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May 13 2021

SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

Appellate Case No. 2018-00103

**APPEAL FROM YORK COUNTY
Grace Gilchrist Knie, Circuit Court Judge
Trial Court Case No. 2018-GS-46-2505**

The State,..... Respondent

v.

Warren Tremaine Duvant,..... Appellant

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Warren Tremaine Duvant petitions for rehearing because this Honorable Court overlooked or misapprehended the matters set forth in his pleadings. Specifically, this Honorable Court overlooked the lack of key evidence linking Mr. Duvant to the charge of trafficking for which he was convicted and the confusion created by the *Miranda* warning he was given. As more fully explained below, rehearing of this matter is warranted.

- 1. Whether the circuit court erred by denying defendant's motion for directed verdict, when the State failed to present substantial circumstantial evidence that he committed the charged offense of trafficking.**

The trial court erred by denying defendant's motion for directed verdict because the State presented circumstantial evidence that merely raised a suspicion that defendant was guilty of

trafficking drugs. In denying this claim, the circuit court reasoned that Mr. Duvant had constructive possession of the drugs in dispute. The facts and evidence, however, demonstrate that although Mr. Duvant knew of the existence of the drugs, there was no evidence that he knew of the quantity or even what the drugs were. Simply knowing the existence of drugs does not mean he knew the specifics about the drugs.

Instead, the overwhelming evidence at trial demonstrated that Mr. Duvant was staying in another person's house—a person who was found with drugs in her possession. The home belonged to Carolyn Johnson. The paraphernalia in the home belonged to her. Cocaine was actually retrieved from her own purse, she had been smoking marijuana immediately before law enforcement arrived at her home, and the paraphernalia strewn throughout her kitchen was hers. Although Mr. Duvant's overall actions may appear suspicious, mere suspicion is insufficient to support a guilty verdict. *State v. Odems*, 395 S.C. 582, 590, 720 S.E.2d 48, 52 (2011) (citing *State v. Arnold*, 361 S.C. 386, 389-90, 605 S.E.2d 529, 531 (2004) (holding that the trial court must grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty)). The circuit court specifically referenced that its review is limited to the existence or nonexistence of evidence, further citing that any substantial circumstantial evidence tending to prove guilt would result in the directed verdict being denied and case submitted to the jury. Therefore, the lack of such evidence should result in defendant's directed verdict being granted.

The issue of whether the evidence presented by the State was sufficient to constitute substantial circumstantial evidence was misapprehended first by the trial court, and again by the circuit court. There is no fine line between evidence that reasonably tends to prove guilt and evidence that creates a mere suspicion of guilt. Indeed, it appears the trial court made no distinction between the two. In this case, the evidence revealed that Carolyn Johnson actually

possessed the drugs found in her home, on her person and just smoked by her prior to law enforcement appearing at the home. There was, however, a dearth of evidence linking the defendant to the drugs in the home and no evidence showing that he knew any specifics about the drugs actually found.

Further, that the circuit court reasoned that Mr. Duvant had constructive possession of the drugs to substantiate the verdict cannot be overlooked. Such reliance is misplaced. The legal conclusion that Mr. Duvant constructively possessed the drugs was, again, based on mere suspicion and not direct evidence or substantial circumstantial evidence. As previously briefed by Mr. Duvant, there was no evidence showing that he even knew what drugs were in the room, much less the quantity—just that there were drugs.

The inferences made, to impute Mr. Duvant with specific knowledge (i.e., quantity, type of contraband, etc.) that ultimately led to his conviction, were not reasonable in light of the total evidence adduced at trial. There was a lack of evidence linking Mr. Duvant to having dominion and control over the contraband. This Honorable Court should, therefore, rehear this matter, consider the standards at issue, reverse the trial court, and enter an order directing a verdict of acquittal.

2. Whether the trial court erred in instructing the jury that “actual knowledge of the presence of the cocaine is strong evidence of the defendant’s intent to control its disposition or use.”

Although this Honorable Court is precluded from considering this issue, having ruled that this issue was not preserved for appellate review due to trial counsel’s failure to object, it should be noted that this erroneous jury instruction effected an egregious miscarriage of justice on Mr. Duvant by violating basic principles of federal due process. M. Duvant’s case was submitted to the jury with an instruction that elevated his knowledge of the presence of contraband; the jury

charge directly instructed the factfinders on the weight that should be accorded to that purported knowledge. As argued in the briefs below, the State presented no evidence that Mr. Duvant participated in any drug activities. The State presented no evidence of Mr. Duvant's guilt. Instead, the effect of the jury instruction was to expressly endorse and direct the jury to make an impermissible inference of guilt. This error cannot be considered harmless, in that the State's entire case against Mr. Duvant was circumstantial. But for the erroneous jury instruction, the overwhelming evidence militated against a finding of guilt. Accordingly, and notwithstanding the preclusion from considering plain errors in state court, Mr. Duvant respectfully requests that this Honorable Court rehear this claim, consider the constitutional implications presented by the improper jury charge and its effect on the jury, and reverse the Mr. Duvant's conviction as constitutionally infirm, an egregious miscarriage of justice and violative of his basic right to a fair trial.

3. The trial court erred in failing to suppress statements made by the defendant during interrogation and failing to suppress evidence as a result of those statements, as fruit of the poisonous tree.

Prior to interrogation, law enforcement *Mirandized* Mr. Duvant. During the course of those warnings, however, Mr. Duvant was advised that, "We have no way of appointing you a lawyer but one will be appointed by the Court for you if you wish." On this issue, this Honorable Court agreed with the trial court, finding that the *Miranda* warnings were not defective; however, the court overlooked the confusion created by the ambiguous references to timing. The purpose of *Miranda* is to inform a suspect of his right to counsel before and during interrogation, not at some later point in time, or linking that right to some later period or tribunal. *California v. Prysock*, 453 U.S. 355, 360, 101 S.Ct. 2806, 2810, 69 L.Ed.2d 696, 702 (1981). This Honorable Court misapprehended the confusion created by the ambiguously worded

warnings that law enforcement gave to Mr. Duvant. *Miranda* requires that a suspect be warned prior to any questioning,

[1] that he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Florida v. Powell, 559 U.S. 50, 59-60, 130 S.Ct. 1195, 1203, 175 L.Ed.2d 1009, 1018 (2010) (citing *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)). The fourth warning is at issue in this matter. Under the stress and tension of an imminent interrogation for activities that were committed by other persons, and surrounded by uniformed law enforcement, it would not have been unreasonable for a suspect to confuse his right to have an attorney for present questioning. Indeed, the curious statements by law enforcement beyond the four required warnings of *Miranda*, could have lulled a suspect into seeming comfort with a decision to waive his right to have an attorney present at the current time and for the imminent interrogation. Accordingly, this Honorable Court should rehear this matter and reverse the trial court's ruling.

CONCLUSION

For the foregoing reasons, this Honorable Court should rehear this matter, withdraw its Opinion, and reverse the trial court. Alternatively, this Court should reverse the trial court and remand this case for a new trial.

IT IS SO MOVED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have served a copy of this pleading on the State of South Carolina, pursuant to South Carolina Supreme Court Order No. 2020-12-16-01, Section (c)(13), by emailing at copy to counsel, at their AIS email address, as reflected below:

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