STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
C. Victor Pyle, Jr., Circuit Court Judge

Appellate Case No. 2012-212039

THE STATE, ...RESPONDENT

v.

ANDREW DAVION BURNSIDE, ...APPELLANT.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

Whether the trial court properly denied Appellant's motion for a directed verdict and submitted the case to the jury where the State presented substantial evidence from which the jury could fairly and logically find that Appellant had constructive possession of the controlled substances and the weapon which were the basis of his charges?

STATEMENT OF THE CASE

Appellant was indicted at the February 2012 term of the grand jury for Greenville County for trafficking cocaine base (count I) and possession of a weapon during the commission of a violent crime (PWDCVC) (count II) (2011-GS-23-1738); possession of a controlled substance with intent to distribute (2011-GS-23-1739); distribution of cocaine base (2011-GS-23-1740); and possession of cocaine with intent to distribute (2011-GS-23-1741). He was represented by Scott Robinson, Esquire, of Greenville. (Tr.p.1). On May 15-16, 2012, Appellant and his co-defendant, Dominique Shumate, proceeded to trial by jury pursuant to which Appellant was found guilty of: trafficking cocaine base (count I) and PWDCVC (count II) (2011-1738); distribution of cocaine base (2011-1740); possession of cocaine (2011-1741); and possession of a controlled substance (2011-1739). (Tr.p.225, line 20-p.226, line 25). He was sentenced by the Honorable C. Victor Pyle, Jr., as follows: twenty-five (25) years' imprisonment and a fine of $50,000 for trafficking cocaine base 10g-28g – third offense; five (5) years' concurrent imprisonment for possession of cocaine – second offense; fifteen (15) years' concurrent imprisonment and a fine of $2,000 for distribution of cocaine base – third offense; one (1) year's concurrent imprisonment for possession of a controlled substance – third offense; and five (5) years' concurrent imprisonment for PWDCVC. (Tr.p.232, line 9-p.233, line 14; Sentencing Sheets). Appellant timely filed a notice of intent to appeal his convictions and sentences and subsequently submitted a Brief of Appellant. This Brief of Respondent (the State) follows.

STATEMENT OF FACTS

At trial the State first called four officers from the Greenville County Sheriff's Office to describe the investigation and circumstances that led to Shumate's and Appellant's arrests. Deputy Jacob Walters testified about a November, 2010 drug investigation initiated as the result of a "crime stoppers" tip. Based on the tip, the Sheriff's Office began surveillance of a particular trailer park located at 120 Old Bleachtry Road. They observed heavy traffic in and out of the trailer park, including in an out of the trailer on Lot #7. Several of the vehicles leaving the trailer park were stopped for traffic infractions, which led to the discovery of drugs. Walters was able to use certain individuals from the stops as confidential informants (CIs) who could then return to the trailer park to try to make controlled drug buys for the police. (Tr.p.42, line 1-p.45, line 23). On November 10, 2010, a CI was sent to Lot #7 and as a result, on November 17, 2010, a search warrant was obtained for the trailer on that lot. Walters served the search warrant on the Lot #7 trailer, but did not participate in the search. (Tr.p.45, line 24-p.48, line 22). On cross-examination Walters acknowledged the trailer was not owned by Appellant or Shumate and was being rented by a Mr. Drummond. (Tr.p.58, line 20-p.60, line 7).

Master Deputy Patrick Swift testified he participated in the execution of the search warrant on Lot #7 by first deploying a noise distraction at the back of the trailer, then entering the front door of the trailer with the search team and conducting the search. He explained the front door had been barricaded from the inside with a 2x4 so that it took numerous blows from the breaching ram to get through the door. (Tr.p.60, line 22-p.66, line 1). Swift went down a hallway where he encountered Shumate in the bathroom, standing over the toilet with the toilet running, as if he had just flushed something. He

handcuffed Shumate and took him outside the trailer, then returned to the bathroom where he noticed a Uno™ playing card floating in the toilet. (Tr.p.66, line 2-p.69, line 15).

Swift described the plan for searching the residence, the role of the "scribe" to log all evidence discovered, and the actual search that was conducted room by room. In the kitchen, on top of the cabinets, they found a Tupperware container holding two Uno™ cards and eight pieces of a rock-like substance which field tested positive for cocaine or cocaine base. In the living room they discovered $172 in cash. In one bedroom they found a cell phone on the floor and a coat that had a plastic bag containing a white rock-like substance in the pocket, which also field tested positive for cocaine or cocaine base. In a hallway closet they discovered a gray digital scale, and in the second bedroom they discovered ammunition for an assault rifle. (T.p.70, line 20-p.79, line 19). Swift testified they did not discover any drug paraphernalia that would indicate drug use, like crack pipes or rolling papers. (Tr.p.81, line 23-p.82, line 2). On cross-examination Swift acknowledged no drugs were found around or near Shumate or Appellant and that they were not near the scales or the coat when they were arrested. (Tr.p.89, line 24-p.91, line 18).

Master Deputy Brandon Brown participated in the entry of the trailer and Appellant's arrest but did not participate in the actual search. He was qualified by the trial court as an expert in street-level narcotic sales and gang recognition. Brown described the barricade on the front door, the difficult entry, and discovering Appellant in a back bedroom partially under the bed. (Tr.p.99, line 13-p.110, line 13). He then offered an opinion that based on a variety of factors he believed Lot #7 was used

primarily for the distribution of narcotics. The factors included the various amounts of crack cocaine, cocaine, and prescription pills discovered in the house; plastic bags, a razor blade and other items suggesting packaging for sale; the barricade on the front door; and security cameras pointing down the front steps. (Tr.p.110, line 14-p.117, line 16). Brown testified it was not typical for narcotics dealers to leave drugs and money unattended in a house with buyers. (Tr.p.117, line 17-p.118, line 9). On cross-examination Brown noted that Shumate and Appellant had access to everything inside the house because it was all barricaded inside with them. (Tr.p.120, lines 3-7).

Deputy Justin Lanford participated in the search and served as the scribe. He personally found a Glock 40 caliber handgun on the kitchen counter, various pills in the kitchen cabinets, and a bag of cocaine in an oven mitt above the stove. Lanford described field testing the microwave, which was positive for crack cocaine. He testified that the search team did not find any kind of paraphernalia to indicate personal drug use. (Tr.p.123, line 10-p.135, line 8).

The State then called Jerry Drummond, Jr., to the stand. He testified he and Appellant were close friends, that he first met Appellant in 1999, and that they "hung." Drummond said he and Shumate were like cousins and that he had known Shumate his whole life. Drummond said he didn't really "live" at Lot #7 on 120 Old Bleachtry Road because it was more like a bachelor pad. He said the water bill was in his name and that he rented it from his landlord, Billy Rhodes. Drummond testified that although Appellant did not live in the trailer either, he visited two or three times a week and often spent the night. He explained that he, Appellant, Shumate, and a few others would chip in and pay the bills for the trailer because "everybody came and chilled." Drummond said he was

"locked up" on November 3, 2010, and therefore was not at Lot #7 when the CI went to the trailer or when the search warrant was executed. He testified the security cameras were installed after he left and that he did not leave any money or anything of value behind. (Tr.p.137, line 16-p.146, line 8).

Next the State called chemist James Armstrong and forensic investigator David Gambell, both of the Greenville County Department of Public Safety, to describe respectively the process of testing and weighing the various drugs and prescription pills, and the process of testing for fingerprints on the gun, microwave, and a plastic bag. (Tr.p.153, line 15-p.174, line 2). Finally, Investigator Steven Perron of the Greenville County Sheriff's Office testified about cash confiscated from and later returned to Appellant and Shumate as a result of their arrests. (Tr.p.174, line 13-p.177, line 15).

At the conclusion of the State's case after Shumate moved for a directed verdict Appellant argued:

> Your Honor, I'd make the same motion based on the fact that, as I said the jury in the beginning, I think mere presence because they were there just raises suspicion. There has been no indication that any of these drugs or property was linked, either actually or constructive, in anything the State presented, as a result of that I move for a directed verdict.

(Tr.p.180, line 20-p.181, line 1). The trial judge held: "That makes a good argument for the jury . . . I will deny your motion." (Tr.p.181, lines 2-3). Neither Shumate nor Appellant testified or offered evidence in defense.

After closing arguments, the trial judge charged the jury on the applicable law. At the beginning of the charge, the judge gave the jury detailed instructions on knowledge, actual and constructive possession, and mere presence. (Tr.p.214, line 2-p.215, line 17). The trial judge then defined distribution and trafficking before charging the jury on the

elements of trafficking. This included a second detailed charge on knowledge, actual and constructive possession, and mere presence. (Tr.p.217, line 3-p.218, line 11). The trial judge then gave general jury instructions on direct and circumstantial evidence, the jury's duty to assess the credibility of the witnesses, the presumption of innocence, and the State's burden of proof. (Tr.p.218-p.225).

At the conclusion of trial, the jury convicted Appellant of trafficking cocaine base (count I) and PWDCVC (count II) (2011-1738); distribution of cocaine base (2011-1740); possession of cocaine (2011-1741); and possession of a controlled substance (2011-1739). (Tr.p.225, line 20-p.226, line 25). He was sentenced to: twenty-five (25) years' imprisonment and a fine of $50,000 for trafficking cocaine base 10g-28g – third offense; five (5) years' concurrent imprisonment for possession of cocaine – second offense; fifteen (15) years' concurrent imprisonment and a fine of $2,000 for distribution of cocaine base – third offense; one (1) year's concurrent imprisonment for possession of a controlled substance – third offense; and five (5) years' concurrent imprisonment for PWDCVC. (Tr.p.232, line 9-p.233, line 14; Sentencing Sheets).

ARGUMENT

The trial court properly denied Appellant's motion for a directed verdict and submitted the case to the jury where the State presented substantial evidence from which the jury could fairly and logically find that Appellant had constructive possession of the controlled substances and the weapon which were the basis of his charges.

Appellant argues the trial court erred in refusing to grant a directed verdict on all charges because the evidence was insufficient to show he had knowledge of the drugs and weapon, or dominion and control over the premises where the drugs and weapon were found. He contends he was merely present and therefore not in constructive possession. The State disagrees and submits Appellant's argument is without merit.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Liverman, 398 S.C. 130, 137, 727 S.E.2d 422, 425 (2012); State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). When reviewing a denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must find the case was properly submitted to the jury. Weston, 367 S.C. at 292-93, 625 S.E.2d at 648; State v. Cherry, 361 S.C. 588, 593-94, 606 S.E.2d 475, 477-78 (2004); State v. Harris, 351 S.C. 643, 653, 572 S.E.2d 267, 273 (2002); State v. Condrey, 349 S.C. 184, 190, 562 S.E.2d 320, 323 (Ct. App. 2002). Critically, the appellate court may only reverse the trial judge's denial of a directed verdict motion if there is no evidence supporting the trial judge's ruling or if the ruling is

based on an error of law. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002); State v. Dantonio, 376 S.C. 594, 603, 658 S.E.2d 337, 342 (Ct. App. 2008). Indeed, "unless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict must stand absent an error of law." State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986).

When ruling on a motion for a directed verdict, the trial court is concerned with the existence or non-existence of evidence, not its weight. Gaster, 349 S.C. at 555, 564 S.E.2d at 92; Condrey, 349 S.C. at 190, 562 S.E.2d at 323. A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. McKnight, 352 S.C. 635, 642, 576 S.E.2d 168, 171 (2003); State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). In State v. Ballenger, the Supreme Court reiterated the standard a trial judge should utilize to measure circumstantial evidence in light of a defendant's motion for a directed verdict:

> [A]lthough [the trial judge] should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury if there be any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.

322 S.C. 196, 199, 470 S.E.2d 851, 853 (1996) (quoting State v. Littlejohn, 228 S.C. 324, 329, 89 S.E.2d 924, 926 (1955)).

Discussion

Each indictment in Appellant's case involved a charge containing an element of possession: either of a controlled substance (cocaine base, cocaine, or hydrocodone) or a

handgun. Conviction of possession of contraband requires proof of possession, either actual or constructive, coupled with knowledge of its presence. State v. Williams, 346 S.C. 424, 430, 552 S.E.2d 54, 57 (2001); State v. Muhammed, 338 S.C. 22, 26, 524 S.E.2d 637, 639 (Ct. App. 1999) (citing State v. Hudson, 277 S.C. 200, 284 S.E.2d 773 (1981)).

Constructive Possession

"Actual possession occurs when the drugs are found to be in the actual physical custody of the person charged with possession." Ballenger, 322 S.C. at 199, 470 S.E.2d at 854. To prove constructive possession the State must show a defendant had dominion and control, or the right to exercise dominion and control, over any of the drugs or the property in which the drugs are found. State v. Tindall, 379 S.C. 304, 314, 665 S.E.2d 188, 194 (Ct. App. 2008). Possession requires more than mere presence. State v. Tabory, 260 S.C. 355, 365, 196 S.E.2d 111, 113 (1973). However, "[w]hen 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 and possession which may be sufficient to carry the case to the jury." Hudson, 277 S.C. at 203, 284 S.E.2d at 775. A person has possession of a controlled substance within the meaning of the law when he has both the power and the intent to control its disposition or use. State v. Brownlee, 318 S.C. 34, 38, 455 S.E.2d 704, 706 (1995). Indeed, possession of a controlled substance can be inferred from the circumstances of a particular case and can be imputed to a person with both the power and intent to control the disposition and use of the drugs. State v. Brown, 319 S.C. 400, 404, 461 S.E.2d 828, 830 (Ct. App. 1995). "Constructive possession can be

established by circumstantial as well as direct evidence, and possession may be shared." Id.; see also Hudson, 277 S.C. at 200, 284 S.E.2d at 773; State v. Brown, 267 S.C. 311, 227 S.E.2d 674 (1976).

Here, substantial evidence was presented establishing Appellant had constructive possession of the controlled substances and the weapon discovered in the trailer on Lot #7. Viewing the evidence in a light most favorable to the State, there was testimony presented establishing that Appellant and Shumate were the only two individuals inside the trailer on Lot #7 when the police entered to execute the search warrant. They were not simply inside, but were barricaded inside. Behind the barricade with Shumate and Appellant the police discovered: (1) a Tupperware container holding two Uno™ cards and eight pieces of cocaine base on top of the kitchen cabinets; (2) a Glock 40 caliber handgun on the kitchen counter; (3) plastic baggies containing Diazepam, Alprazolam, and Hyrdocodone in the kitchen cabinets; (4) baggies of cocaine and cocaine base inside an oven mitt above the stove; (5) a microwave plate that tested positive for cocaine base residue; (6) $172 in cash on the floor of the living room; (7) a cell phone on the floor of a bedroom; (8) a plastic bag containing cocaine base in the pocket of a coat in the same bedroom; (9) a gray digital scale typically used to weigh narcotics in a hallway closet; and (10) ammunition for an assault rifle in a second bedroom. Testimony was also presented that Appellant and Mr. Drummond were close friends and had known each other for over ten years. Drummond used the trailer like a bachelor pad rather than a residence, and though Appellant did not live in the trailer he visited two or three times a week and frequently spent the night. Appellant and Shumate even helped pay the bills for the trailer.

Clearly, the evidence supported the inference that Appellant and Shumate had dominion and control of the drugs and weapon found in the trailer. Appellant's and Shumate's presence inside the barricaded trailer, along with the installation of security cameras after Drummond moved out of the trailer, demonstrated the trailer was under their control. This fact in and of itself gives rise to an inference of knowledge and possession which was sufficient to carry the case to the jury. Hudson, supra. Furthermore, the fact that the handgun and most of the drugs were found in a common area of the residence helps establish constructive possession. Thus, the issue of Appellant's constructive possession of the controlled substances and weapon was a matter properly left to the jury.

Knowledge

In drug cases, the element of knowledge is seldom established through direct evidence, but may be proven circumstantially. State v. Attardo, 263 S.C. 546, 550, 211 S.E.2d 868, 869 (1975). "The knowledge element may be proved circumstantially by evidence of acts, declarations, or conduct of the accused from which an inference may be drawn that the accused knew of the existence of the prohibited substance. Possession gives rise to an inference of the possessor's knowledge of the character of the substance." State v. Mollison, 319 S.C. 41, 45, 459 S.E.2d 88, 91 (1995). Knowledge is generally a question for the jury. Attardo, 263 S.C. at 550, 211 S.E.2d at 869.

In this case, substantial evidence was also presented establishing Appellant had knowledge of the controlled substances and the weapon discovered in the trailer on Lot #7. An expert in street-level narcotic sales testified that based on a variety of factors he

believed Lot #7 was used primarily for the distribution of narcotics. The factors included the various amounts of crack cocaine, cocaine, and prescription pills discovered in the house; plastic bags, a razor blade and other items suggesting packaging for sale; the barricade on the front door; and the presence of security cameras pointing down the front steps. The expert testified it was not typical for narcotics dealers to leave drugs and money in a house unattended with individuals who were simply buyers. Testimony was also presented that Shumate was found standing over a toilet that had just been flushed, but where an Uno™ card was still floating in the basin, a card which matched the ones discovered with the cocaine base in the kitchen. Although this information was specifically related to Shumate, it still provided circumstantial evidence of Appellant's knowledge since multiple parties can jointly share possession of drugs. State v. Lewis, 277 S.C. 234, 236, 285 S.E.2d 354, 355 (1981) ("Moreover, a person may be convicted of an offense related to narcotics where he was a joint participant in committing the offense."); Muhammed, 338 S.C. at 27, 524 S.E.2d at 639 (noting constructive possession may be shared). The testimony further established Appellant was conscious of his own guilt because he tried to hide under the bed in a back bedroom when the officers entered the trailer. State v. McDowell, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976) ("As a general rule, any guilty act, conduct, or statements on the part of the accused are admissible as some evidence of consciousness of guilt."). Thus, the issue of Appellant's knowledge of the controlled substances and weapon was a matter properly left to the jury.

Based on the trial testimony and evidence, a finder of fact could reasonably conclude Appellant had constructive possession and knowledge of the controlled substances and the handgun in the trailer on Lot #7 and was therefore guilty of the

convicted offenses. This case did not present a complete failure of evidence requiring the grant of a directed verdict motion. State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986) ("[U]nless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict must stand absent an error of law."). Appellant's arguments to the contrary merely go to the weight of the evidence against him rather than its sufficiency to submit the charge to the jury. Based on the existence of substantial evidence establishing the "possession" element of the convicted offenses, the trial court properly denied the directed verdict motion. Therefore, Appellant's convictions and sentences should be affirmed.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, convictions, and sentences of the lower court be affirmed.

Respectfully submitted,

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Columbia, South Carolina
May 8, 2013

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DESIGNATION OF MATTER

In addition to the matter designated by Appellant, Respondent proposes the following to be included in the Record on Appeal:

(1) Transcript pages: 1; 105; 214-215; 217-226; 232-233.

To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers.

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

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Columbia, South Carolina
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PROOF OF SERVICE

I, Angela Bennett, Executive Legal Assistant, hereby certify that I have served the within *Initial Brief of Respondent* and *Designation of Matter* , both dated May 8, 2013, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

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I further certified that all parties required by Rule to be served have been served. This 8th, day of May, 2013.

Angela Bennett
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