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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Horry County

Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ERIC DANTZLER,

PETITIONER

APPELLATE CASE NO. 2011-199609

BRIEF OF PETITIONER

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

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ISSUE PRESENTED

Did the trial judge err in refusing to direct a verdict of acquittal for trafficking cocaine when the State failed to show that appellant exercised dominion and control over the cocaine that was found in the locked glove compartment of the car in which appellant was merely a passenger?

STATEMENT

In May of 2008, the Horry County Grand Jury indicted Dantzler, along with his co-defendant, Maria Rodriguez, for trafficking cocaine, 10-28 grams, indictment #2008-GS-26-1538. On January 5, 2009, the cases were tried together before a jury with the Honorable Steven H. John presiding. The jury returned verdicts of guilty for both Dantzler and Rodriguez. Judge John treated the conviction as a third drug offense and sentenced Dantzler to 25 years. A timely notice of intent to appeal was filed on January 12, 2009.

The appeal was perfected and on June 29, 2011, the South Carolina Court of Appeals affirmed the conviction. State v. Dantzler, Op. No. 2011-UP-343 (S.C.Ct.App. filed June 29, 2011). A petition for rehearing was filed and denied on August 23, 2011. The petition for writ of certiorari was filed on November 22, 2011. The State filed a return on December 22, 2011. This court granted the petition for writ of certiorari on January 9, 2013. This brief of petitioner follows.

ARGUMENT

The trial judge erred in refusing to direct a verdict of acquittal for trafficking cocaine when the State failed to show that appellant exercised dominion and control over the cocaine that was found in the locked glove compartment of the car in which appellant was merely a passenger.

The jury convicted Dantzler of trafficking cocaine based on 12.17 grams of cocaine found in the locked glove compartment of a car in which Dantlzler was a passenger. Officer Gibson with the Myrtle Beach Police Department stopped the car based on a report from an unrelated incident that took place at the Noisy Oyster. (R. p. 2, lines 3-24). Officer Gibson testified that Maria Rodriquez was the driver and appellant, Dantzler was a passenger. (R. p. 2, lines 4-10). Rodriquez was arrested for the unrelated incident at the Noisy Oyster. (R. p. 3, lines 21-25). Officer Gibson confirmed that Dantzler was not under arrest at the time Rodriquez was arrested. (R. p. 3, lines 2-21). Officer Gibson testified that the car was registered to Bill Thompson. The officer admitted that Mr. Thompson was never investigated or even contacted in regard to the cocaine that was found in the glove compartment of his car. (R. p. 23, lines 21 – p. 24, lines 1-11). The officer testified that although Dantzler produced a valid South Carolina identification card, he did not have a valid driver's license. (R. p. 4, lines 18 – p. 5, lines 1-11). Based on the fact that the driver had been arrested and Dantlzler did not have a valid driver's license, the car was towed. According to the officer, Dantzler asked them not to tow the car. (R. p. 4, lines 22 – p. 5, line 1).

Officer Pearce, another officer from the Myrtle Beach Police Department, testified that once the decision to tow the car was made, he did an inventory search. (R. p. 82, lines 9-25). Officer Pearce testified that the glove compartment was locked so he took the keys out of the ignition and unlocked the glove compartment. (R. p. 82, lines 17-23). Officer Pearce testified that he found plastic bags with a white powdery substance inside the glove compartment. (R. p. 82, lines 23-25).

The white powdery substance field tested positive for cocaine. (R. p. 12, lines 13-25). A chemist later analyzed the white powdery substance and determined that it was 12.17 grams of a cocaine mixture. (R. p. 192, lines 8-21). According to Officer Gibson, Dantzler began to walk away from the car when it was clear that it was going to be towed. (R. p. 7, lines 20-25). Officer Gibson testified that Dantzler then ran from the scene without getting his identification card back. (R. p. 7, lines 1-17). Dantzler later turned himself in at the police station. (R. p. 74, lines 13-14). In addition to the cocaine, Officer Gibson also seized one thousand seven hundred and thirty dollars ($1, 730.00) from the co-defendant driver Rodriquez's purse. (R. p. 13, lines 9-15).

At the close of the State's case, Dantzler moved for a directed verdict. Dantzler argued that he was merely present and the State failed to prove that Dantzler knew the cocaine was in the locked glove compartment. Dantzler argued that the case was a constructive possession case and the State failed to prove that Dantzler was in control of the car. (R. p. 174, lines 21 – p. 221, lines 1-11). The judge denied the motion. The judge said:

> All right. Once again in this matter - - and I'm not going to review the directed verdict standard because I've already done that. This being a constructive possession case, the defendant, Eric Dantzler, was the passenger, front passenger, and occupied the front passenger seat of this vehicle. Immediately in front of the front passenger seat the drugs were found in a glove box. It appears the glove box was locked, the keys were in the vehicle, the defendant had access to the keys and the locked glove box.
>
> Further, there has been evidence submitted by the State as to the defendant's actions when it was apparent that he was not going to be able to exercise control of the car. He made efforts to exercise control over the car, asking that the car not be towed by the police, asking that the police not retain custody of the car, suggesting alternatives to them so that the police would not have custody of the car.
>
> When it became apparent that this was not going to take place the defendant chose to leave the scene where the drugs were found

> immediately in his – or near his vicinity, in a manner which would suggest actual knowledge of the presence of the drugs, but once again, it's not my job to judge the weight of the evidence, only whether or not it exists. In this case evidence clearly exists that the defendant knew about the drugs, and that he was in constructive possession of the drugs, therefore, your directed verdict motion is denied.

(R. p. 175, lines 12 – p. 176, lines 1-12). The judge erred. The State failed to prove that Dantzler was in constructive possession of the cocaine found in the locked glove compartment of the car in which he was a passenger.

On a motion for a directed verdict in a criminal case, the trial court is concerned with the existence or non-existence of evidence, not its weight. State v. Morgan, 282 S.C. 409, 319 S.E. 2d 335 (1984); State v. Barksdale, 311 S.C. 210, 428 S.E.2d 498 (Ct.App.1993). The motion should be granted if the evidence merely raises a suspicion of the defendant's guilt. Barksdale, 428 S.E.2d at 501. However, if the State presents any evidence which reasonably tends to prove defendant's guilt, or from which defendant's guilt could be fairly and logically deduced, the case must go to the jury. State v. Poindexter, 314 S.C. 490, 431 S.E.2d 254 (1993). On appeal from the denial of a motion for directed verdict, this court must view the evidence in a light most favorable to the State. State v. Schrock, 283 S.C. 129, 322 S.E. 2d 450 (1984).

One of the "key" factors in this case is the fact that Dantzler never had custody and control of the keys to the car. Dantzler was not the driver nor the owner of the car. While he was a passenger in the car where the drugs were found, the glove box was locked and the keys in the ignition. Dantzler could not have exercised dominion and control over the drugs in the locked glove box.

In State v. Halyard, 274 S.C. 397, 400, 264 S.E.2d 841, 842 (1980) the Court wrote, "This court has repeatedly recognized that a conviction for possession of contraband drugs

requires proof of actual or constructive possession, coupled with knowledge of the presence of the drugs. To prove constructive possession the State must show a defendant had dominion and control, or the right to exercise dominion and control over the substance. Such possession may be established by circumstantial as well as direct evidence." The defendant's knowledge and possession may be inferred if the substance was found on premises under his *control.* State v. Adams, 291 S.C. 132, 135, 352 S.E.2d 483, 486 (1987) (emphasis added). The State failed to prove that Dantzler exercised control over the glove box.

The State's case against Dantzler is based on his requests of the police to not tow the car combined with the fact that he left the scene where the cocaine was found. These factors do not establish that Dantzler exercised dominion and control over the cocaine in the locked glove compartment or that he had the right to exercise dominion and control over the cocaine. Mere presence is insufficient to prove constructive possession. State v. Tabory, 260 S.C. 355, 364, 196 S.E.2d 111, 113 (1973).

The present case is distinguished from State v. Brownlee, 318 S.C. 34, 455 S.E.2d 704 (Ct.App. 1995) because in Brownlee the State produced evidence that the defendant exercised dominion and control over the glove compartment where cocaine was found. The owner of the car in Brownlee, Brenda Hadden, testified that Brownlee borrowed her car keys and then returned the keys just prior to cocaine being found in the glove compartment. Hadden testified that Brownlee told her that he had to put something in the car. The South Carolina Court of Appeals found there was sufficient evidence to submit the case to the jury and wrote, "Though Officer Barry did not actually see Brownlee open the glove compartment, he saw Brownlee seated on the passenger side of the vehicle moments before the drugs were found, engaged in some activity. Finally, the uncle testified he saw Brownlee run from the scene. Evidence of

flight has been held to constitute evidence of guilty knowledge and intent. State v. Milan-Hernandez, 287 S.C. 183, 336 S.E.2d 476 (1985)." Brownlee, 318 S.C. at 37, 455 S.E.2d at 706. In contrast to Brownlee, there is no evidence in the present case that Dantzler ever had the keys to the car. Dantzler's alleged flight without some evidence that he exercised dominion and control over the car is insufficient to establish constructive possession.

In affirming Appellant's conviction, the Court of Appeals wrote:

> The State produced evidence of Dantzler's dominion and control over the vehicle and glove box where the drugs were found: Dantzler was seated in the front passenger seat at the time of the traffic stop, approximately one foot from the glove box containing the cocaine. He was unusually nervous and agitated while the police considered towing and taking inventory of the vehicle, he made repeated attempts to control the disposition of the vehicle, and he fled immediately upon seeing the glove box opened. Thus, viewing the evidence in the light most favorable to the State, the evidence supported submitting the case to the jury.

State v. Dantzler, No. 2011-UP-343 (Ct.App. filed June 29, 2011). (App. p. 1).

While Dantzler was seated in the front passenger seat at the time of the traffic stop, approximately one foot from the glove box containing the cocaine, the glove box was locked and there was no evidence that Dantzler ever had access to the keys to the glove box. While there was testimony that Dantzler had been seen in this car on previous occassions with the driver Maria Rodriguez, his girlfriend and co-defendant, the officer testified that the girlfriend was in the process of buying the car from the owner and this was not the first time the officer had seen the girlfriend with the car. (R. p. 68, lines 6-8). Also, upon her arrest police seized a large amount of cash from the girlfriend's purse. (R. p. 13, lines 9 – p. 14, lines 1-13). Dantzler's nervous behavior, request that the police not tow the vehicle and his ultimate flight fail to establish that Dantzler exercised

dominion and control over a locked glove box when there is no evidence that Dantzler ever had the keys to the glove box.

At best, Dantzler's actions show that he may have been aware of the drugs. In order to prove constructive possession of drugs, however, the State must prove that the defendant exercised dominion and control or the right to exercise dominion and control over the drugs **coupled** with knowledge of the presence of the drugs . In State v. Jackson, 395, S.C. 250, 255, 717 S.E.2d 609, 611-612 (Ct.App. 2011)(cert denied March 6, 2013) the South Carolina Court of Appeals wrote:

> "Conviction of possession of [illegal drugs] requires proof of possession-either actual or constructive, coupled with knowledge of its presence. Actual possession occurs when the drugs are found to be in the actual physical custody of the person charged with possession. To prove constructive possession, the State must show a defendant had dominion and control, or the right to exercise dominion and control, over the [drugs]. Constructive possession can be established by circumstantial as well as direct evidence, and possession may be shared." State v. Hudson, 277 S.C. 200, 202, 284 S.E.2d 773, 774–75 (1981). "Possession requires more than mere presence." State v. Stanley, 365 S.C. 24, 43, 615 S.E.2d 455, 465 (Ct.App.2005). "In drug cases, the element of knowledge is seldom established through direct evidence, but may be proven circumstantially." State v. Hernandez, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009). "Knowledge can be proven by the evidence of acts, declarations, or conduct of the accused from which the inference may be drawn that the accused knew of the existence of the prohibited substances." Id.

Knowledge of the drugs alone, however, is not sufficient to prove constructive possession. In Goldsmith v. Witkowski, 981 F.2d 697, 701 (4th Cir. 1994) the Fourth Circuit Court of Appeals wrote:

> Under South Carolina law, the mere presence of a person in an area containing drugs, absent evidence of his dominion and control over them, is insufficient to prove his possession of the drugs. State v. Tabory, 260 S.C. 355, 196 S.E.2d 111, 113 (1973). Again, even presence coupled with knowledge of the drugs is insufficient to sustain a possession conviction; the State must also prove dominion and control. See Kimbrell, 362 S.E.2d at 631. Even if this were not state law, the due process protections of

> Jackson[1], in our view, would require the invalidation of convictions based solely on evidence of mere presence, as was established in this case.

In the present case, the State failed to prove that petitioner exercised dominion and control over drugs found in the locked glove compartment of a car in which petitioner was merely present. Viewing the evidence in the light most favorable to the State, Dantzler's nervous behavior, request that the police not tow the vehicle and his ultimate flight show possible knowledge of the drugs but not dominion and control.

In State v. Cheeks, S.C. , 737 S.E.2d 480, 484 (2013), the South Carolina Supreme Court wrote:

> Similarly, charging a jury that "actual knowledge of the presence of a drug is strong evidence of intent to control its disposition or use" unduly emphasizes that evidence, and deprives the jury of its prerogative both to draw inferences and to weigh evidence. This charge converts all persons merely present who have actual knowledge of the drugs on the premises into possessors of that drug. We agree with appellant that this charge largely negates the mere presence charge, and erroneously conveys that a mere permissible evidentiary inference is, instead, a proposition of law.

In the present case the judge charged the jury that mere presence where the drugs are found does not constitute constructive possession. (App. p. 182, lines 15-16). The judge also charged the jury, "Now, actual knowledge of the possession of the cocaine is evidence of the defendant's intent to control its disposition or use." (App. p. 183, lines 3-5). The charge in the present case did not include the adjective "strong" in describing that actual knowledge of cocaine is evidence of the defendant's intent to control the disposition or use of the cocaine, as in

[1] Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 61 L.Ed.2d 560 (1979).

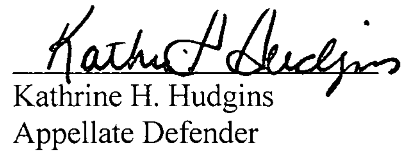
Cheeks.. Pursuant to Cheeks, however, the charge is an impermissible inference of guilt of constructive possession based on actual knowledge.

While knowledge is a factor the jury may consider, knowledge alone is not sufficient to establish constructive possession. In order to establish constructive possession the State must prove dominion and control. The State's evidence in the present case failed to establish that petitioner exercised dominion and control. The judge erred in refusing to grant the motion for directed when the evidence failed to establish constructive possession.

<u>CONCLUSION</u>

Based on the above argument, the decision of the Court of Appeals should be reversed, the conviction reversed and a directed verdict of acquittal ordered.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER.

This 13th day of May, 2013

STATE OF SOUTH CAROLINA

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Steven H. John, Circuit Court Judge

THE STATE,

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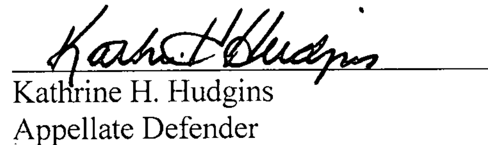
ERIC DANTZLER,

PETITIONER

APPELLATE CASE NO. 2011-199609

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on Tyson Andrew Johnson, Sr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and also served up on Mr. Eric Dantzler #260298 Lieber Correctional Institution PO Box 205 Ridgeville, SC 29472 this 13th day of May, 2013.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

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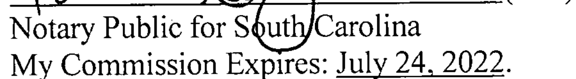
of May, 2013.



_______________________(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.