controlling the house in the absence of evidence to the contrary." Adams, 291 S.C. at 135, 352 S.E.2d at 486. The Court held this instruction impermissibly shifted the burden of proof to the appellant to disprove possession, but then corrected this problem by directing trial courts to charge both the inference and that it is merely permissive. Id. at 135-36, 352 S.E.2d at 486. Again, this is precisely what the trial court did in Appellant's case. (R.p.469).

Appellant next contends the challenged jury charge is similar to the federal statutory presumption of knowledge of illegal importation from the mere fact that the defendant possessed a small amount of marijuana, a presumption rejected by the United States Supreme Court in Leary v. United States, 385 U.S. 6 (1969). He argues the inference charge should similarly be rejected by this Court because such information is not within the specialized judicial competence or completely commonplace. (Brief of Appellant, p.15-p.16). However, unlike the statutory presumption in Leary, our permissive inference does nothing to relieve the State of the burden of proving a defendant knowingly and intentionally possessed the drugs. As noted repeatedly by this Court in the context of a directed verdict: "Where contraband materials are found on premises under the control of the accused, this fact in and of itself gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury." Hudson, 277 S.C. at 203, 284 S.E.2d at 774. This inference is inherently rational without need for direct or circumstantial data regarding whether a person controlling a premises generally has knowledge and possession of materials found on that premises. Yet, it is not information that is "completely commonplace" in the context of constructive possession, a concept which we define for jurors in South Carolina. Thus, there is both a basis in fact to support the inference, and a rational basis to explain the permissive inference to the jury. Doing so does not violate due process.

Appellant goes on to attack the inference by claiming "the reasonable assumption is that the jury used the inference if they believed the case were close simply because that is what they were instructed to do." He claims the inference will lessen the State's burden of proof in violation of the principles established in In re Winship, 397 U.S. 358 (1970). Appellant argues that when the only means the State has to win a case is to tell the jury it may infer guilt from the proof of certain facts, the State has not proven its case beyond a reasonable doubt. Finally, he relies on two out-of-state cases, State v. Brunson, 905 P.2d 346 (Wash. 1995) and Commonwealth v. Bujanowski, 613 A.2d 1227 (Pa. Super. 1992), in an attempt to bolster his attack. (Brief of Appellant, p.16-p.17).

Appellant's assumption that the inference charge only has an impact in close cases is essentially an acknowledgement that it could not have been prejudicial in this case. The evidence against Appellant was strong. Appellant was identified by both a police officer and Mr. Cheatham as the person at the residence who sold heroin in the controlled buy. A recording of that controlled buy was introduced into evidence. A day after the controlled buy, the money used was found in the pocket of Appellant's pants along with over $1,000 in additional cash. Large quantities of heroin and oxycodone, digital scales, more cash, and a gun were also found in the residence where Appellant was discovered sleeping on the couch. Appellant admitted in a jail phone call that he would say the drugs were his. Thus, the permissive inference charge could not have influenced the jury to lessen or disregard the burden of proof. This is particularly true where the trial court clearly and consistently instructed the jury on that burden of proof. In reviewing the jury charge as a whole, it stayed true to the constitutional stature of the reasonable doubt standard of criminal law described in Winship.

In regard to Brunson, the State submits it actually supports the validity of the inference charge given in Appellant's case. In Brunson, the Supreme Court of Washington, in an *en banc* opinion, found the pattern inference of intent instruction, "In prosecution for burglary, any person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein," to be a constitutionally sound permissive inference rather than an unconstitutional mandatory inference. Brunson, 905 P.2d at 349-50. In doing so, the Washington Court noted: (1) it allowed the trier of fact to either infer the elemental fact from proof by the prosecutor, or reject the inference; (2) the language in the instruction was clearly discretionary; and (3) no proof existed that the jury considered the inference to the exclusion of all other evidence. Id. Here, the knowledge and possession inference is clearly permissive, and similar to Brunson, our inference is constitutional because knowledge and possession more likely than not flow from a substance being found on property under the defendant's control. In regard to Bujanowski, Appellant's claim that the inference is intended to make it easier to convict the guilty is simply not true. It is simply a correct statement of South Carolina law, and it is constitutional. The complete and correct jury charge on the burden of proof and the presumption of innocence protects against the possibility of this permissive inference leading to the conviction of the innocent.

Appellant next argues the permissive inference charge is a charge on the facts in violation of the South Carolina Constitution. However, as explained above, it was simply a declaration of the law as it exists in South Carolina. The charge given here did not instruct the jury as to the importance of certain facts to the exclusion of others because it included language explaining it is to be taken into consideration along with the other evidence and given the weight the jury thinks it deserves. (R.p.469).

Appellant relies on two early twentieth century civil cases in support of his contention that any jury instruction that tells the jurors some fact can be "inferred" is impermissible. In Yarborough v. Southern Ry., 78 S.C. 103, 58 S.E. 936 (1907), there was evidence of a conspicuously posted sign forbidding all persons to place cotton on the premises of the company until tendered and accepted for shipment. Because it was for the jury to say whether the paper was so posted as to give notice to all shippers, this Court found the charged inference which would have allowed the jurors to disregard making this determination became an unconstitutional comment on the facts. In Finch v. Atlanta & C. Air Line Ry., 87 S.C. 190, 69 S.E. 208 (1910), the trial court instructed the jury it could infer negligence of the railroad company merely because there was an injury or death and, being the only party to know how it happened, had not come forward to explain. This Court found the constitution does not allow the presiding judge to single out any particular act or omission of the defendant, and instruct the jury that, if that appears, then it may infer that the defendant was negligent. Finch, 69 S.E. at 209. Although the inference charges in these two cases were found improper, they were problematic not merely because they charged an inference, but because they were lacking in any explanatory language that the inference was permissive and could be given whatever weight the jury decided. Thus, they suffered from the same infirmity identified in Adams. Here, the trial court charged the jury that the inference was no different from any other evidentiary fact, eliminating the potential prejudice recognized by the decisions in Yarborough and Finch.

Appellant also complains that the inference charge is unfair by asking: "Why is the State the only party to achieve such an inference charge?" (Brief of Appellant, p.19). However, this complaint rings hollow, considering immediately before the charge on the inference Petitioner's complains about he received a charge that "mere presence at the scene where the drugs were

found is not enough to prove possession." (R.469). The charge he complains of is essentially the opposite side of the coin from the mere presence charge he received.

Finally, Appellant relies on two cases where this Court held jury charges requested by a defendant were improper charges on the facts, arguing the inference charge given by the trial judge here is equivalent. However, in State v. Hartley the improper jury charge—that the absence of motive "is to be duly considered by you in weighing the question of guilt"—would effectively have told the jury that particular evidence is entitled to receive weight or consideration. 307 S.C. 239, 241, 414 S.E.2d 182, 184 (1992). Here, the inference charge is clearly permissive because the jurors were told they alone determine what weight to give the evidentiary fact. No such instruction was requested in Hartley. Likewise, in State v. Bagwell the improper charge—that the testimony of a co-defendant was to be "received by the jury with caution and should be scrutinized by the jury with great caution"—would equate to the judge intimating an opinion as the weight or sufficiency of testimony. 201 S.C. 387, 23 S.E.2d 244, 249 (1942). Again, the permissive inference charge here gave no such opinion.

Further ameliorating any possible prejudice, the trial court in Appellant's case also charged the jury, prior to giving the inference charge, as follows:

> Again, you are the sole and exclusive judges of the facts in this case. A trial judge cannot intimate, state, comment on, or make any statement to a jury about the facts. Since you, the jury, are the sole judges of facts, you're not to infer from what I said during the progress of this trial in ruling on the admissibility of evidence or otherwise or anything that I say to you now during the course of these instructions that I have any opinion about the facts of this case. Ladies and gentlemen, the law does not permit me to have any opinion about the facts. This is a matter solely for you to determine. As jurors it's your duty to determine the effect, value, weight and truth of the evidence presented during trial.

(R.p.462, lines 6-18) (emphasis added). This general charge, when read in conjunction with the specific explanation that the inference was permissive, completely removed any danger that the charge unconstitutionally lessened the burden of proof or commented on the facts.

When read as a whole rather than in isolation, the inference charge was not a charge on the facts because the trial court repeatedly emphasized to the jury that "this inference is simply an evidentiary fact to be taken into consideration by you along with other evidence and to be given the weight you think it deserves." (R.p.469). Furthermore, the entire jury charge, when read as a whole, contained the correct definition of possession and it adequately covered the current and correct law of South Carolina. The jury charge was neither erroneous nor prejudicial. Accordingly, this Court should deny the Petition for Writ of Certiorari as to this issue.

VI. The Court of Appeals correctly affirmed the trial court's jury instruction that "Constructive possession means that the Defendant had dominion and control over either the drugs itself or the property upon which the drugs were found" because, when read as a whole, the jury charge contained the correct definitions and adequately covered the current and correct law of South Carolina.

The Court of Appeals correctly found the charge regarding constructive possession was a correct statement of law and did not eliminate the required *mens rea* of possession. Possession requires more than simple knowledge. Indeed, the charge given by the trial court prior to giving the portion of the jury charge Appellant challenges in this appeal was as follows: "to prove possession, ladies and gentlemen, the State must prove beyond a reasonable doubt the defendant had knowledge of, power over and the intent to control the disposition or use of the drugs involved." (R.p.468, lines 20-24). Thus, even if the challenged charge arguably eliminates the requirement of knowledge, it does not eliminate the requirement of intent, thereby preserving a

mens rea for the crime. While the jury charge allows dominion and control of the property to substitute for knowledge of the drugs, it does not allow dominion and control to substitute for the intent to control the disposition or use of the drugs. Both are needed to prove possession, constructive or otherwise. Appellant states: "As no firm foundation exists in South Carolina for such a charge, this Court should correct the error." In other words, he invites this court to make new law which would invalidate a regularly charged statement of the law of South Carolina. This Court should decline the invitation. When read as a whole, the jury charge contained the correct definitions and adequately covered the current and correct law of South Carolina. Accordingly, this Court should deny the Petition for Writ of Certiorari as to this issue.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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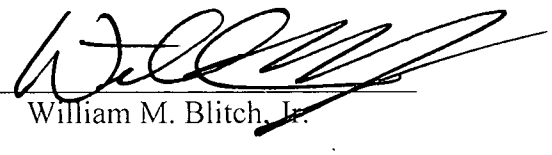
BY: 
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October 18, 2019

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Laurens County
Hon. Donald B. Hocker, Circuit Court Judge
Appellate Case Tracking No. 2019-001584

The State, Respondent,

v.

Terrance Edward Stewart, Petitioner.

PROOF OF SERVICE

I, Caroline Collins, certify that I have served the within Return to Petition For Writ of Certiorari to the Court of Appeals by having delivered two copies addressed to:

C. Rauch Wise, Esquire
305 Main Street
Greenwood, South Carolina 29646

I further certify that all parties required by Rule to be served have been served.
This 18th day of October, 2019.

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