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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to the Court of Appeals
Appeal from Beaufort County
The Honorable J. Ernest Kinard, Jr., Circuit Court Judge

The State, Petitioner,

v.

Diamon D. Fripp, Respondent.

Opinion No. 4956(S.C. Ct. App. filed March 21, 2012)
Appellate Case No. 2012-212201

BRIEF OF PETITIONER

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STATEMENT OF QUESTIONS PRESENTED

1. When there is evidence that an accused has planned and performed a skit to mislead the police and to temporarily conceal contraband in the publically accessible parking area of a nightclub is a jury instruction on constructive possession of the contraband either irrelevant, inapplicable, or erroneous?

2. When there is evidence that one has in the nighttime furtively placed contraband - out of ordinary visibility to patrons using a business' publicly accessible parking lot - within freshly disturbed pine straw, is a jury instruction on constructive possession of the contraband irrelevant, inapplicable, or erroneous?

3. Is the furtive, nighttime concealment of packaged cocaine within the area of a business' publicly accessible parking lot - accompanied by a theatrical performance to mislead the police into believing that ordinary stones are contraband and there is then no reason to look further - evidence of maintaining dominion and control of cocaine that supports a jury instruction on constructive possession?

STATEMENT OF THE CASE

The Grand Jury of Beaufort County charged the defendant with trafficking cocaine (2009-GS-07-0196). The defendant and his counsel came to trial October 26-27, 2009 before the Honorable J. Ernest Kinard, Jr., Judge, and a jury. The jury found the defendant guilty, and the court imposed a sentence of twelve years imprisonment and a fine of fifty thousand dollars. The defendant served opposing counsel a timely notice of appeal.

The South Carolina Court of Appeals reversed and remanded the judgment of the circuit court on the basis of one of the defendant's three assignments of error: the state's evidence supported only the actual possession of cocaine, and the trial court erred charging the jury on both actual and constructive possession of cocaine. The Court of Appeals opined there was no evidence that the defendant was in constructive possession of the drugs, and the trial court's constructive possession charge was irrelevant, inapplicable, and erroneous since it had the potential to confuse the jury, and affect the outcome of the trial. The Court of Appeals determined that the evidence upon which the state could rely in proving actual possession was entirely circumstantial, but Sergeant Rodriguez offered no testimony demonstrating circumstantial evidence of actual possession, and there was a dearth of direct evidence of actual possession. State v. Fripp, 397 S.C. 455, 725 S.E.2d 136 (Ct.App. 2012).

The state served its petition for rehearing on March 22, 2012, and the South Carolina Court of Appeals denied the petition for rehearing by Order filed May 3, 2012. The State served its petition for writ of certiorari on June 4, 2012, and the defendant made return on June 12, 2012.

This Court granted the petition for writ of certiorari by Order dated July 10, 2014. This brief of petitioner follows.1

1 The State was represented in all prior appellate proceedings and filings by former Senior Assistant Attorney General Harold M. Coombs, Jr.

ARGUMENT

Trial evidence supported the court's jury instruction on constructive possession. (Questions Presented for Review 1-3).

Issue and Rulings

At trial the defendant objected to a charge on constructive possession since the drugs were found 30 feet away from him, and there was no evidence of dominion and control. The court declined to adopt his reasoning. [App. pp. 101-102; 137]. The court instructed the jury on constructive possession. [App. pp. 130 – 132].

The South Carolina Court of Appeals found no evidence that the defendant was in constructive possession of the drugs, and the trial court's constructive possession charge was irrelevant, inapplicable, and erroneous since it had the potential to confuse the jury and to affect the outcome of the trial. State v. Fripp, 397 S.C. 455, 725 S.E.2d 136 (Ct.App. 2012).

Trial Evidence

Officer Rodriguez responded to Studio Seven nightclub in the early hours of January 1, 2009 and its reported disturbance involving a male, dressed in blue, who was acting belligerently at the front door of the club. [App. pp. 33 – 34; 53-54] On arriving at the scene, Rodriguez observed that the nightclub was open. The parking lot was full and Rodriguez could hear music playing and saw a security guard in front of the club dealing with a row of females. He also observed only one male in the parking lot – the defendant. The defendant was wearing blue clothing. The defendant had his back turned toward Rodriguez. [App. pp. 35-36; 54; 58] Before Officer Rodrigues exited his patrol car, the defendant looked over his shoulder in Rodriguez' direction and walked off to the left. [App. pp. 36; 55] Rodriguez approached the front door of the

club, looked inside, and the owner pointed at the defendant who was walking away. [App. pp. 37; 55] Rodriguez attempted to approach and to investigate. He whistled and called out to speak with the defendant. In response, the defendant turned, looked at Rodriguez, and attempted to get away with marked persistence by walking faster between the parked cars. [App. pp. 37-38; 58] When the defendant walked away, Rodriguez identified himself and called to the defendant to stop, but the defendant continued to flee some four hundred feet and ran behind a black pickup truck where the defendant remained for approximately ten (10) seconds. [App. pp. 38 – 41; 59-60] The defendant then came from the back of the truck toward Officer Rodriguez and "looked like" he wanted to pass by Rodriguez. Officer Rodriguez could not see the defendant's hands and, as an officer safety issue, drew his weapon and ordered the defendant to the ground. The defendant would not comply. [App. pp. 41 – 42; 61-63] Although nothing had been said about drugs, the defendant declared, "I have no drugs." [App. pp. 43; 62] The owner of the club came out and tried to encourage the defendant to cooperate. The defendant did not cooperate. Finally the officer handcuffed the defendant. [App. pp. 43 – 44] The defendant cursed and screamed that the officer had "nothing." [App. p. 44]

Officers searched the defendant and found about $594 crumpled cash and eight or nine rocks and placed the items on the trunk of the car. [App. pp. 45 – 46] While handcuffed, the defendant theatrically attempted to retrieve - with his mouth - the stones or rocks. [App. p. 46] The rocks or stones that he apparently attempted to ingest, were field tested and tested by a forensic chemist and were not a controlled substance. [App. pp. 31-51; 57-58; 62-63; 70-71; 64-65; 101] The defendant was put into the back of an officer's car. The defendant continued acting out including unnecessary verbal statements. At Officer Rodriguez's direction and using a

drug dog, Officer Mooney found a bag of white powdery substance among freshly disturbed pine straw - like somebody had tried to bury it - right behind the truck where Officer Rodriguez had seen the defendant flee and remain for ten (10) seconds. [App. 44; 69 – 72; 78 - 81] Even though it was cold, there was no condensation or dirt on the bag containing the white powdery substance. The bag was described by Officer Mooney as appearing to have just been placed there. [App. 72 – 73] No one else was seen in the area where the bag was uncovered. [App. 83] A field test showed it was positive for cocaine, but nothing was said to the defendant about the identity of the substance in the bag. [App. pp. 48-49] Officer Rodriguez stated to the defendant who was seated in the back of a patrol car, "I'm charging you with this." The defendant said, "I don't know anything about that cocaine." Neither officer had mentioned cocaine. Neither officer saw the defendant with drugs or bags in his hands. [App. p. 65] The white substance was a valuable quantity (34.35 grams) of cocaine. (App. pp. 88-90; 97-98; 100).

Applicable Law

"The law to be charged to the jury must be determined by the evidence presented at trial." State v. Harris, 382 S.C. 107, 674 S.E.2d 532 (Ct.App. 2009). In reviewing a jury charge for error, the appellate court must consider the charge given as a whole in light of the evidence and issues as presented at trial. Barber v. State, 393 S.C. 232, 712 S.E.2d 436 (2011). A jury charge must be erroneous and prejudicial to warrant reversal of the conviction. State v. Brandt, 393 S.C. 526, 713 S.E.2d 591 (2011).

"Conviction of drug possession requires proof of possession, either actual or constructive, coupled with knowledge of its presence." State v. Dantzler, 408 S.C. 389, 389, 759 S.E.2d 737, 739 (Ct. App. 2014); see also State v. Bowers, 301 S.C. 457, 392 S.E.2d 482 (Ct.App. 1990).

Knowledge 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. State v. Gore, 318 S.C. 157, 456 S.E.2d 419 (Ct. App. 1995). Actual possession of contraband is the actual physical custody of the substance. Constructive possession of contraband is the exercising of dominion and control or the right to exercise dominion and control over either the substance or the premises where the substance is kept. State v. Ballenger, 322 S.C. 196, 470 S.E.2d 851 and n. 3 (1996)(stating that the evidence reasonably tended to show actual possession when police saw the defendant apparently engaged in a drug transaction, pursued him on foot, and found twenty-nine units of crack laying on the ground, out in the open, near where defendant fell); State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637, 640 (1999)(stating "[b]ecause no drugs were found on [defendant's] person, our analysis proceeds under constructive possession."); see also State v. Stanley, 365 S.C. 24, 27, 615 S.E.2d 455 (Ct. App. 2005); State v. Tabory, 260 S.C. 355, 196 S.E.2d 111 (1973). Constructive possession may be established by circumstantial as well as direct evidence. State v. Hudson, 277 S.C. 200, 284 S.E.2d 773 (1981). An accused has possession of contraband when he or she has both the power and intent to control its disposition or use. State v. Ellis, 263 S.C. 12, 207 S.E.2d 408 (1974), rev'd on other grounds. The defendant's knowledge and possession may be inferred when the contraband is found in an area under his control. State v. Heath, 370 S.C. 326, 635 S.E.2d 18 (2006).

Discussion

Circumstantial evidence supports a reasonable inference that the defendant had the cocaine in his constructive possession. When the police officer arrived at the parking lot of the nightclub, the defendant was the only person in a parking lot accessible to the public who not standing in line

with the security guard at the front door of the club. When the defendant noticed the arrival of the officer in the patrol car, he immediately fled in the parking lot to a location behind the truck where he remained for approximately ten (10) seconds before then approaching the same officer he initially fled from. When apprehended, the defendant assured the police officers with screams and curses that they lacked evidence. When officers found the crumpled cash in his pocket and apparently what the defendant hoped the officers would consider the evidence [the eight or nine actual rocks], the defendant theatrically attempted to consume that benign evidence. The police, having supposedly found the evidence, would have no reason to retrace the route he took when he fled and no reason to suspect that he had secreted any contraband while fleeing. The defendant, or a confederate, could then recover the hidden treasure [34.35 grams of cocaine] at an opportune time. The cocaine was found behind the truck where the officer saw the defendant run. When the bag of cocaine was located in the freshly hidden location, the defendant immediately volunteered that he knew "nothing about that cocaine" when the contents of the bag had not been mentioned or identified by the officers. [App. 49] Only the defendant knew where he buried the cocaine and, absent the assistance of the drug dog and officer, would have been the only person who knew of the secret location in order to retrieve the cocaine at a later time. Fleeing, secreting the cocaine within the freshly disturbed pine straw behind the truck, and attempting to mislead the police into believing that they had found incriminating evidence demonstrate that the defendant exercised dominion and control or had the right or intent to exercise dominion and control over the cocaine and support the trial court's jury instruction on constructive possession of drugs. See State v. Shine, 464 S.E.2d 475 (N.C. App. 1995)(stating that trial court properly submitted charge to the jury on the theory of constructive possession where officers were delayed by one of three

co-defendants from entering premises and when officers entered, defendant was seen leaving bathroom where drugs were hidden).

In State v. Ballenger, 322 S.C. 196, 470 S.E.2d 851 and n. 3 (1996), this Court concluded that there was sufficient evidence of actual possession to justify the trial court's denial of a directed verdict motion and noted that the evidence did not support constructive possession. The only reasonable inference from the evidence presented in Ballenger was that the defendant had either discarded and abandoned the crack or simply lost the crack. In the present case the defendant did not toss, discard, lose, or abandon his cocaine. The facts of this case are distinguishable from Ballenger. Here, the defendant maintained constructive possession of his cocaine by secreting his packaged cocaine out of the ordinary visibility of patrons using the nightclub's publically accessible parking lot within freshly disturbed pine straw and then, through his theatrics, attempted to misdirect the police from discovering his treasure so that he could return later to the location only he knew about to retrieve it. The evidence linked the defendant to the cocaine. The defendant exercised dominion and control or maintained the right to exercise dominion and control over the cocaine and the trial judge properly charged the jury on constructive possession based upon the presentation of this evidence. See State v. Williams, 346 S.C. 424, 552 S.E.2d 54 (Ct. App. 2001)(stating there was sufficient evidence defendant exercised dominion and control over contraband when the contraband was found in the locker assigned to defendant and defendant ran to the bathroom and spit something out of his mouth before he could be searched); State v. Gore, 319 S.C. 157, 456 S.E.2d 419 (Ct.App. 1995) (stating evidence sufficient to withstand directed verdict when marijuana was found after 1:00 a.m. in vacant parking lot under car where defendant had been).

CONCLUSION

The case presents circumstantial evidence supporting a jury instruction on constructive possession of cocaine by the exercise of dominion and control over the substance in a publicly accessible area. The trial court ruled on an objection to its jury charge and applied the correct law. The case forensically illustrates circumstantial evidence and constructive possession, and the Court should affirm the trial court.

Respectfully submitted,

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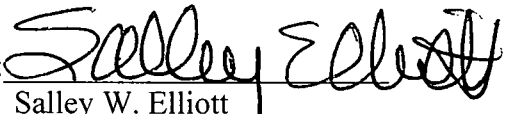
BY: 
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August 15, 2014

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PROOF OF SERVICE

I, ANGELA BENNETT, certify that I have served the within Brief of Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 15th day of August, 2014.

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