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)

BRIEF OF RESPONDENT

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August 30, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF QUESTION PRESENTED 1

STATEMENT OF THE CASE 2

ARGUMENT:

I. The Court of Appeals correctly found that the trial court erred in charging the jury on the law of constructive possession under the facts of the case and that charge prejudiced the Respondent. 3

II. The trial court should have suppressed the statements of the Respondent and the evidence found on his person and that this error prejudiced the Respondent 4

CONCLUSION 8

TABLE OF AUTHORITIES

Constitutional Authority:

United States Constitution, Amendment IV 7

South Carolina Constitution, Article I, Section 10 7

Case Law:

Carolina Chloride, Inc. v. Richland County, 394 S.C. 154, 172, 714 S.E.2d 869, 878 (2011) 7

In Re Jeremiah W., 353 S.C. 90, 576 S.E.2d 185 (S.C. Ct. App. 2003) 6

State v. Ballenger, 322 S.C. 196, 470 S.E.2d 851 (1996) 3

State v. Burton, 356 S.C. 259, 589 S.E.2d 6 (S.C. 2003) 6

State v. Burton, 349 S.C. 430, 562 S.E.2d 668 (S.C. App. 2002) 6

State v. Heath, 370 S.C. 326, 635 S.E.2d 18 (2006) 3

State v. Perkins, 306 S.C. 353, 412 S.E.2d 385 (SC 1991) 6

Terry v. Ohio, 392 U.S. 1, 32, 88 S.Ct. 1868, 1885, 20 L.Ed.2d 889 (1968) 6

STATEMENT OF QUESTIONS PRESENTED

I. Whether the Court of Appeals correctly found that the trial court erred in charging the jury on the law of constructive possession under the facts of the case and that charge prejudiced the Respondent?

II. Whether the trial court should have suppressed the statements of the Respondent and the evidence found on his person and that this error prejudiced the Respondent?

STATEMENT OF THE CASE

The Respondent agrees that the State has made a correct Statement of the Case in their brief to this Court.

ARGUMENT

I. The Court of Appeals correctly found that the trial court erred in charging the jury on the law of constructive possession under the facts of the case and that charge prejudiced the Respondent.

This case is factually similar to not only State v. Ballenger, 322 S.C. 196, 470 S.E.2d 851 (1996) but also to State v. Heath, 370 S.C. 326, 635 S.E.2d 18 (2006). As in the cases cited above, there was no direct evidence that the Respondent was in actual possession coupled with knowledge of the drugs. These cases, including the Respondent's, are all cases of the State's trying to prove *constructive* possession and knowledge of the drugs through circumstantial evidence. The evidentiary problem with all of these cases is that none of the defendants were found to be in *constructive* possession of the drugs, because none of the defendants had dominion and control over the property where the drugs were found.

The Court of Appeals was correct to uphold longstanding precedent against charging constructive possession on a premises not under the dominion and control of the Respondent. It was prejudice to the Respondent, under longstanding precedent, to weaken the burden of proof to charge a jury that; if the drugs were found on a premises under the Respondent's dominion and control, when legally he was **not** in dominion and control of the premises, the Respondent is criminally responsible for the drugs found on that premises. This undoubtedly led to jury confusion and weakened the burden of proof in order to convict the Respondent.

In order to reverse the Court of Appeals on this issue, this Court must also reverse Ballenger, Heath and their progeny. The only error the Court of Appeals made in this case was to not reverse the trial court's failure to direct a verdict. See, Heath.

II. The trial court should have suppressed the statements of the Respondent and the evidence found on his person and that this error prejudiced the Respondent.

Factually, this is a case of police induced probable cause. The deputies responded to a vague call at the Studio Seven Nightclub on New Years Eve that someone was creating a "disturbance" in the parking lot. (App. p.5). Upon the deputy's arrival a man was walking off and the manager pointed to the Respondent. The deputy observed the Respondent commit no crime or suspicious behavior other than that he was walking away. The deputy in fact never talks to the manager to find out the problem, if any.

The deputy hails the Respondent to Stop, but he Respondent continues to walk away not committing any crime or disturbance. (App. pp. 6-8). The Respondent walked four hundred feet away from the establishment, still not committing any crime or suspicious behavior, other than as a citizen he did not want to talk to the cops. The deputy even comments to his dispatcher, after he lost sight of the Respondent, "I guess he doesn't want to talk to me." (App. p. 8). The Respondent walks back in general the direction of the deputy, and the deputy pulled a firearm on him and ordered him to show his hands. (App. p. 9).

The following transpires:

Q. So what happened then?

A. I drew my service weapon, and I ordered him to let me see his hands.

Q. And why did you do that?

A. It's a safety issue at that point. I don't know if he has a gun in his hands. I

don't know what. If he doesn't have anything in his hands, he pretty much can't hurt me.

Q. Okay.

A. So I ordered to see his hands.

Q. And what happened then?

A. He said, "You got nothing on me. I don't got any drugs," and I continued ordering him to let me see his hands, let me see his hands.

Q. Okay. And did he ever show you his hands?

A. Yes, eventually he did. (App. p. 9).

It is clear from the testimony that the Respondent did not have anything in his hands. The deputy still insisted, at gun point no less, that the Respondent get on the ground. The deputy then arrested the Respondent and searched him. (App. p. 10). The search yielded some cash and some stones.[1] The State introduced a statement from the Respondent that the cocaine shown to him was not his. (App. p. 12). No *Miranda* warnings were given, and the statement was introduced into evidence over the Respondent's objection.

The first question that comes to mind is, what was the Respondent being arrested for? The deputy witnessed the Respondent commit no crime. The deputy did not interview anyone at the nightclub to determine if any criminal activity occurred. Simply put the deputy possessed no probable cause to arrest the Respondent. Lamely, the stated charge to be lodged against the Respondent was for "fleeing to evade arrest." Again the question is:

1

It is clear from the record that the "stones" were not drugs, but in fact were common stones made from, well - stone.

fleeing to evade an arrest for what? The deputy aptly told his dispatcher, "I guess he doesn't want to talk to me." (App. p. 8). Citizens are at liberty to refuse to talk to the police. State v. Burton, 349 S.C. 430, 562 S.E.2d 668 (S.C. App. 2002)(Reversed on other grounds State v. Burton, 356 S.C. 259, 589 S.E.2d 6 S.C. 2003)(The Supreme Court agreed that there was an illegal search, but reversed on grounds of issue preservation). See, also, Terry v. Ohio, 392 U.S. 1, 32, 88 S.Ct. 1868, 1885, 20 L.Ed.2d 889 (1968)(Harland, J., concurring. "Notwithstanding a law enforcement officer's position of authority, a citizen approached in this manner has the right to, 'ignore his interrogator and walk away.'" Id. at 32-33, 88 S.Ct. At 1885-86). After a protracted ruling on the lack of probable cause for arrest and admissibility of evidence pursuant to an illegal search and seizure, the trial court stated, " . . . he's got a right to detain him when he starts walking away, I think, for a brief period of time. **If he hadn't smarted back off at him, he'd probably be out of here today. There you go"** (App. p. 24)(Emphasis added).

The question is: detain the Respondent for what? Smarting off? Citizens have a substantial right under the First Amendment to ignore, challenge or criticize the police without risking arrest. See, In Re Jeremiah W., 353 S.C. 90, 576 S.E.2d 185 (S.C. Ct. App. 2003); See also, State v. Perkins, 306 S.C. 353, 412 S.E.2d 385 (SC 1991)("The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.").

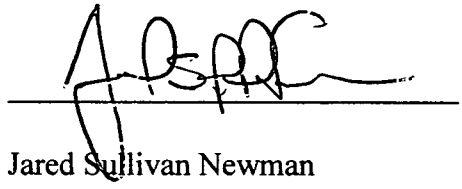
This was not a case of a *Terry* frisk, the deputy admitted he searched the Respondent after an arrest for fleeing to evade arrest. The magistrate's court directed a verdict (i.e. no

evidence from which guilt could be established) on the fleeing to evade arrest charge. (App. p. 17). The State did not appeal the magistrate's court direct verdict, and right or wrong, that finding is the law of the case. Carolina Chloride, Inc. v. Richland County, 394 S.C. 154, 172, 714 S.E.2d 869, 878 (2011). The arrest and search in this case are an anathema to the Fourth Amendment to the United States Constitution and Article I, Section 10 of the South Carolina Constitution. The admission of the money, stones and the Respondent's statement clearly prejudice the Respondent, particularly in light of a burden weakening and incorrect jury charge.

CONCLUSION

The Respondent prays that this Court affirm the unanimous decision of the Court of Appeals, which was based upon longstanding and clear precedent. The Respondent further prays that this Court modify the Court of Appeals decision and Reverse the conviction based upon State v. Heath.

Respectfully Submitted,



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PROOF OF SERVICE

I, JARED SULLIVAN NEWMAN, certify that I have served the within Brief of Respondent by depositing two (2) copies of the same in the United States Mail, postage prepaid, addressed to the following:

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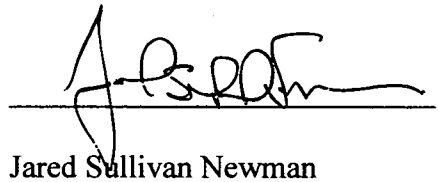

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September 2, 2014