In the

Supreme Court of Virginia

At Richmond

Record No. 082228

WILLIAM S. SMALLWOOD,

Appellant,

– v. –

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

JASON MOORE, VSB# 47200
LAW OFFICES OF JASON MOORE
P.O. Box 394
Powhatan, Virginia 23139
P: (804) 598-8851
F: (804) 598-8915
elmouva@hotmail.com

Counsel for Appellant

COUNSEL PRESS · VA – (800) 275-0668

TABLE OF CONTENTS

Table of Authorities..... iii

Assignment of Error..... 1

Questions Presented 1

Statement of the Nature of the Case and Material Proceedings 2

Statement of Fact..... 3

Summary of Argument 6

Argument 9

A. Standard of Review 9

B. The Commonwealth did not provide sufficient evidence to prove beyond a reasonable doubt that Mr. Smallwood possessed a firearm after having been convicted of a felony in violation of Virginia Code 18.2-308.2 12

C. The trail court could not rule that Mr. Smallwood maintained possession of the firearm, because the Commonwealth did not prove actual possession of the firearm and could not prove beyond a reasonable doubt that Mr. Smallwood had constructive possession of the firearm, because there was a reasonable hypothesis of innocence presented by the accused 15

D. The Court's expansive definition of what constitutes dominion and control as expressed in the holding in the lower court's ruling goes beyond a definition of what is appropriate based

a reasonable reading of the Code of Virginia and violates Ms. Barnett's right to bear arms as defined by the Second Amendment to the Constitution of the United States 18

Conclusion 20

Certificate of Service

TABLE OF AUTHORITIES

Cases:

Archer v. Commonwealth,
26 Va. App. 1, 492 S.E.2d 491 (1990)..... 10, 11

Brown v. Commonwealth,
15 Va. App. 1, 421 S.E.2d. 877 (1992)..... 14

Cantrell v. Commonwealth,
7 Va. App. 269, 373 S.E.2d 328 (1988)..... 11

Commonwealth v. Hudson,
265 Va. 505, 578 S.E.2d 781 (2007) 12

Dodd v. Commonwealth,
50 Va. App. 304, (2007) 15

Drew v. Commonwealth,
230 Va. 471, 338 S.E.2d 844 (1986) 10

Hamilton v. Commonwealth,
16 Va. App. 751, 433 S.E.2d 27 (1993)..... 11

Hancock v. Commonwealth,
21 Va. App. 466, (1995) 12, 13

Inge v. Commonwealth,
217 Va. 360, (1976) 13

Josephs v. Commonwealth,
10 Va. App. 87, 390 S.E.2d 491 (1990)..... 10

Martin v. Commonwealth,
4 Va. App. 443, 492 S.E.2d 832 (1995)..... 11

Powers v. Commonwealth,
227 Va. 474, 316 S.E. 2d 739 (1984)..... 10, 12, 14, 15

Traverso v. Commonwealth,
6 Va. App. 172, 366 S.E.2d. 719 (1988)..... 9

Tucker v. Commonwealth,
18 Va. App. 141, 442 S.E.2d 419 (1994) 11

Walton v. Commonwealth,
255 Va. 422, 497 S.E.2d 869 (1998) 10

Womack v. Commonwealth,
220 Va. 5, 255 S.E.2d 351 (1979)..... 11

Rules, Statutes and Other Authorities

Virginia Code § 18.2-308.2 ..... 1, 2, 9

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF VIRGINIA

ASSIGNMENT OF ERROR

1. The trial court erred in finding the defendant William Smallwood guilty of possessing a firearm after having been convicted of a felony in violation of Virginia Code Section 18.2-308.2.

QUESTIONS PRESENTED

1. The trial court erred in finding evidence sufficient for a conviction. The evidence was not sufficient to prove beyond a reasonable doubt that the Appellant was guilty of possessing a firearm after having been convicted as a felon in violation of Virginia Code Section 18.2-308.2. (See Transcript at J.A. 31 and 40).
2. The trial court erred in determining that the Appellant constructively possessed the firearm. (See Transcript at J.A. 31 and 40).
3. The trial court erred in determining that Mr. Smallwood's prohibition from possessing a firearm

overrode Ms. Barnett's right under the Second Amendment of the United States Constitution to bear a firearm. (See Transcript at J.A. 31 and 40).

STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS

The Appellant, William Smallwood, was indicted by grand jury, meeting on October 22, 2007, and was charged with one count of felony possession of a firearm after having been convicted of a felony in violation of Virginia Code Section 18.2-308.2. (See Indictment J.A. 1). Appellant pled not guilty. After hearing evidence and arguments, Judge Richard Blanton of the Cumberland Circuit Court found the Appellant guilty. (See Conviction Order J.A. 54). On April 11, 2008, he was sentenced by the Honorable Ernest Gates, in the Cumberland County Circuit Court to five years incarceration by the Department of Corrections with three years suspended for violating Virginia Code Section 18.2-308.2. (See Sentencing Order J.A. 66). It is from this conviction and sentence that Appellant appeals. Appellant timely filed all notices and petitions with the Court of

Appeals and the Court of Appeals rejected the appeal by order entered October 16, 2008. (See Notice of Appeal J.A. 71 and Petition for Appeal to the Court of Appeals of Virginia J.A. 78). Appellant then timely filed notice and petitions with this court, and was heard before a three judge panel. (See Notice of Appeal J.A. 116).

STATEMENT OF FACT

On July 27, 2007, Mr. Smallwood was driving Ms. Crystal Barnett's car in Cumberland County, Virginia. (See Transcript at J.A. 9). Mr. Smallwood was driving the vehicle, because Ms. Barnett had drank several alcohol beverages earlier in the evening at a private residence. (See Transcript at J.A. 35). Ms. Barnett knew that she could not drive safely, so Mr. Smallwood began driving the vehicle. (See Transcript at J.A. 35). At all times after leaving the private residence where Ms. Barnett had consumed the alcohol, Ms. Barnett was driving the vehicle. (See Transcript at J.A. 35).

Prior to Mr. Smallwood and Ms. Barnett leaving the private residence, Ms. Barnett placed her handgun on top on

the center console between the two front seats in the vehicle in plain view. (See Transcript at J.A. 36). Ms Barnett never told Mr. Smallwood the firearm was in the vehicle. (See Transcript at J.A. 37). Ms. Barnett kept the unloaded handgun in the plain view, because she had not received a concealed weapons permit. (See Transcript at J.A. 36). Ms. Barnett knew that the law required her to have the gun in plain view, unless or until she received the concealed weapons permit. (See Transcript at J.A. 36). Ms. Barnett testified that Mr. Smallwood never touched, moved or in any other way handled the unloaded firearm. (See Transcript at J.A. 37).

While driving Mr. Smallwood came to a properly authorized and legal checking detail in Cumberland County at the intersection of Mahan Road and State Route 45. (See Transcript at J.A. 22). When stopped at the checking detail, Mr. Smallwood made contact with Deputy Frankie Lampkin of the Cumberland Sheriff's Department. Deputy Lampkin asked for Mr. Smallwood's driver's license, and Mr.

Smallwood informed the Deputy that his privilege to drive had been suspended. (See Transcript at J.A. 23-24). The Deputy asked Mr. Smallwood to drive to the side of the checking detail, and await further instructions. Mr. Smallwood complied with the Deputy's instructions. (See Transcript at J.A. 23-24). The Deputy said Mr. Smallwood was polite, cooperative and direct throughout their encounter.

Mr. Smallwood complied with Deputy Lampkin's instructions to pull to the side of the road, when Deputy Michael Boggs approached the vehicle's passenger side. Deputy Boggs flashed his light into the car, and he saw an unloaded firearm on top of the center console located between the front seats. (See Transcript at J.A. 29). Deputy Boggs asked the parties exit the vehicle, and he interviewed them. (See Transcript at J.A. 29).

Mr. Smallwood admitted to knowing the gun was in the vehicle. (See Transcript at J.A. 25) He stated his belief that since Ms. Barnett owned the firearm and that he had not

handled the gun, then he was not in possession of the firearm. (See Transcript at J.A. 25). Ms. Barnett stated the gun was her weapon. (See Transcript at J.A. 36). She explained to the officer why she owned and possessed the gun. She stated that the weapon was in the front console, because she was applying for a concealed weapons permit and she knew the firearm must be kept in plain view in order to comply with the law. (See Transcript at J.A. 36-37). She also stated that Mr. Smallwood never touched, handled or in any other way manipulated the firearm. (See Transcript at J.A. 37).

Appellant's criminal record was reviewed, and he admitted to a felony conviction. (See Transcript at J.A. 27). The Deputy arrested Mr. Smallwood for possession of a firearm after having been convicted of a felony. (See Transcript at J.A. 25).

SUMMARY OF ARGUMENT

The Court has a history of ruling that circumstantial evidence of constructive possession is sufficient to support a

conviction only when the circumstantial evidence excludes every reasonable hypothesis of innocence. Here the Court has a reasonable and undisputed alternative hypothesis for Mr. Smallwood not having constructive or actual possession of the firearm. Ms. Barnett testified that she owned the car in which the gun was located, she owned the gun and that Mr. Smallwood never touched, handled, utilized or in way possessed the weapon. She placed the weapon between the seats on the console to comply with the Virginia's concealed weapons law. Mr. Smallwood cannot exercise constructive possession of the firearm when Ms. Barnett is exercising actual and excusive possession of the firearm.

The Court also has ruled that occupancy of a car in which contraband is located or proximity to contraband shall not create a presumption that such person either knowingly or intentionally possesses said contraband. The Court must look at the totality of the circumstances to determine whether or not the defendant possessed the contraband. In this case, Mr. Smallwood was polite and cooperative with the

officers. He honestly answered their questions regarding his license suspension, his knowing the gun was in the car and his criminal record. It was never shown that he lied to the deputies at anytime.

Furthermore, the lower court's expansive definition of dominion and control is unreasonable leading to absurd rulings and a violation of an individual's right to bear arms under the United States Constitution. For example, a parent is teaching their minor child to drive a car. The parent is smoking leaving their pack of cigarettes in plain view on top of a console between then front seats. The minor is stopped by an officer for a traffic infraction. The officer smells smoke, sees an ashtray full of cigarettes and a pack of cigarette on the console. The minor child admits to knowing the pack of cigarettes is on the console, and the parent admits to owning the cigarettes. If this Court adopted the lower court's definition of possession, then the above scenario would lead to a minor being convicted of possession of tobacco.

Finally, Ms. Barnett has a right to bear arms, and her right to possess a firearm is violated by this ruling. No person wishing to possess a firearm could bring their weapon within any reasonable distance of a convicted felony for fear of that person being convicted of possessing a firearm in violation of Virginia Code Section 18.2-308.2.

ARGUMENT

A. Standard of Review

When considering the sufficiency of the evidence on appeal of a criminal conviction, the court must view all the evidence in the light most favorable to the Commonwealth and accord to the evidence all reasonable inferences fairly deducible therefrom." Traverso v. Commonwealth, 6 Va. App. 172, 176, 366 S.E.2d. 719, 721 (1988). To support a conviction based on constructive possession, "the Commonwealth must point to evidence of acts, statements, or conduct of the accused or other facts or circumstances which tend to show that the defendant was aware of both the presence and character of the substance and that it was

subject to his dominion and control." Powers v. Commonwealth 227 Va. 474, 476, 316 S.E. 2d 739, 740 (1984). "Possession need not always be exclusive. The defendant may share it with one or more.'" Archer v. Commonwealth 26 Va. App. 1, 12, 492 S.E.2d 491, 497 (1990) (quoting Josephs v. Commonwealth, 10 Va. App. 87, 99, 390 S.E.2d 491, 497 (1990) (en banc)).

In terms of proving constructive possession, mere proximity to the contraband is not sufficient to establish the requisite "dominion and control." Drew v. Commonwealth, 230 Va. 471, 473, 338 S.E.2d 844, 845 (1986). Similarly, "ownership or occupancy of the premises where the [contraband] is found does not create a presumption of possession." Walton v. Commonwealth 255 Va. 422, 426, 497 S.E.2d 869, 872 (1998). Nonetheless, these factors may be considered in deciding whether an accused possessed the contraband at issue. Id. "Thus, in resolving this issue, the Court must consider `the totality of the circumstances disclosed by the evidence.'" Archer, 26 Va.

App. at 12, 492 S.E.2d at 832 (quoting Womack v. Commonwealth, 220 Va. 5, 8, 255 S.E.2d 351, 353 (1979)).

Circumstantial evidence of such possession is sufficient to support a conviction, provided it excludes every reasonable hypothesis of innocence. Tucker v. Commonwealth, 18 Va. App. 141, 143, 442 S.E.2d 419, 420 (1994). However, "[t]he Commonwealth need only exclude reasonable hypotheses of innocence that flow from the evidence, not those that spring from the imagination of the defendant." Hamilton v. Commonwealth, 16 Va. App. 751, 755, 433 S.E.2d 27, 29 (1993). Whether an alternative hypothesis of innocence is reasonable is a question of fact, Cantrell v. Commonwealth, 7 Va. App. 269, 290, 373 S.E.2d 328, 339 (1988), and, therefore, is binding on appeal unless plainly wrong. Martin, 4 Va. App. at 443, 358 S.E.2d at 418. Id. at 12-13, 492 S.E.2d at 832. "The statement that circumstantial evidence must exclude every reasonable theory of innocence is simply another way of stating that the Commonwealth has the burden of proof beyond a reasonable

doubt." Commonwealth v. Hudson, 265 Va. 505, 513, 578 S.E.2d 781, 785 (2003).

B. The Commonwealth did not provide sufficient evidence to prove beyond a reasonable doubt that Mr. Smallwood possessed a firearm after having been convicted of a felony in violation of Virginia Code 18.2-308.2.

Commonwealth failed to prove beyond a reasonable doubt that the appellant possessed the firearm. The Commonwealth relied on Hancock v. Commonwealth 21 Va. App. 466, 465 S.E.2d 138 (1995) to establish that Mr. Smallwood had constructive possession of the firearm. Hancock states referring to Powers v. Commonwealth that "the Commonwealth must point to evidence of acts, statements, or conduct of the accused or other facts or circumstances which tend to show that the [accused] was aware of both the presence and character of the [item] and that it was subject to his dominion and control." Powers v. Commonwealth, 227 Va. 474, 476, (1984).

Powers creates a two prong test which must be proved by the Commonwealth. First, the Commonwealth must prove

that Appellant knew of the presence and character of the firearm. Smallwood admitted that he knew the firearm was in the vehicle when he spoke to the Deputy. Hancock does not address the issue of dominion and control. The Court overturned Mr. Hancock's conviction by stating that there was no evidence that Mr. Hancock knew the firearm was in the vehicle.

Second, the Commonwealth must prove that the firearm was subject to Smallwood's dominion and control. The Court rested its finding for a conviction upon Mr. Smallwood's knowledge that the firearm was in the vehicle and the circumstantial evidence that Mr. Smallwood could have exercised dominion and control over the firearm. Where "a conviction is based on circumstantial evidence, 'all necessary circumstances proved must be consistent with guilt and inconsistent with innocence and exclude every reasonable hypothesis of innocence.' " Inge v. Commonwealth, 217 Va. 360, 366, 228 S.E.2d 563, 568 (1976). Although "[t]he Commonwealth is not required to

prove that there is no possibility that someone else may have planted, discarded, abandoned or placed the drugs or paraphernalia [where they were found near an accused]," Brown, 15 Va. App., 1, 10, 421 S.E.2d. 877, 888 (1992) all reasonable hypotheses of innocence must be excluded. Furthermore, proof that the firearm "was found in ... a vehicle ... occupied by the [accused] is insufficient, standing alone, to prove constructive possession." Id.

The Commonwealth has failed to prove the second prong of the Powers test, because Ms. Barnett testified to owning the car, the gun, and being the person who placed the gun in the car and on the console. Mr. Smallwood could not have exercised dominion and control over the gun when the gun was under the dominion and control of Ms. Barnett at all times.

The Commonwealth can argue that possession need not be exclusive. Here Ms. Barnett's testimony excludes the possibility of joint possession. She clearly stated that the car and gun were her chattel, that she placed her gun in her

car and that Mr. Smallwood never touched or manipulated the weapon in any way handled the weapon.

C. The trial court could not rule that Mr. Smallwood maintained possession of the firearm, because the Commonwealth did not prove actual possession of the firearm and could not prove that Mr. Smallwood had constructive possession of the firearm, because there was a reasonable hypothesis of innocence presented by the accused.

Commonwealth failed to prove that the Appellant constructively possessed the firearm. As stated above in the discussion of the entirety of the evidence the Commonwealth failed to prove the second prong of the Powers test. The Appellant did not exercise dominion and control over the firearm.

The reasoning used by Judge Benton in Dodd v. Commonwealth 50 Va. App. 304, 649 S.E.2d 222 (2007) maybe of assistance in this case. In Dodd, police observed what they believed to be drug transactions in a 7-eleven parking lot. The parties involved in the transaction were the driver of the vehicle in which Dodd was a passenger, a female, and the driver of a second vehicle in which the drug

transaction may have taken place. The officers lacked probable cause to stop the parties based on a drug transaction, but knew the driver of the Dodd car in had a suspended license.

The officer made contact with the female driver of the Dodd vehicle, and determined that she and Dodd both had suspended licenses. The officer told Dodd he could leave, but Dodd had to wait for a friend to come pick him up. While Dodd waited for his ride, the officer began to inventory the car's contents for towing. Inside the car, the officer found a woman's purse containing two pill bottles that had been converted into smoking devices. The devices contained ashes and appeared to have been used to smoke cocaine or marijuana. In a container or "tin" in the center console beneath the front armrest, the police discovered "numerous items of drug paraphernalia," including marijuana and a piece of suspected crack cocaine. Although one of the officers described the container as a "makeup case" or "makeup purse," only drugs and drug paraphernalia

were inside the container. The female driver admitted the purse that contained the two smoking devices was hers, but she denied knowing the container of drugs was in the center console and disclaimed ownership of the container and its contents.

Dodd was told he could not leave but the officer decided to search Dodd. Dodd ran from the scene, and was later caught with drugs and a substantial amount of money. Dodd was not charged with possession of any of the drugs found in the vehicle or in the driver's bag, but was charged with possession of the drugs on his person.

The question presented at trial was whether or not the officer had probable cause to search Dodd after he found the drugs in the vehicle and the female driver has admitted to owning the drugs in her purse, but not in the console even though the drugs in the console where in feminine carrying cases. Judge Benton argued that the officer did not have probable cause to arrest Dodd, because all the evidence

pointed to the female driver being the only person involved in any illegal activity.

Judge Benton's reasoning applies here. The only evidence to ownership, possession or dominion and control over the weapon point to Ms. Barnett. The Commonwealth has only proven that Mr. Smallwood knew of the weapon's presence and not that he exercised dominion and control over the firearm.

D. The Court's expansive definition of what constitutes dominion and control as expressed in the holding in the lower court's ruling goes beyond a definition of what is appropriate based a reasonable reading of the Code of Virginia and violates Ms. Barnett's right to bear arms as defined by the Second Amendment to the Constitution of the United States.

Ms. Barnett has an unabridged right to own, possess and use a firearm granted to her by both the federal and state constitutions. Her rights have not been circumscribed, as in the case of Mr. Smallwood, and the circumscription of Mr. Smallwood's rights should not interfere with Ms. Barnett's right to bear arms.

Mr. Smallwood is being convicted of constructively possessing a firearm, because Ms. Barnett exercised her right to carry a firearm. Where is the line to be drawn between Ms. Barnett's right to possess a firearm and Mr. Smallwood's prohibition to possessing a firearm? If Ms. Barnett had a concealed weapons permit and was wearing the gun in a holster, then could Mr. Smallwood have been convicted of possession of a firearm even if he knew the gun was in the car and on Ms. Barnett's person? Can Mr. Smallwood be convicted of possession of a firearm by simply entering a store that sells firearms like Wal-Mart?

This case tests the limits to constructive possession, because Ms. Barnett's uncontroverted testimony is that she owed the car and gun; and that she was the only person that handled the gun. Mr. Smallwood only knew the gun was in the car, and as stated earlier simply driving the car does not mean a person has dominion and control over all items or people in the car.

CONCLUSION

For the foregoing reasons, the appellant requests this Court reverse and dismiss his conviction and sentence.

Respectfully Submitted,

WILLIAM S. SMALLWOOD

/S/ Jason Moore__
By Counsel

Jason Moore, Esq.
VSB# 47200
Powhatan, Virginia 23139
(804) 598-8851
(804) 598-8915 *facsimile*
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2009

- ☐ 7 copies of the brief and 7 copies of the appendix (VA - COA)
- ☑ 15 copies of the brief and 15 copies of the appendix (VA - SUP)
- ☐ 4 copies of the petition for appeal or brief in opposition (VA – COA & SUP)
- ☐ 4 copies of the motion
- ☐ 1 copy / copies of

were filed in the Clerk's Office of the ☐ Court of Appeals of Virginia ☑ Virginia Supreme Court. This same date

- ☑ 3 copies of the brief and 3 copies of the appendix (VA – COA & SUP)
- ☐ 1 copies of the petition for appeal or brief in opposition (VA – COA & SUP)
- ☐ 1 copy of the motion / petition for appeal / brief in oppostion
- ☐ 1 copy / copies of

were mailed or delivered to the following counsel of record:

Richard Smith
Office of the Attorny General
900 East Main Street
Richmond, VA 23219

/s/ J. Josef Taylor

Filing and service were performed by direction of counsel.

Counsel Press, L.L.C.
1011 East Main Street
Suite LL-50
Richmond, Virginia 23219
(804) 648-3664 (800) 275-0668