THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

CERTIORARI - COA
Appeal from Laurens County
Court of General Sessions
Frank R. Addy, Jr. Circuit Judge
Donald Hocker, Circuit Judge

Appellate Case No. 2019-001584
Lower Court Case No. 2015GS3000957, 958, 959

The State, ... Respondent,

vs.

Terrance Edward Stewart ..... Petitioner.

BRIEF OF PETITIONER

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Question II: 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 men rea of possession of the drugs when found on the property of the Defendant?

Procedural History

The Laurens County Grand Jury indicted Terrance Stewart on June 19, 2015 on the charges of distribution of heroin, trafficking heroin, and possession with intent to distribute oxycodone. On March 28, 2016, Mr. Stewart filed a pre-trial motion to dismiss the case on double jeopardy grounds based on S. C. Code § 44-53-410 . The denial of this motion resulted in an interlocutory appeal to the South Carolina Court of Appeals. This appeal was dismissed on September 9, 2016.

The case was tried before the Honorable Frank R. Addy, Jr. and a jury on December 13-14, 2016. Mr. Stewart was convicted of distribution of heroin, trafficking heroin and possession of oxycodone. He was sentenced to 25 years for trafficking heroin, ten years for distribution of heroin, and five years for possession of oxycodone. All the sentences are to be served concurrently.

Mr. Stewart filed his Notice of Appeal on December 20, 2016.

The South Carolina Court of Appeals affirmed the conviction by unpublished order on June 5, 2019. Mr. Stewart filed a Motion to Rehear this matter on June 20, 2019. This Motion was denied on August 22, 2019. On March 12, 2020 this Court granted the Petition for Writ of Certiorari as to two issues presented.

Factual History

On June 19, 2015, the Laurens County Grand Jury indicted Terrance Stewart for trafficking in heroin, one count of distribution of heron and one count of possession oxycodone with intent to distribute for an incident that occurred on January 22, 2015.

The trial of this case then commenced on December 13, 2016. The State presented the testimony of investigating officers and an undercover informant as to the basic facts of the case involving the alleged distribution of heroin. The drugs were found in a home that Mr. Stewart shared with his girl friend, who was the mother of his children. Rec. on App. at 127, ll 17-21. The undercover informant testified that he purchased five small bags of heroin. A subsequent search of the residence found the basis for the trafficking in heroin charge and the possessing with intent to distribute oxycodone.

The jury convicted Mr. Stewart of trafficking heroin, distribution of heroin, and possession of oxycodone. He was sentenced to 25 years for trafficking in heroin, ten years for distribution of heroin, and five years for possession of oxycodone. All sentences were to run concurrently.

Argument

Question I

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?

Over the objection of Terrance Stewart, the trial judge instructed the jury that "The defendant's knowledge and possession may be inferred when a substance is found on the property under the defendant's control." Rec. on App. at 237, ll 7-10. Such a charge is factually not correct and is not supported in the law of our state. In addition, the charge is a violation of Article V, § 21 of the Constitution of the State of South Carolina.

Such an Inference Charge is not Supported by the Prior Decisions in South Carolina

The historical basis for so instructing a jury is simply not supported by a logical reading of the prior cases in South Carolina. The basis for the charge is generally attributed to *State v. Adams,* 291 S.C. 132, 352 S.E.2d 483 (1987). In *Adams,* the Supreme Court said, "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." *Id.* at 135, 352 S.E.2d at 486. In support of this statement the Court cited *State v. Hudson,* 277 S.C. 200, 284 S.E.2d 773 (1981). But *Hudson* does not support such a charge. All *Hudson* holds is that if a defendant is exercising dominion and control over the premises, then the case should be submitted to the jury. The Court said, "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 which may be sufficient to carry the case to

the jury." *Id.* at 203, 284 S.E.2d at 775. The Court in *Hudson* made no reference to a jury charge. For the jury to reach such a conclusion on their own without an instruction from judge is certainly permissible. To give the state the edge by telling the jury they may make such an inference, and thus encouraging them to do so, is not permissible. As this Court has said, "Simply because certain facts may be considered by the jury as evidence of guilt in a given case where the circumstances warrant, it does not follow that future juries should be charged that these facts are probative of guilt. It is always for the jury to determine the facts, and the inferences that are to be drawn from these facts." *State v. Cheeks*, 401 S.C. 322, 328, 737 S.E.2d 480, 484 (2013)

In *Leary v. United States*, 385 U.S. 6 (1969) the United States Supreme Court addressed the question of whether Congress could constitutionally pass a statute that established a presumption of knowledge of illegal importation from the mere fact that the defendant possessed a small amount of marijuana. In rejecting such a presumption the Court held, "Such information is 'not within specialized judicial competence or completely common place.'" *Id.* at 38. There is no basis in fact for telling a jury a person is responsible for everything that is found in a house he shares with another person. As there is no basis in fact to support such an inference, the charge also violates the due process clause of Article I, § 3 of the Constitution of the State of South Carolina and the Fourteenth Amendment of the Constitution of the United States of America.

To what use did the jury use the inference? While this question obviously cannot be answered with certainty, the Court can only assume the jury followed the judge's instructions. That being true, 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. The jury would be less likely to use the inference if the evidence against a defendant is very strong or very weak. When the jury

decides that in a close case, they will use the inference to persuade them the case has been proven beyond a reasonable doubt, then the burden of proof required of the State has been lessened. This would violate the principles established in *In Re Winship*, 397U.S. 358 (1970). When the only means the State has to win a case is to tell the jury they may infer guilt from the proof of certain facts, the State has not proven its case beyond a reasonable doubt. Arguably when two equally plausible conclusions can be drawn from the same set of facts, the government has not met its burden of eliminating other reasonable hypothesis and therefore has not met it's burden of proof. And if two equally plausible theories are possible, a charge telling the jury they may infer one is correct, guides the jury as to the result whether it be right or wrong.

In discussing the use of presumptions and inferences, the United States Supreme Court has said "But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts." *Tot v. United States*, 319 U.S. 463, 468 (1943).

The Supreme Court of Washington has also discussed the question of permissive inference in the context of an inference of intent to steal from breaking into a residence. The Court said "Because it was not the sole and sufficient proof of intent in these consolidated cases, the inference is constitutional if intent to commit a crime more likely than not flows from unlawful entry." *State v. Brunson*, 128 Wash.2d 98, 112, 905 P.2d 346, 353 (1995).

No doubt eliminating a charge that the jury may infer knowledge, dominion and control of the drugs from control of the premises where the drugs are found will result in some guilty individuals not being convicted. But it will also assure that some innocent defendants will not be convicted. As was said by the Pennsylvania Supreme Court:

> It is true, of course, that permitting the Commonwealth to introduce the out-of-court assertions ... against the defendant ... would make it easier to convict the guilty. Unfortunately, it would also make it easier to convict the innocent. If such a trade-off is acceptable, why not suspend the hearsay rule entirely when the Commonwealth introduces evidence in a criminal case? More defendants, guilty and innocent alike, would undoubtedly be convicted. The same result would obtain if we allowed the Commonwealth to introduce coerced confessions.
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> However, such a trade-off is not acceptable. It is a fundamental precept of law in Pennsylvania that one charged with crime, be it murder, child abuse, or keeping a public nuisance, comes to trial clothed in the presumption of innocence. If we bear this in mind, we will be less tempted to distort the law of evidence in favor of the Commonwealth in order to increase the conviction rate. The Commonwealth should be bound by the same rules of evidence, including the hearsay rule, as other litigants.
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> *Commonwealth v. Bujanowski,* 418 Pa. Super. 163, 172, 613 A.2d 1227, 1232 (1992).

Charging the Jury They may Infer Knowledge, Dominion and Control of Drugs Found in the Premises Under the Control of Terrance Stewart is a Charge on the Facts in Violation of Article V, § 21 of the Constitution of the State of South Carolina.

Article V, § 21 of the Constitution of the State of South Carolina provides, "Judges shall not charge juries in respect to matters of fact, but shall declare the law." This provision simply means that judge may not tell a jury to place emphasis on one fact over another. To do so is to instruct the jury as to the importance of certain facts to the exclusion of others and is therefore a comment on the facts.

The prohibition against a judge charging a jury on the facts of a case was first prohibited by Article V, § 26 Constitution of the State of South Carolina for 1868 . In *Norris v. Clinkscales,* 47 S.C. 488, 25 S.E. 797 (1896), this Court conducted a detailed analysis of the importance of this provision of our State Constitution. The opinion the Court collected cases that interpreted the 1868 constitutional provision and was the first case decided under the slightly different 1895 constitutional

provision. Both prohibit a judge from commenting on the facts. *Norris* held that taking away the provision that a judge "may state the testimony" from the 1868 Constitution placed an even greater burden on the trial judge to avoid commenting on the facts. This Court said, "The portions of the charge under consideration amount to a 'stating of the testimony' in part, and we have seen that the right 'to state the testimony' has been taken from the trial judge." *Id.* at ___, 25 S.E. at 810.

In the general discussion of the prohibition of a trial judge from commenting on the facts, the Court cited with approval numerous cases decided under the Constitution of 1868 and quoted from them. In discussing the cases, the *Norris* Court concluded, "A judge violates this provision when he expresses in his charge his views of the sufficiency or insufficiency of the evidence in whole or in part." *Id.* at ___, 25 S.E. at 806. In this case, the comment as to inferring knowledge of the drugs from having dominion and control over the property is expressing a view as to the weight of the evidence against Mr. Stewart.

In a decision interpreting the 1868 constitutional provision of prohibiting a judge from commenting on the facts, this Court, in reversing the conviction, said a judge, "should carefully avoid expressing any opinion which he may have formed from the facts, leaving it for the jury to draw their own conclusions unbiased by any impressions which the testimony may have made upon the mind of the judge." *State v. White*, 15 S.C. 381, 392 (1881). The *Norris* opinion strengthened this provision.

In later cases interpreting this provision, this Court has held that a trial court may not charge a jury that they can infer acceptance by the railroad of a package left on their loading dock for a period of time. As the Court said:

> The circuit judge laid down in the charge of the proposition that the

> jury might properly infer the consent of the railroad company to the placing of property on its platform from the fact that an agent has notice of its being placed there and makes no objection. In view of the issues made on the trial, we think this was a charge on the facts.

Yarborough v. Southern Ry., 78 S.C. 103, ___, 58 S.E. 936, 937 (1907). The Court held that charging such an inference is a comment upon the facts in violation of the State constitution.

In *Finch v. Atlanta and C Airline Ry.*, 87 S.C. 190, 69 S.E. 208 (1907) this Court held that instructing a jury they may infer negligence from particular facts was a comment on the facts in violation of our State constitution. The Court said:

> What inferences may be drawn from the circumstances appearing on the trial, from the direct evidence, from the manner of the witnesses, the introduction of evidence, or the failure to introduce it-all are for the jury. The Constitution does not allow the presiding judge to state the evidence, much less does it allow him to single out any particular act or omission of the defendant, and instruct the jury that, if that appears, then they may infer that the defendant was negligent. *Id.* at
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> ___, 69 S.E. at 209.

In this case the trial judge singled out one particular fact - who was in control of the premises - and instructed the jury they may infer that person was the possessor of the drugs. Such a charge is a charge on the facts in violation of our constitution. The charge takes one particular fact, and heightens it above all the others. What if the drugs were found in a purse in the house? Could the trial judge have charged that the jury may infer that drugs found in the purse are in the possession of the owner of the purse? That charge would actually make more factual sense than saying a person in control of the premises knows what is in the house. No trial court would ever charge that a jury can infer the defendant did not possess the drugs because he was not the owner of the house or automobile. Why is the State the only party to benefit from an inference charge?

In *State v. Hartley*, 307 S.C. 239, 414 S.E.2d 182 (1992) the defendant requested that a charge to the jury simply stating that the absence of motive "is to be duly considered by you in weighing the question of guilt regarding him." *Id.* at 240, 414 S.E.2d at 183. The Court held that such a charge was improper as it was a charge on the facts in violation of the state constitution. As the Supreme Court held "Thus, the trial judge was requested, in effect, to charge that particular evidence (*i.e.* evidence of lack of motive) is entitled to receive weight or consideration. The requested charge is clearly a charge on the fact that the jury was to determine." *Id.* at 241, 414 S.E.2d at 184. Any inference charge is legally no different. A judge in essence would tell the jury that particular evidence is entitled to receive special weigh or consideration

In *State v. Bagwell*, 201 S.C. 387, 23 S.E.2d 244 (1942)[1] the defendant had requested a simple 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." *Id.* at ___, 23 S.E.2d at 249. In holding the trial court did not commit error, the South Carolina Supreme Court said "A judge cannot express in his charge, or intimate any opinion as to the *weight or sufficiency* of testimony of accomplice without violating the prohibition of the Constitution as to charging upon the facts." *Id.* (emphasis added). When a judge instructs a jury that they may infer guilt from the fact that the defendant is in control of the premises, that judge is both expressing and intimating an opinion as to the weight and sufficiency of the evidence. He is making a comment on the facts and telling a jury what they may do with those particular facts. Such a statement violates the constitution in that it is a comment on a particular fact of the case. The comment as to an inference tells the jury to place special emphasis

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[1] T. FELDOR DORN, GUNS OF MEETING STREET (The University of South Carolina Press 2006) chronicles this murder and trial in great detail.

on one fact above all others.

To rule in favor of Mr. Stewart on this issue does not require this Court to rule that the mere presence charge is a charge on the facts. A mere presence charge is a proper statement of the law. A proper charge on the law is required under the Constitution of the 1885. As a matter of law, if a defendant is merely present at a scene and not aiding and abetting in the crime, they are not guilty. As this Court said in *Norris,* "[T]he trial judge, in charging the law of the case, should law lay before the jury that law as applicable to a supposed state of facts." *Id.* at___, 47 S.E. at 809. When mere presence is a defense, the trial judge would err in failing to charge this correct statement of the law.

Question II

Did the trial court err in instructing the jury "Constrictive possession mean 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 men rea of possession of the drugs when found on the property of the Defendant?

"The presumption of mens rea embodies deeply rooted principles of law and justice that the Supreme Court has emphasized time and again. The presumption of mens rea is no mere technicality, but rather implicates "fundamental and far-reaching" issues, as this case well illustrates." *United States v. Burwell*, 690 F.3d 500, 527 (D.C. Cir. 2012)(Kavanaugh, dissenting). The charge to the jury in this case eliminated the mens rea of knowingly possessing the drugs in question.

The trial court charged the jury that constructive possession of drugs means "that the Defendant had dominion and control over either the drugs itself or the property upon which the drugs were." found." App. at 469, ll 2-5. Such a charge eliminated the requirement that the State prove a defendant has knowledge that the drugs are on the premises. The charge tells the jury if a

defendant has dominion and control over the property, he possesses the drugs. No real foundation in South Carolina law can be found for the charge. When a judge also charges the jury that mere presence is not sufficient to convict, then confusion arises. As this Court has said "A jury charge is no place for purposeful ambiguity." *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009).

Research of this specific charge show little support among our sister states. *See, People v. Fetter*, 607 N.Y.S.2d 381, 382, 201 A.D.2d 500, 500 (N.Y.A.D. 2 Dept.,1994)("In order for a defendant to be found to 'possess' the property, it is sufficient to show constructive possession, which means that the defendant exercised some 'dominion and control' over the goods or the premises where the goods were found."); *State v. Amezola*, 49 Wash.App. 78, 86, 741 P.2d 1024, 1029 (Wash.App.,1987) ("Actual possession means that the goods are in the personal custody of the person charged with possession, while constructive possession is established when the person charged with possession has dominion and control over either the drug, . . . or the premises.")(internal citations omitted); *but see, State v. Callahan,* 77 Wash.2d 27, 29,459 P.2d 400, 401–02 (1969)("Actual possession means that the goods are in the personal custody of the person charged with possession; whereas, constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over the goods.")

Most states do not include control over the premises in their definition of constructive possession. They refer, properly, to the ability to control the actual contraband itself and not the premises upon which the property at issue is found. *State v. Durgan*, 467 A.2d 165, 167 (Me.,1983)("Constructive possession means that although one does not have the actual physical

custody of the goods, he has dominion, authority or control over them."); *State v. Whittaker*, 326 N.J.Super. 252, 262, 741 A.2d 114, 120, (N.J.Super.A.D. 1999)("Constructive possession means possession in which the person does not physically have the property, but though not physically on one's person, he is aware of the presence of the property and is able to exercise intentional control or dominion over it."); *U.S. v. Caldwell*, 423 F.3d 754, 758 (7th Cir. 2005)("Constructive possession exists when a person knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly, or through others.")

This Court has said, "Conviction of possession of heroin requires proof of possession-either actual or constructive, coupled with knowledge of its presence." *State v. Hudson*, 277 S.C. 200, 202, 284 S.E.2d 773, 774 (1981). The charge to the jury in this case eliminated the requirement that the State prove Mr. Stewart had "knowledge of its presence."

This Court, at least implicitly if not expressly, rejected such a charge in *State v. Adams*, 291 S.C. 132, 352 S.E.2d 483 (1987). This Court said, "Further, the trial judge charged the jury that articles in a dwelling house 'must be deemed to be in the constructive possession of the person controlling the house in the absence of evidence to the contrary.' The jury could have taken this language to require appellant to rebut the State's evidence. This instruction impermissibly shifted the burden of proof to appellant to disprove possession which is an element of the offense charged." *Id.* at 135, 352 S.E.2d at 486. Here, the trial Court went even further and told the jury that merely having dominion and control over the premises is sufficient to convict. The charge is not a correct statement of the law.

The unpublished opinion in this case is in conflict with the Court of Appeals opinion in *State v. Miles*, 421 S.C. 154, 805 S.E.2d 204 (Ct. App. 2017). In that opinion the Court of Appeals said,

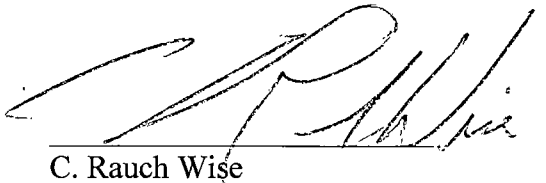
"Our supreme court has held the language now codified in subsection (c) requires the State to prove beyond a reasonable doubt that the defendant knew he possessed a 'controlled substance.'" *Id.* at 161-162, 805 S.E.2d at 208-209. Here the charge to the jury did not even require the State to prove Mr. Stewart knew there was in fact a controlled substance in the residence, but the State need only prove he had dominion and control over the residence.

As no foundation exists in South Carolina for such a charge, this Court should correct the error. As the charge eliminates any mens rea concerning knowledge of the drugs, it should be found to be a violation of the due process clause of the 14th Amendment to the Constitution of the United States of America and Article I, § 3 of the Constitution of the State of South Carolina. This is especially true when the charge is given in conjunction with the inference charge referred to in Argument I. This Court should reverse this case and remand for a new trial.

Conclusion

For the reasons stated in Questions I and II this Court should reverse the conviction for Terrance Stewart and remand the matter to the lower court for a new trial.

April 9, 2020



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