

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Roger L. Couch, Circuit Court Judge

RECEIVED

Oct 01 2020

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

WORTH G. MYERS,

APPELLANT.

APPELLATE CASE NO. 2019-001982

ANDERS BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW3

ARGUMENT

The trial judge erred by failing to direct a verdict of acquittal when the state failed to present any direct or substantial circumstantial evidence that Appellant constructively possessed the drugs found in his car, which was also occupied by three other people, particularly when the arresting officer admitted the drugs could have been stashed in the location where they were found between the driver’s seat and the center console by one of the backseat passengers, who was physically closer to the drugs than Appellant.4

CONCLUSION.....10

PETITION TO BE RELIEVED AS COUNSEL11

TABLE OF AUTHORITIES

Cases

State v. Ballenger, 322 S.C. 196, 470 S.E.2d 851 (1996)..... 8

State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004) 7, 8

State v. Ellis, 263 S.C. 12, 207 S.E.2d 408 (1974)..... 8

State v. Fennell, 340 S.C. 266, 531 S.E.2d 512 (2000) 7

State v. Halyard, 274 S.C. 397, 264 S.E.2d 841 (1980) 8

State v. Heath, 370 S.C. 326, 635 S.E.2d 18 (2006)..... 8

State v. Hernandez, 382 S.C. 620, 677 S.E.2d 603 (2009)..... 3

State v. Hudson, 277 S.C. 200, 284 S.E.2d 773 (1981)..... 8

State v. Jackson, 395 S.C. 250, 717 S.E.2d 609 (Ct. App. 2011)..... 7, 8

State v. Stuckey, 347 S.C. 484, 556 S.E.2d 403 (Ct. App. 2001)..... 7

State v. Tabory, 260 S.C. 355, 196 S.E.2d 111 (1973)..... 8

State v. Weston, 367 S.C. 279, 625 S.E.2d 641 (2006)..... 3

STATEMENT OF ISSUE ON APPEAL

Did the trial judge err by failing to direct a verdict of acquittal when the state failed to present any direct or substantial circumstantial evidence that Appellant constructively possessed the drugs found in his car, which was also occupied by three other people, particularly when the arresting officer admitted the drugs could have been stashed in the location where they were found between the driver's seat and the center console by one of the backseat passengers, who was physically closer to the drugs than Appellant?

STATEMENT OF THE CASE

A Beaufort County Grand Jury indicted Appellant on January 17, 2019 for possession of furanyl fentanyl, possession of oxycodone, possession with intent to distribute heroin, possession of hydrocodone, and possession of alprazolam. R. 161-170. His case was called to trial on November 20, 2019 before the Honorable Roger L. Couch, and a jury. R. 1. Assistant Solicitors Andrew Smith and Sarah Fowler represented the state. R. 1. Brittany Holmes and Courtney Gibbs represented Appellant. R. 1.

On November 21, 2019, the jury found Appellant guilty of possession of furanyl fentanyl, possession of oxycodone, possession of hydrocodone, possession of alprazolam, and the lesser included offense of possession of heroin. R. 145, ll. 2-22. Appellant was sentenced to three years for possession of furanyl fentanyl, possession of oxycodone, possession of hydrocodone, and possession of heroin and one year for possession of alprazolam. R. 155, ll. 6-14. All sentences were ordered to be served concurrently. R. 155, ll. 9-12.

This appeal follows.

STANDARD OF REVIEW

“When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight.” State v. Hernandez, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009) (citing State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006)). “A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged.” Id. (citing Weston, 367 S.C. at 292, 625 S.E.2d at 648). “When reviewing a denial of a directed verdict, an appellate court views the evidence and all reasonable inferences in the light most favorable to the State.” Id. (citing Weston, 367 S.C. at 292, 625 S.E.2d at 648). “If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury.” Id. (citing Weston, 367 S.C. at 292-293, 625 S.E.2d at 648).

ARGUMENT

The trial judge erred by failing to direct a verdict of acquittal when the state failed to present any direct or substantial circumstantial evidence that Appellant constructively possessed the drugs found in his car, which was also occupied by three other people, particularly when the arresting officer admitted the drugs could have been stashed in the location where they were found between the driver's seat and the center console by one of the backseat passengers, who was physically closer to the drugs than Appellant.

Relevant Facts

Sometime after midnight on July 18, 2018, Trooper Christopher Wampler with the South Carolina Highway Patrol stopped a four door sedan on Fording Island Road in Bluffton for speeding. Wampler claimed the vehicle was traveling “well over” ninety miles per hour when the speed limit was only fifty-five miles per hour. R. 63, l. 20 – 65, l. 2. As he approached the car, Wampler noticed there were four occupants in the vehicle. R. 65, ll. 3-8. He later identified Appellant as the driver and as the registered owner of the car. R. 65, ll. 10-11; R. 66, ll. 3-6.

While Trooper Wampler was asking Appellant for his license and registration, he noticed “a pill or two in the center console just loosely on the gearshift location.” R. 66, ll. 7-11. The pills “were white in color, rectangular, oval in shape.” R. 66, ll. 18-19. Wampler also claimed he “smelled the strong odor of marijuana.” R. 66, ll. 11-13.

After a Beaufort County deputy arrived as backup, Trooper Wampler asked Appellant and the three passengers to step out of the car. R. 66, l. 22 – 67, l. 1. Once they complied, all four were patted down. R. 67, ll. 2-6. Nothing was found on their persons. R. 67, ll. 7-8. Wampler then searched the vehicle. R. 67, ll. 9-10. He claimed during his testimony that he

searched the car based on the pills he saw in plain view on the center console and the smell of marijuana. R. 67, ll. 11-14.

During the search, Wampler claimed he found “a couple extra pills in the driver’s seat.” R. 67, ll. 15-18. He later said he “believed” there were five pills in total on the seat. R. 70, ll. 7-10. The pills were “sitting on the driver seat itself as if the driver [had been] sitting on them.” R. 67, ll. 15-22; R. 70, ll. 11-13. Wampler eventually found more illegal substances in a single plastic bag tucked between “the backrest for the driver seat” and the center console. R. 68, ll. 2-23. Inside the bag, was “a green, leafy substance that was identified as marijuana, numerous pills, and a tan powder substance.” R. 68, ll. 20-23. The pills “were various shapes, between oval, rectangular, white in color, blue in color, and they had different markings on a few of them.” R. 69, ll. 1-3.

Significantly, no where in his incident report or on the audio and video recording from his in car dash camera, which recorded the traffic stop and search, did Wampler state that he found pills located in plain view in the center console and on the driver’s seat. R. 72, l. 6 – 73, l. 24. The first time he claimed he saw loose pills in the car was during his testimony before the jury. On the dash camera video, Wampler said the reason he was going to search the vehicle was because he smelled marijuana. He never mentioned the pills he allegedly saw in plain view on the center console. R. 72, l. 25 – 73, l. 2. Wampler also admitted that if he had found pills laying on the driver’s seat, he would have written it in his report. R. 74, ll. 6-8.

No photographs were taken to document where the drugs were found in the car. R. 75, ll. 8-10. Moreover, Wampler was not wearing a body camera which would have documented where the drugs were found. R. 75, ll. 1-7. The only evidence presented as to where the drugs were allegedly located was Wampler’s testimony.

During his testimony, Trooper Wampler admitted that the plastic bag of drugs could have been “stashed” between the backrest of the driver’s seat and the center console, where they were found, by the backseat passenger. R. 75, l. 11 – 76, l. 14. This person was also charged with possession of the same drugs as Appellant. R. 76, ll. 20-23. None of the occupants would take ownership of the drugs during the stop. R. 76, ll. 3-9. For whatever reason, law enforcement did not conduct any fingerprint testing or other forensic analysis on the bag containing the illegal substances, which may have helped determine who had previously possessed it. R. 76, l. 24 – 77, l. 5.

Trooper Wampler admitted he did not find any small plastic bags, scales, or cash that may have suggested distribution. R. 77, ll. 6-13.

Jessica Ziepfel, who was qualified as an expert in drug analysis without objection, testified that the tan powder substance was found to contain heroin with a weight of 0.595 grams or 9.182 grains. R. 85, ll. 22-24; R. 87, ll. 2-5. She divided the pills found in the bag into four categories based on their appearance. The first category consisted of thirty-nine tablets. She analyzed three of them and those three were found to contain furanylfentanyl. The second category consisted of one tablet, which was found to contain oxycodone. The third category consisted of four tablets. Ziepfel analyzed one of the four and found it contained hydrocodone and acetaminophen. The fourth category consisted of sixteen tablets. She analyzed one of the sixteen and found it contained alprazolam. R. 85, l. 21 – 86, l. 7.

After the state rested, Appellant moved for a directed verdict. Defense counsel argued the state failed to present any direct or substantial circumstantial evidence that Appellant knew the drugs were in his car and that he intended to possess them. R. 90, ll. 3-14.

The trial judge denied the motion. He found there was “sufficient evidence to send the case to the jury.” R. 91, ll. 24-25. In support of his ruling, the judge cited to evidence that there were two pills on the center console, which would have been in plain view of Appellant who was driving the car, that the other drugs were found within the seating area of Appellant, and that Appellant owned the vehicle. R. 91, l. 15 – 92, l. 1.

Discussion

The trial judge erred by failing to direct a verdict of acquittal when the state failed to present any direct or substantial circumstantial evidence that Appellant constructively possessed the drugs found in his car, which was occupied by three other people. Trooper Wampler admitted the plastic bag containing drugs could have been stashed in the location where they were found between the driver’s seat and the center console by one of the backseat passengers, who was also arrested for possessing the same drugs. Moreover, Wampler never mentioned the pills allegedly seen in plain view until his testimony before the jury, which calls into question the accuracy of his claims.

“When considering a motion for a directed verdict, a trial court is concerned only with the existence of evidence, not its weight.” State v. Jackson, 395 S.C. 250, 254, 717 S.E.2d 609, 611 (Ct. App. 2011) (citing State v. Stuckey, 347 S.C. 484, 498, 556 S.E.2d 403, 410 (Ct. App. 2001)). “A trial court must submit the case to the jury if any direct or substantial circumstantial evidence has been presented that reasonably tends to prove the defendant’s guilt or from which his guilt may be fairly and logically deduced.” Id. at 255, 717 S.E.2d at 611 (citing State v. Fennell, 340 S.C. 266, 270, 531 S.E.2d 512, 514 (2000)). “However, the trial court should grant a directed verdict motion when the evidence presented merely raises a suspicion of guilt.” Id. (citing State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004)). “Suspicion implies a

belief or opinion as to guilt based upon facts or circumstances not amounting to proof, but the trial court is not required to find the evidence infers guilt to the exclusion of any other reasonable hypothesis.” Id. (citing Cherry, 361 S.C. at 594, 606 S.E.2d at 478).

Conviction for possession of illegal drugs requires proof of possession, either actual or constructive, coupled with knowledge of its presence. Jackson, 395 S.C. at 255, 717 S.E.2d at 611 (citing State v. Hudson, 277 S.C. 200, 202, 284 S.E.2d 773, 774-775 (1981)). “Actual possession occurs when the drugs are found to be in the actual physical custody of the person charged with possession, while constructive possession occurs when the person charged with possession has dominion and control over either the drugs or the premises upon which the drugs are found.” State v. Ballenger, 322 S.C. 196, 199, 470 S.E.2d 851, 854 (1996) (quoting State v. Ellis, 263 S.C. 12, 22, 207 S.E.2d 408, 413 (1974)) (internal quotation marks omitted).

“Mere presence is insufficient to prove constructive possession.” State v. Heath, 370 S.C. 326, 329, 635 S.E.2d 18, 19 (2006) (citing State v. Tabor, 260 S.C. 355, 364, 196 S.E.2d 111, 113 (1973)). The state may establish constructive possession by either circumstantial or direct evidence. Id. (citing State v. Halyard, 274 S.C. 397, 400, 264 S.E.2d 841, 842 (1980)).

In this case, there was no evidence Appellant knew the drugs were stashed between his seat and the center console or that he constructively possessed them. Even Trooper Wampler admitted it was possible the backseat passenger placed the drugs in the location where they were found. This individual was also charged with possessing the same drugs as Appellant.

Moreover, Wampler’s testimony that there was “a pill or two in the center console just loosely on the gearshift location” and “a couple extra pills in the driver’s seat,” was not credible. See R. 67, ll. 15-18 and R. 66, ll. 7-11. Wampler later said with certainty that there were two pills in the center console and five on the driver’s seat. See R. 66, ll. 20-21 and R. 70, ll. 7-10.

However, he admitted that nowhere in his incident report or on the audio and video recording from his in-car dash camera did he mention the loose pills found in plain view in the car. He further conceded that if he had found pills in plain view on the center console or driver's seat, he would have documented the finding in his report. See R. 72, I. 16 – 75, I. 3.

Because Wampler's testimony concerning the existence of pills in plain view lacked credibility and there was no evidence Appellant knew the plastic bag of drugs was stashed between his seat and the center console, the trial judge erred by failing to direct a verdict on all charges. Respectfully, this Court should reverse Appellant's convictions and direct a verdict of acquittal.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court direct a verdict of acquittal on all charges.

Respectfully submitted,

s/ Lara M. Caudy _____
Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of October, 2020.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Worth Myers states:

1. She is an appellate defender for the South Carolina Office of Appellate Defense and was appointed to represent Appellant.
2. She has reviewed the record of Appellant's trial, which was held on November 21, 2019 before the Honorable Roger L. Couch, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Worth Myers.

Respectfully Submitted,

s/ Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

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**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) Complete Trial Transcript Dated November 20-21, 2019;
- (2) Court's Exhibit No. 2 (Jury Note and Response);
- (3) Court's Exhibit No. 3 (Jury Note);
- (4) Court's Exhibit No. 4 (Excerpt of Jury Charge);
- (5) True-Billed Indictments;
- (6) Sentence Sheets.

I certify that this designation contains no matter which is irrelevant to this appeal.

s/ Lara M. Caudy

Appellate Defender

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ATTORNEY FOR APPELLANT

October 1, 2020

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled “Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.”

s/ Lara M. Caudy _____
Appellate Defender

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