THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
Hon. Markley Dennis Jr., Circuit Court Judge

Appellate Case No. 2018-001147
Lower Case No. 2015GS1006523

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

vs.

Mutekis Williams ................................................... Appellant.

# FINAL BRIEF OF APPELLANT

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**Index**

Page:

Table of Authorities . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . ii

Statement of Issue Presented . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 1

Statement of the Case :

Procedural History . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 2

Factual History . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 2

Argument:

Question: Did the trial court err in failing to strike the testimony of Officer Scott Brown when he stated in an unresponsive answer that Mutekis Williams was in constructive possession of the drugs in found in the automobile? . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 1, 4

Conclusion . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 10

## Table of Authorities

**Cases:** **Page:**

*Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003) . . . . . 5

*Commonwealth. v. Canty*, 466 Mass. 535, 998 N.E.2d 322 (2013) . . . . . 8

*State v. Andrews*, 424 S.C. 304, 818 S.E.2d 227 (Ct. App. 2018) . . . . . 7

*State v. Ellis,* 345 S.C. 175, 547 S.E.2d 490 (2001) . . . . . 7, 9

*State v. Reed*, 197 N.J. 280, 962 A.2d 1087 (2009) . . . . . 6

*State v. Wiles*, 383 S.C. 151, 679 S.E.2d 172 (2009) . . . . . 9

*United States v. Rea,* 958 F.2d 1206 (2d Cir. 1992) . . . . . 4

**Court Rules:**

Rule 403 of the South Carolina Rule of Evidence . . . . . 7

Rule 701 of the South Carolina Rules of Evidence . . . . . 4

Rule 702 of the South Carolina Rules of Evidence . . . . . 4

**Other Authorities:**

Black's Law Dictionary, 4th ed 1951 . . . . . 7

Note, *Expert Legal Testimony*, 97 HARV.L.REV. 797 (1984) . . . . . 5

## Statement of Issue Presented

Did the trial court err in failing to strike the testimony of Officer Scott Brown when he stated in an unresponsive answer that Mutekis Williams was in constructive possession of the drugs found in the automobile?

## Statement of the Case

*Procedural History*

Mutekis Williams was tried before Judge Markley Dennis and a jury on June 11-12, 2018 in Charleston County. He was convicted of trafficking more than 100 grams of cocaine. A pre-trial motion to suppress the evidence was held on June 6, 2018. The Motion to Suppress was denied. After he was convicted, he was sentenced to 25 years imprisonment. Rec. on App. at 284, ll 2-9.

Mr. Williams filed his notice of Appeal on June 19, 2018. Rec. on App. At 291.

*Factual History*

Mutekis Williams was driving an automobile that had been rented by his sister. The arresting officer detected Mr. Williams traveling 81 mph in a 60 mph speed zone. This stop occurred on Highway 17, near Nebo, SC. Rec. at 60, l 19 to 66, l 3. After the stop, the arresting officer learned that Mr. Williams had an outstanding bench warrant from the Family Court. Rec. on App. at 64, ll 4-9. At that point Mr. Williams was placed under arrest.

During the search of Mr. Williams' person, the officers discovered that Mr. Williams had $4,000 in his pocket. Rec. on App. at 65, l 25 to 65, l-3. The officers then questioned Mr. Williams as to whether any more money was in the automobile, and he informed them there was an additional $8,000 in the automobile. Rec. on App. at 68, ll 14-17. Mr. Williams, when asked, informed them it was in the trunk. Rec. on App. at 69, ll 20 - 25. The State and the Defendant stipulated the money was lawfully obtained and owned by Mr. Williams. Rec. on App. at 66, ll 17-18; 79. ll 21-24. The money came from $20,000 Mr. Williams had won in the South Carolina lottery. Rec. on App. at 169, ll 9 - 22.

The officers found the money in the trunk. Directly underneath the money was a yellow bag

containing the cocaine. Rec. on App. at 95, ll 15 - 19. The cocaine was in a different bag. Rec. on App. at 100, ll 4 - 8. Some of the officers testified to smelling marijuana, but no marijuana was found in the automobile. Rec. on App. at 101, ll 1 - 7.

The automobile had been rented by his sister, Eutopia Williams, who testified for the State. She testified that she let her father and Mr. Williams drive the rental car on occasions. Rec. on App. at 160, 7-9. The only day Mr. Williams used the automobile was on July 21, 2015, the day he was arrested. Rec. on App. at 161, ll 4 - 9. She denied knowing 122 grams of cocaine was in the automobile. Rec. on App. 162 at 20-24.

During the cross-examination of Officer Scott Brown, defense counsel asked the following question:

> Q. (By Mr. Byrd) But it was in the trunk right? It wasn't on his person?
> A. It was in his constructive possession.
> Rec. on App. at 81, ll 8-10

At that point, Counsel for Mr. Williams objected and asked that the comment be stricken as a legal conclusion. The request was denied by the trial judge. Rec. on App. at 81, ll 11-13.

After only 11 minutes of deliberation, the jury asked the trial judge to re-charge them on the meaning of constructive possession. Rec. on App. at 272, l 8 to 273, l 14. After about fifty more minutes of deliberation, the jury asked to re-hear the testimony of Officer Corey Shelton, the officer who found the drugs. After about a total of two hours of deliberation, Mr. Williams was convicted. He was sentenced to the mandatory minimum of 25 years.

## Question

**Did the trial court err in failing to strike the testimony of Officer Scott Brown when he stated in an unresponsive answer that Mutekis Williams was in constructive possession of the drugs found in the automobile?**

During the cross-examination of Officer Scott Brown, trial counsel asked a question which should have elicited a simple yes or no answer. The question asked by trial counsel was "It wasn't on his person?" Rec. on App. 81, ll 8-9. This question was proper and not misleading. The proper answer under the facts of this case is a simple "no." But instead of answering the question properly, the officer elected to assert an opinion as to a legal conclusion from the facts and say, "It was in his constructive possession." Rec. on App. at 81, l 10. Officer Brown had not been qualified as an expert under Rule 702 of the South Carolina Rules of Evidence. Nor was his statement admissible as a lay opinion testimony under Rule 701 of the South Carolina Rules of Evidence. The comment was not based upon his perception. As a lay opinion, the testimony certainly was not helpful to the jury as they were as well qualified to make the factual determination of constructive possession as Officer Brown. *See, United States v. Rea,* 958 F.2d 1206, 1215 (2d Cir. 1992) ("Rule 701's helpfulness requirement is designed to provide 'assurance[ ] against the admission of opinions which would merely tell the jury what result to reach.'")(internal citations omitted). The same logic would prohibit the use of such a statement even if Officer Brown had been qualified as an expert. The testimony would not "assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." Rule 702. Officer Brown gave an opinion as to the ultimate issue which, under the facts of this case, no expert would ever be permitted to opine.

The first error with the testimony is, as noted by trial counsel, that the statement is a legal

conclusion. Whether the facts of this case constitute constructive possession of the drugs is a legal conclusion. The trial judge defined constructive possession for the jury. Rec. on App. at 265, ll 4-7. The officer testified as to his opinion what the legal conclusion of this case should be. He gave a legal opinion.[1]

The South Carolina Supreme Court has held an expert, while permitted under some circumstances to give an opinion as to the ultimate issue, cannot give an opinion in the form of a legal conclusion. "In general, expert testimony on issues of law is inadmissible." *Dawkins v. Fields*, 354 S.C. 58, 66, 580 S.E.2d 433, 437 (2003)(emphasis in original). *See,* Note, *Expert Legal Testimony*, 97 HARV.L.REV. 797, 798-799 (1984) ("A question of fact involves concrete issues, such as whether the fingerprints found on a glass belong to a certain person. In contrast, a question of law involves the jural significance that the State attaches to a certain set of facts."). Under established South Carolina law, the statement of Officer Brown should have been stricken from the record and the jury instructed to disregard the testimony.[2]

New Jersey in a similar case held that even a qualified expert was not permitted to testify that the defendants were in constructive possession of the drugs found in the automobile in which they were riding. The officer, testifying as an expert, stated:

> Q [Prosecutor] Assuming all those hypothetical facts, do you have an opinion as to why the drugs, specifically the heroin, totaling several

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[1] Interestingly, trial counsel later attempted to cross examine the officer about constructive possession. The State made an objection and the objection sustain by the judge stating "[I]f you're asking the question it is now getting into the law and that's not this officer's opinion is to what the law is." Rec. on App. at 84, ll 23-25.

[2] Arguably, trial counsel should have moved for a mistrial as the testimony was so prejudicial. As the trial judge refused to even give a curative instruction, one would not have expected the trial judge to grant a mistrial.

> hundred bags or folds, would be possessed?
> A [Expert] *My opinion they would be possessed with the intent to distribute.*
> Q And would that opinion be as to suspects one, two and three?
> A *All constructive possession with the intent to distribute.*
> [(Emphasis added).]
> *State v. Reed,* 197 N.J. 280, 295, 962 A.2d 1087, 1095 (2009)(emphasis added by the Court in the opinion)

The Court noted that the statement by the Officer was not elicited by the prosecutor asking the question. This fact is very similar to the facts existing in this case where defense counsel did not elicit the response. The Court noted:

> Although the prosecutor appeared to ask for an opinion about the intent of the participants, the last response by the expert inappropriately addressed the point of constructive possession. Thus, the expert reached to address the factual issue about who in the car could be found to be in possession of the drugs. That should not have been permitted.
> *Id.*

Here, the officer also reached to state an opinion as to constructive possession when a simple "no" would have answered the question. The statement in this case, likewise, should not have been permitted.

The New Jersey Court noted, as discussed above, "'Constructive possession,' the phrase used by Detective Swan, is a legal term referenced in the statutes under which the defendant was charged." *Id.* at 295, 962 A.2d at 1097-1098. The Court stated:

> Here, by mimicking the language of the statute, and positing on the pivotal legal element, the expert's testimony on constructive possession of drugs found in the vehicle did not constitute probative, helpful testimony for the jury. . . . Rather, the expert's constructive possession opinion was tantamount to a legal conclusion, resulting in a veritable pronouncement of guilt on the two possession crimes for which defendant was charged, which clearly was unduly prejudicial.
> *Id.* at 296-297, 962 A.2d at 1097(internal citations omitted).

In reversing the conviction, the Court finally stated:

> In sum, defendant suffered undue prejudice from the evidence in the form of expert testimony opining, in effect, that he constructively possessed the drugs found in the vehicle he was driving. This ultimate-issue testimony usurped the jury's singular role in the determination of defendant's guilt and irredeemably tainted the remaining trial proofs.
> *Id.* at 300, 962 A.2d at 1099.

Similarly, the South Carolina Supreme Ccurt in *State v. Ellis,* 345 S.C. 175, 547 S.E.2d 490 (2001) found the State qualified the officer as an expert. The Court held he should not have been so qualified and should not have been permitted to testify as to the ultimate issue of self-defense. The Court said, "Sergeant Walters was allowed to give his opinion on the ultimate issue: Whether appellant was acting in self defense when he shot and killed the victim. This was error." *Id.* at 178, 547 S.E.2d at 491. *c.f. State v. Andrews*, 424 S.C. 304, 318, 818 S.E.2d 227, 234 (Ct. App. 2018), reh'g denied (Sept. 20, 2018), aff'd as modified, No. 2018-001765, 2019 WL 2519043 (S.C. June 19, 2019)("However, an opinion may be offered on the ultimate issue of the case only when the witness is otherwise qualified."); "Ultimate issue signifies such an issue as within itself is sufficient and final for the disposition of the entire case or one which, in connection with other issues, will serve such end." Black's Law Dictionary, 4th ed 1951 at 965. Permitting Officer Brown to testify that Mr. Williams was in constructive possession of the drugs found in the automobile was error requiring reversal of the conviction.

While the lower court did not conduct an analysis under Rule 403 of the South Carolina Rule of Evidence, the admissibility of the statement could never pass such an analysis. "But where an opinion comes close to an opinion on the ultimate issue of guilt or innocence, the probative value

of the opinion must be weighed against the danger of unfair prejudice."

*Commonwealth. v. Canty*, 466 Mass. 535, 543–44, 998 N.E.2d 322, 330 (2013). A police officer saying the defendant is guilty will always be more prejudicial than probative.

*Error was prejudicial*

The error in this case was not harmless. Mr. Williams never admitted the drugs belonged to him. He borrowed the car from his sister that morning. He had not been the only driver of the automobile. Rec. on App. at 160, 7-9. He only drove the automobile one time which was the day of the incident. Rec. on App. at 161, ll 6-7. The State did not test the bag for fingerprints. Rec. on App. at 83, ll 6-7. No evidence of DNA testing was introduced by the State. As trial counsel argued, "The point is that why in the world would he direct officers to [the cocaine] if he knew it was there. It makes no sense." Rec. on App. 250, ll 8-10. The State, in closing, argued constructive possession. They argued all they had to prove was dominion and control over the automobile. Rec. on App. at 245, ll 1-19. The trial judge instructed the jury on constructive possession. Rec. on App. at 265, ll 1-14. He even instructed the jury "Constructive possession means that the defendant had dominion and control or the right to exercise dominion and control over the cocaine itself *or the property in which the cocaine is found.*" Rec. on App. at 265, ll 4-7(emphasis added). The jury easily could have concluded this statement was exactly what Officer Brown meant by "constructive possession," and, therefore, Mr. Williams was guilty.

In addition to the above, the jury specifically asked to be re-charged on the definition of "constructive possession." Rec. on App. at 272, ll 19-20.[3] They obviously decided the case on the

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[3] The trial court did not track the exact same language as he used in the original charge. At the requested re-charge he used the phrase "dominion or control" and not dominion and control." The State used "or" in their closing argument. Rec. on App. at 245, ll 2-5. While no

issue of constructive possession and considered that Officer Brown had said Mr. Williams was in fact in constructive possession of the cocaine.

In *Ellis*, the South Carolina Supreme Court was also faced with whether the testimony of an improperly qualified expert was prejudicial to the defendant. In determining the opinion by the unqualified expert was prejudicial, the Court said, "An officer's opinion which goes to the heart of the case is not harmless." *Id.* at 178, 547 S.E.2d at 491. The same is applicable here. Whether the State had proven Mutekis Williams was in constructive possession of the drugs found in the automobile was the sole issue. The improper testimony of Officer Brown went to the "heart of the case." The testimony was prejudicial. The testimony gave the jury an improper basis upon which to base their conviction. *State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009)("Unfair prejudice means an undue tendency to suggest decision on an improper basis").

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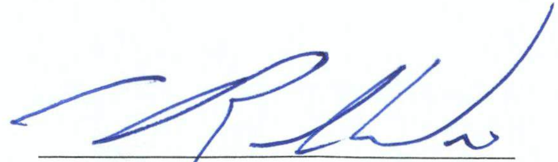
objection was raised, the definition of "constructive possession" is important to the determination of the issue in this case because Officer Brown was incorrectly permitted to interject his opinion that Mr. Williams was in constructive possession. Therefore based upon the record in this case, the jury could have determined that Officer Brown also believed it was "dominion or control."

## CONCLUSION

For the foregoing reasons this Court should reverse the conviction of Mutekis Williams and remand this matter to the lower court for a new trial.

Janu 7, 2020



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