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,

v.

Terrance Edward Stewart ..... Petitioner.

REPLY BRIEF OF PETITIONER

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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?

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

The Respondent appears to concede that prior to *State v. Adams,* 291 S.C. 132, 352 S.E. 2d 483 (1987), no court in our state had ever held a charge to the jury that they may infer possession of the drug from exercising dominion and control over the premises where the drugs are found was given. Such a charge was not given in *State v. Hudson*, 277 S.C. 200, 284 S.E.2d 773 (1981) and *State v. Brown*, 267 S.C. 311, 227 S.E.2d 674 (1976).

This Court in *Adams* impliedly overruled *State v. Ellis,* 263 S.C. 12, 207 S.E.2d 408, (1974). While this Court did overrule some language in *Ellis*, this Court ultimately said, "Where such materials are found on the premises under the control of an 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 on a charge of unlawful possession." *State v. Ellis*, 263 S.C. 12, 22, 207 S.E.2d 408, 413 (1974). This was the same holding in *Adams* without reference to a jury charge. To the extent *Adams* gave a jury instruction as to future jury charges, such a conclusion would be dicta as the holding in *Adams* was the jury charge as given was not proper. The Defendant would have no reason to petition for a rehearing to correct the error as he had received the relief to which he was entitled - a new trial.

The State in its brief argues, "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 items 'must be deemed to be in the constructive possession of the person controlling the house in the absence of evidence to the contrary.'" Br. of Resp. at 10 (internal citations omitted). Other than the *Adams* case, there had been no history of judges giving such a charge to a jury. Thus, without apparent urging from the defendant in *Adams*, this Court approved a charge that no one had urged the Court to adopt.

The State then argues that as the possession of items found in the residence, by common sense, would belong to the person exercising dominion and control over the premises, the charge was proper. This argument ignores two things. First, Mr. Stewart did not have exclusive dominion and control over the premises. He shared the residence with his wife. Second, even if such a conclusion is common sense, why does the State obtain the advantage of a charge that tells the jury they can infer the drugs belong to the defendant? Would a defendant, who is accused of the possession of drugs found in an automobile in which he is a passenger, be entitled to a charge that the jury may infer he was not the possessor of the drugs found in the automobile? If the State is entitled to such a charge, then so should the defendant under those circumstances.

Under the State's "common sense" approach to inference charges, the number of inferences given would be limited only by the imagination of the prosecutor. If a defendant smells of alcohol, is unsteady on his feet, and slurs his speech, the jury could be instructed they may infer he is guilty of driving under the influence. From the DNA of the defendant being found on a piece of evidence, the jury could be instructed the jury may infer the defendant touched the piece of evidence. From a defendant fleeing the state after the crime, a jury may be

instructed that they may infer the defendant is guilty. *But see, State v. Grant*, 275 S.C. 404, 407, 272 S.E.2d 169,171 (1980)("While an instruction on flight has been acceptable law for some time in most jurisdictions, we are inclined to think that henceforth it is more appropriate for the judge to decline any charge whatsoever on this issue.") For some reason, the courts have given the advantage of an inference instruction to the State and not the defendant.

The Indiana Supreme Court has long rejected the use of inferences. "It is not proper for the court to instruct the jury as to mere inferences of fact which it is their duty to make from the evidence. Instructions should state legal principles, not declare inferences of fact. They may be declarations of law, but not commentaries upon evidence." *Union Mut. Life Ins. Co. v. Buchanan,* 100 Ind. 63, 81 (1885). Not every court even accepts the fact that dominion and control creates an inference. "Dominion and control of the premises does not, however, create an inference that the defendant had dominion and control over the drugs found on the premises." *State v. Shumaker*, 142 Wash. App. 330, 331, 174 P.3d 1214, 1214 (2007), as amended on denial of reconsideration (Feb. 26, 2008). The charge in this case was improper.

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.

Recently this Court has said:

> When the trial court tells the jury it may use evidence of the use of a deadly weapon to establish the existence of malice, a critical element of the charge of murder, the trial court has directly commented upon facts in evidence, elevated those facts, and emphasized them to the jury. Even telling the jury that it is to give evidence of the use of a deadly weapon only the weight the jury determines it should be given does not remove the taint of the trial

court's injection of its commentary upon that evidence.

State v. Burdette, 427 S.C. 490, 502–03, 832 S.E.2d 575, 582 (2019), reh'g denied (Sept. 27, 2019).

The same principles apply in this case. To tell the jury they may infer guilt from the defendant being in control of the premises is a charge on the facts. To paraphrase the opinion in *Burdette*, "A jury instruction that [possession] may be inferred from the [control of the premises] is an improper court-sponsored emphasis of a fact in evidence—that [the drugs belonged to the defendant]—and it should no longer be permitted." *Id.* at 503, 832 S.E.2d at 582 (2019).

The State has argued that such an inference is the companion to a charge that mere presence is not sufficient to convict. This is not correct. The companion charge would be that the jury may infer the defendant did not possess the drugs if he is not in control of the premises. A mere presence charge tells the jury the proper legal result if they determine the defendant was merely present. *State v. Campbell*, 144 S.C. 53, 142 S.E. 31, 33 (1928)("Even if this be held to constitute sufficient testimony showing presence, mere presence at the commission of an offense is not sufficient to justify a conviction."). Such a charge does not tell the jury to infer the defendant is merely present. It is a correct statement of the law as opposed to telling a jury what they may infer from the facts.

The State has argued that the charge to the jury in *Yarborough v. Southern. Ry.*, 78 S.C. 103, 58 S.E. 936, 937 (1907) was in the nature of a mandatory presumption and not an inference. The passage from the opinion quoted by the State in its brief belies such a conclusion. This Court said the charge told the jury they "might properly infer the consent." Such a conclusion is inconsistent with a mandatory presumption. *Yarborough* unequivocally held that a permissive

inference is a charge on the facts in violation of the Constitution of the State of South Carolina.

The State contends that *Finch v. Atlanta and C Airline Ry.,* 87 S.C. 190, 69 S.E. 208 (1907) is a comment on the facts because the charge presented facts to the jury. The same argument can be made about a charge that tells a jury they can infer guilt from the fact that a defendant is in control, even jointly in this case, of the premises where drugs are found. In *Finch,* the trial court took one fact, the failure of witnesses to testify, and elevated it above all other facts. This is exactly what the constitution was intended to prohibit. The trial court in this case "presented the jury with instructions on how to use the evidence they find existed." Br. of Resp. at 16.

The State argues that *State v. Cheeks*, 401 S.C. 322, 737 S.E.2d 480 (2013) was properly decided because a statement that a fact is "strong evidence" is a comment on the facts. Whether the trial judge were to say certain evidence is strong evidence, good evidence or slight evidence, does not change the fact that the comment is a comment on the facts. And for a judge to tell a jury they can take one fact and based upon that one fact make an inference as to guilt, is a comment on the facts as surely as saying "strong evidence" is a comment. They differ only in degree and not substance.

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 mens rea of possession of the drugs when found on the property of the Defendant?

The basic flaw in the State's argument was best expressed by this comment by the

Washington Court of Appeals. "[I]t is a crime to possess a controlled substance. It is not a crime to have dominion and control over the premises where the substance is found." *State v. Olivarez*, 63 Wash. App. 484, 486, 820 P.2d 66, 68 (1991) The jury instruction in this case made the control of the premises upon which the drugs were found to be a crime. The jury easily could have interpreted the charge to mean that the knowledge and intent to control the drug is proven when the State proves a defendant has dominion and control over the premises. Coupled with the inference discussion above, such a conclusion is virtually assured.

The State argues that "When read as a whole, the charge given by the trial judge was a full and correct statement of law." Br. of Resp. at 19. Then the State cites a string of cases that purport to state that simple control of the premises where drugs are found is sufficient to convict without the State having to prove a mens rea. This is simply not the law. "The jury instruction in *Ponce*, like the one in this case, incorrectly stated that constructive possession is defined by showing that the defendant had dominion and control over either the drugs or the premises in which the drugs were found. *Ponce*, 79 Wash.App. at 654, 904 P.2d 322; CP at 35. The correct instruction for constructive possession was whether a defendant had dominion and control over the substance only." *Shumaker*, at 334, 174 P.3d at 1216. A defendant having dominion and control over the property is a factor the jury may consider, but the State still has the burden of proving the defendant had actual knowledge of the illegal substances.

Under the law as urged by the State, a parent who is driving the family car would be guilty of any illegal drugs left in the car by a friend of their child. The jury would be told that constructive possession means having dominion and control over the car. A mens rea of knowledge of the drugs would not be required. Parents should not be exposed to such criminal

liability.

This Court has previously said, "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." *State v. Tabory*, 260 S.C. 355, 364–65, 196 S.E.2d 111, 113 (1973). The jury charge in this case violated this principle. The charge eliminated the need for the state to prove dominion and control over the illegal substance.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the opening brief, this Court should reverse the conviction of Terrance Edward Stewart and remand the case for a new trial.

June 18, 2020

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