

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

NOV 12 2019

CERTIORARI TO THE COURT OF APPEALS
Appeal from Laurens County General Sessions S.C. SUPREME COURT
Donald Hocker, Circuit Judge

Appellate Case No. 2019-001584

The State, Respondent,

vs.

Terrance Edward Stewart Petitioner.

REPLY TO RETURN

C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646
S.C. BAR # 06188
(864) 229-5010

Attorney for Petitioner

Index

Table of Authorities ii

Argument:

Question I: Did the lower courts err in failing to suppress the items seized from the residence of Terrance Stewart when the affidavit for the search warrant was not sufficient and the issuing magistrate had no recall of any of the oral information supplied to her allegedly to supplement the affidavit? 1

Question II: Did the lower courts err in failing to suppress the items seized from the residence of Terrance Stewart when the magistrate failed to comply with S. C. Code § 17-13-141 when the magistrate failed to comply with the records required by the statute and as a result, Mr. Stewart was prejudiced? 2

Question III: Did the trial court err in failing to charge the lesser included offense of possession of heroin with intent to distribute when S. C. Code § 44-53-370 by statute makes possession with intent to distribute a lesser included offense? 3

Question IV: Did the trial court err in failing to dismiss the charges on the basis the prosecution is prohibited by S. C. Code §44-53-410 which provides a prosecution in state court is barred if the same act is tried in federal court resulting in either a conviction or acquittal when Judge Herlong in federal district court found that Mr. Stewart had committed this same crime when he sentenced Mr. Stewart and enhanced his federal sentence? 3

Question V: Did the trial court err in charging the jury “The Defendant’s knowledge and possession may be inferred when a substance is found on the property under the Defendant’s control” when such a charge lessens the burden of proof on the State and is an improper charge on the facts in violation of Article V, §21 of the Constitution of the State of South Carolina? .. 4

Question VI: Did the trial court err in instructing the jury “Constrictive possession means that the Defendant had dominion and control over either the drugs itself or the property upon which the drugs were found” when such a charge eliminates any mens rea of possession of the drugs when found on the property of the Defendant? 6

Conclusion 7

Table of Authorities

Cases:	Page:
<i>Finch v. Atlanta and C. Airl Line Ry.</i> , 87 S.C. 190, 69 S.E. 208 (1910)	5
<i>Pines v. State</i> , 166 Ga. App. 724, 305 S.E.2d 459 (1983)	1
<i>Sellers v. State</i> , 362 S.C. 182, 607 S.E.2d 82 (2005)	3
<i>State v. Grandy</i> , 306 S.C. 224, 411 S.E.2d 207 (1991)	3
<i>State v. Lopez</i> , 676 P.2d 393 (Utah 1984)	1
<i>State v. Peay</i> , 321 S.C. 405, 468 S.E.2d 669 (Ct. App. 1996)	3
<i>State v. Raffaldt</i> , 318 S.C. 110, 456 S.E.2d 390 (1995)	3
<i>State v. Tabory</i> , 260 S.C. 355, 196 S.E.2d 111 (1973)	5
<i>Town of Blacksburg v. Beam</i> , 104 S.C. 146, 88 S.E. 441 (1916)	2
<i>Witte v. United States</i> , 515 U.S. 389 (1995)	4
<i>Yarborough v. Southern Ry.</i> , 78 S.C. 103, 58 S.E. 936 (1907)	5
 Statutes:	
S.C. Code § 17-13-141	2
S.C. Code § 44-53-410	3, 4

Argument

Question I

Did the lower courts err in failing to suppress the items seized from the residence of Terrance Stewart when the affidavit for the search warrant was not sufficient and the issuing magistrate had no recall of any of the oral information supplied to her allegedly to supplement the affidavit?

The State argues that an officer testifying as to what he claims he told the magistrate is sufficient to establish probable cause to issue a warrant. To sustain such a position, this Court would have to find that the recollection of the officer as to what was said is sufficient to permit the issuance of a search warrant and not what the magistrate, the issuing judge, heard or did not hear. While the authorities on this issue are scant, the few cases tend to support the proposition that what the magistrate heard controls. *See, State v. Lopez*, 676 P.2d 393, 396 (Utah 1984) (“Similarly, it is well settled that unless a statute or rule of criminal procedure requires otherwise a finding of probable cause for a search warrant can be based wholly or partially on sworn oral testimony heard by the magistrate and not embodied in a written affidavit.”); *Pines v. State*, 166 Ga. App. 724, 726, 305 S.E.2d 459, 460 (1983) (“We pause to note, however, that the better practice in presenting such testimony on a motion to suppress would be via an official record or transcript of the hearing before the magistrate rather than relying solely on the recollection of the affiant. In the absence of official recordation, we encourage magistrates to make some written notation or memorandum as to any oral testimony presented to them in support of the issuance of a warrant.”) In *Pines*, the search was sustained on the basis that a search warrant was not required due to the probable cause for the traffic stop.

In *Town of Blacksburg v. Beam*, 104 S.C. 146, 88 S.E. 441 (1916), this Court said, “Common as the event may be, it is a serious thing to arrest a citizen, and it is a more serious thing to search his person; and he who accomplishes it, must do so in conformity to the laws of the land.” To sustain a search warrant when the issuing magistrate does not recall if any oral testimony was given, is not to permit the search in “conformity to the laws of the land.” This search warrant should be suppressed.

Question II

Did the lower courts err in failing to suppress the items seized from the residence of Terrance Stewart when the magistrate failed to comply with S. C. Code § 17-13-141 as to the records required by the statute to be kept and as a result, Mr. Stewart was prejudiced?

The State has argued that “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.” Br. of Resp. at 9. This is an incorrect statement. Mr. Stewart does not know what the officer told the magistrate when the warrant was issued. Obviously, Mr. Stewart was not present when the warrant was issued. The magistrate has no recall of any supplemental testimony. All Mr. Stewart knows is that the officer at the suppression hearing testified he gave supplemental information to the magistrate at the time the warrant was issued. Mr. Stewart does not know if the same statement testified to at the suppression hearing was given when the warrant was issued. As the magistrate failed to keep a record of alleged oral testimony, Mr. Stewart has been prejudiced by the failure of the magistrate to comply with requirements of S.C. Code § 17-13-141.

Question III

Did the trial court err in failing to charge the lesser included offense of possession of heroin with intent to distribute when S. C. Code § 44-53-370 by statute makes possession with intent to distribute a lesser included offense?

In *State v. Grandy*, 306 S.C. 224, 225, 411 S.E.2d 207 (1991) this Court said “Appellant Harvey Lee Grandy was tried on December 12, 1988” Thus, *Grandy* was tried well before the law was changed to how it reads today. The *Grandy* decision has no impact upon this case. As noted in the opening brief, *Sellers v. State*, 362 S.C. 182, 607 S.E.2d 82 (2005) is a Post Conviction Relief case that was actually tried before the law was changed.

State v. Raffaldt, 318 S.C. 110, 456 S.E.2d 390 (1995) does not discuss the impact of the change in the statute. As the conspiracy began before the statute was changed, an argument can be made that any change would not apply. An opinion silent as to the issue at hand is hardly authority as to how the issue should be decided.

In *State v. Peay*, 321 S.C. 405, 468 S.E.2d 669 (Ct. App. 1996), the Court of Appeals mentioned the appropriate section but never discussed in any detail why it does not apply to the facts of the case. Furthermore, the Court of Appeals appears to rely upon cases that were decided before the statute was amended. The opinion makes no reference to the fact that the statute was amended after the cases the Court cited arose. At the very least, the *Peay* case should be the reason this Court grants the Petition for Writ of Certiorari to correct the decision.

Question IV

Did the trial court err in failing to dismiss the charges on the basis the prosecution is prohibited by S. C. Code §44-53-410 which provides a prosecution in state court is barred

if the same act is tried in federal court resulting in either a conviction or acquittal when Judge Herlong in federal district court found that Mr. Stewart had committed this same crime when he sentenced Mr. Stewart and enhanced his federal sentence?

The State incorrectly relies upon *Witte v. United States*, 515 U.S. 389 (1995) to argue against the application of S.C. Code § 44-53-410 to this case. The *Witte* decision involves the interpretation of the Double Jeopardy clause of the Fifth amendment and not the South Carolina Statute. The holding in *Witte* was that Mr. Witte was not punished for his second indictment when he was sentenced on the first indictment. In this case, the question is whether there was a conviction at the sentencing hearing when the federal judge heard the testimony for the charges in Laurens county and found Mr. Stewart guilty.

The fact that the federal government may be free to indict Mr. Stewart on the Laurens County charges is of no importance. As noted in the *Witte* decision, "Because the concept of relevant conduct under the Guidelines is reciprocal, § 5G1.3 operates to mitigate the possibility that the fortuity of two separate prosecutions will grossly increase a defendant's sentence." *Id.* at 405. The provision in the South Carolina Code serves the same purpose. As noted in the opening brief, here the question is the interpretation of a criminal statute and that interpretation should be in favor of Mr. Stewart.

Question V

Did the trial court err in charging the jury "The Defendant's knowledge and possession may be inferred when a substance is found on the property under the Defendant's control" when such a charge lessens the burden of proof on the State and is an improper charge on the facts in violation of Article V, §21 of the Constitution of the

State of South Carolina?

The State argues that the charge in this case differs from *Yarborough v. Southern Ry.*, 78 S.C. 103, 58 S.E. 936 (1907). Neither the facts nor the law support such a conclusion. The State correctly notes “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 inference charge which would have allowed the jury to disregard this determination became an unconstitutional comment on the facts.” Br. of Resp. at 21. Here, it was for the jury to say whether the drugs were possessed by Mr. Stewart and a court should find the inference charge would have allowed the jury to disregard that determination and the inference charge is therefore an unconstitutional comment on the facts. Likewise, as to *Finch v. Atlanta and C. Airl Line Ry.*, 87 S.C. 190, 69 S.E. 208 (1910), the State says, “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.” Br. of Resp. at 21. By the same principle, in a criminal case 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 possessed the drugs. Here the trial judge singled out the fact that if Mr. Stewart was in control of the premises, the jury could infer he was in control of the drugs. This case is no different from *Finch* and *Yarborough*.

The State further argues that the “mere presence” charge is simply the opposite side of the coin as the inference charge in this case. This is simply not correct. As to the possession of drugs this Court has recognized that mere presence is not legally sufficient to convict. *State v. Tabory*, 260 S.C. 355, 364–65, 196 S.E.2d 111, 113 (1973)(“We recognize that proof of

possession requires more than proof of mere presence and that the State must show defendant had dominion and control over the thing allegedly possessed or had the right to exercise dominion and control over it.”) Thus, the mere presence charge is to tell the jury that as a matter of law, if that is all the State has proven, then they are required to find a defendant not guilty. If the State only proves mere presence, then the trial judge as a matter of law has to direct a verdict. The inference charge in this case is not a statement of the law.

The State further argues that the inference in this case is not prejudicial because the trial judge stated it was only a permissive inference, and other portions of the charge further limited it. If this is true, then why did the State request the charge? What purpose does it serve? Regardless of the other language in the charge, the inference charge gives the jury permission to convict Mr. Stewart based on this inference and this inference alone.

Question VI

Did the trial court err in instructing the jury “Constructive possession means that the Defendant had dominion and control over either the drugs itself or the property upon which the drugs were found” when such a charge eliminates any mens rea of possession of the drugs when found on the property of the Defendant?

In arguing Mr. Stewart was not prejudiced by this charge the State argued “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.” Br. of Resp. at 24. If the jury charge allows dominion and control over the property to substitute for knowledge that the drugs are on the property under the control of the defendant, a jury would then assume the knowledge means the defendant had the intent to control

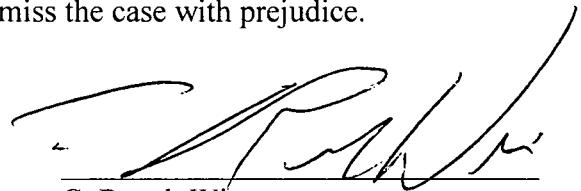
the drugs on the property under the control of the defendant.

In this case, the trial judge went even one step further. The trial judge instructed the jury that constructive possession, which would make a defendant guilty of the crime charged. The trial judge equated constructive possession of the drugs with over the premises where the drugs are found. Under the charge to the jury, to find that Mr. Stewart was in constructive possession of the drugs, all the state had to do was prove Mr. Stewart was in possession of the premises where the drugs were found. This charge in essence directed a verdict against Mr. Stewart. The charge did eliminate the mens rea.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition for Writ of Certiorari, this Court should grant the Petition for Writ of Certiorari and reverse the convictions of Terrance Stewart and remand the matter to the lower court for a new trial. As it Question IV, this Court should grant the Petition for Writ of Certiorari and reverse the conviction of Terrance Stewart and remand the matter to the lower court to dismiss the case with prejudice.

November 5, 2019



C. Rauch Wise
305 Main Street
Greenwood, SC 29646
(864) 229-5010
rauchwise@gmail.com
S.C. Bar № 06188

Attorney for
Terrance Edward Stewart

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

NOV 12 2019

CERTIORARI TO THE COURT OF APPEALS. C. SUPREME COURT
Appeal from Laurens County General Sessions
Donald Hocker, Circuit Judge

Appellate Case No. 2019-001584

The State, Respondent,

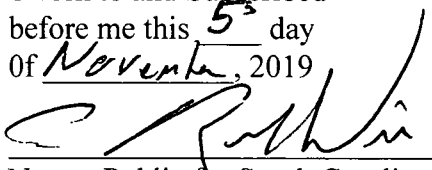
vs.

Terrance Edward Stewart Petitioner.

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 Petitioner in the above entitled case. That on November 5, 2019, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Reply to Return in the above case addressed to William M. Blich, Jr., Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211.

Sworn to and Subscribed
before me this 5th day
of November, 2019



Notary Public for South Carolina
My Commission Expires: 12/7/2019

