In The

Supreme Court of Virginia

RECORD NO. 092592

HUGH LINCOLN CORDON, JR.,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS BELOW

This case arises from proceedings in the Circuit Court for the City of Hampton. (App. 3) On May 30, 2008, appellant pled not guilty to an indictment against him alleging he possessed cocaine in violation of Va. Code § 18.2-250. (App. 6) A bench trial was held, the Honorable Randolph West presiding, and appellant was found guilty. (App. 48)

On July 3, 2008 appellant returned to the Circuit Court with counsel for sentencing, the Honorable Louis Lerner presiding. (App. 56) A pre-sentence investigation report had been completed and was presented at the hearing. (App. 58) Amendments were made to the report through the testimony of Probation Officer Roach. (App. 58-63) The Circuit Court sentenced appellant to three years in the state penitentiary with two years and six months thereof suspended for a period of ten years based on appellant's good behavior, compliance with supervised probation, payment of court costs, and submission of a sample of his DNA. (App. 72-73)

The Court of Appeals of Virginia denied appellant's appeal on December 1, 2009. (App. 83)

STATEMENT OF FACTS

On September 29, 2008, Officer Michael Brown of the Hampton Police Department was dispatched to 169 Finley Square in Hampton based on a report of a home invasion or burglary. (App. 10) He arrived and talked with appellant. (App. 10) Appellant stated that he had "just returned home from a nightclub and there [were] two masked men inside." (App. 10-11) As soon as he stepped into the house, he saw the front room was "ransacked." (App. 11) Appellant walked into the kitchen and was confronted by one of the intruders. (App. 11) The intruder ordered appellant to get on the ground, but appellant refused. (App. 11) The intruder struck appellant with a gun. (App. 11) The gun fired and the bullet hit the wall. (App. 11) Both intruders ran out of the house through the front door. (App. 11)

Appellant told Officer Brown that 169 Finley Square was his uncle's house, but his uncle was out of town and appellant was staying there. (App. 11) Appellant said that several items were missing from the house, including a DVD player, several DVDs. (App. 11) While walking through the house, appellant stated that the room on the right at the end of the hall was his room, and that he did not notice anything missing from it. (App. 12) Another room on the

left side of the hall, the computer room, had been ransacked. (App. 12) Clothes were pulled from the closet and there was an empty rifle case. (App. 12)

Officer Brown saw the bullet hole in the wall and the welt on appellant's temple from being struck by one of the intruders. (App. 18) He also saw that the house had been ransacked. (App. 18) Appellant filled out an incident report at Officer Brown's request. On that form appellant indicated that he lived at 111 Clearbrown in Newport News. (App. 13, 16)

On October 2, 2008 the home invasion and burglary case was assigned to Detective John Baer. (App. 20) Over a month later, on November 14, 2008, he finally called appellant about the incident. (App. 20) Appellant told Det. Baer about the incident and reported that he had discovered that a lock box had been taken from underneath his bed. (App. 21) On November 18, 2008, Det. Baer went to 169 Finley Square and met with the owner, Donald Whitmeyer. (App. 22) Appellant arrived while Det. Baer and Mr. Whitmeyer were talking. (App. 22) Appellant spoke with Det. Baer indicating that only the lock box had been taken in the incident. (May Tr. 21) Det. Baer gave appellant his business card. (App. 24) It is

unknown whether Det. Baer provided one of his cards to Mr. Whitmeyer. (App. 22-23)

On November 20, 2008, Det. Baer returned to 169 Finley Square to help execute a search warrant. (App. 24) Mr. Whitmeyer was present and opened the door for the police. (App. 36) Appellant was not there. (App. 36, 44) In the room where appellant had stayed was a nightstand. (App. 29) Inside the bottom drawer police found a bag of white powder, which was not a controlled substance, a box of rounds, glass jars with liquid in them, a knife, test tubes, a "crusher," scissors, a "torch", boxes of baking soda, and Det. Baer's business card. (App. 29) On the floor, next to a long dresser on the left side of the room, Det. Baer located a closed cooler. (App. 31, 42-43) When he opened it, he found a plastic bag, which contained cocaine, a smoking device, and plastic baggies. (App. 31) The cocaine in the closed cooler was the only controlled substance located in the room. (App. 31)

At appellant's trial, Det. Baer was unable to remember whether the door to the room in question at Mr. Whitmeyer's home was locked or unlocked or even open or closed when the warrant was executed. (App. 36) Det. Baer testified that the Crime Scene Unit tested some

of the seized items for fingerprints, but none were discovered. (App. 37) Det. Baer admitted that he did not know who placed the controlled substance in the room or when it was placed there. (App. 39) Det. Baer did not know who owned items in the room, not even the clothes in the closet. (App. 39-40) "As far as [he] kn[e]w, the only thing [of appellant's] in [the] bedroom was some checks and some papers and stuff. … That was it." (App. 43)

ASSIGNMENT OF ERROR

I. The Court of Appeals erred by affirming the Circuit Court's finding that the appellant constructively possessed cocaine located in a closed cooler in a room in which he had stayed one month earlier, when there was no evidence that appellant had recently been in the room or knew of the cocaine. (App. 43, 44-45)

ARGUMENT

STANDARD OF REVIEW

Under familiar principles of appellate review, appellant acknowledges that this Court views the evidence and all reasonable inferences fairly deducible therefrom in the light most favorable to the Commonwealth, as the prevailing party in the courts below. *Banks v. Commonwealth*, 41 Va. App. 539, 586 S.E.2d 876 (2003). However, "it is just as obligatory upon the appellate court to set aside … the

judgment of a [lower] court, when it is … contrary to the law and evidence, and therefore plainly wrong, as it is to sustain it when the reverse is true." *Bland v. Commonwealth*, 177 Va. 819, 821, 13 S.E.2d 317, 317 (1941). A trial court's findings of historical fact are reviewed only for "clear error" and this Court gives due weight to inferences drawn from those findings. *Commonwealth v. Redmond*, 264 Va. 321, 327, 568 S.E.2d 695, 698 (2002).

DISCUSSION OF ISSUES

There was no evidence that appellant knew of or was in possession of the cocaine found in the bedroom at 169 Finley Square. Ownership or occupancy of a home where illicit drugs are found is not sufficient to prove possession of the drugs. *Scruggs v. Commonwealth*, 19 Va. App. 58, 448 S.E.2d 663 (1994). 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 substance and that it was subject to his dominion and control." *Drew v. Commonwealth*, 230 Va. 471, 473, 338 S.E.2d 844, 845 (1986). In *Drew*, police conducted surveillance of a house and watched as 22 people "entered the residence, remained a short

time, and left." *Drew*, 230 Va. at 472, 338 S.E.2d at 845. Two hours later police returned with a warrant and saw defendant standing outside, two doors down from the house. Although the defendant's checkbook, bank statement, operator's license, and other documents were found in the house with a large amount of cocaine, this Court held that at most the evidence established that the defendant lived at the house and was close to it the night the cocaine was seized. *Drew*, 230 Va. at 472, 338 S.E.2d at 845.

In the case at hand, there is no evidence that appellant was aware of the presence or character of the cocaine at issue. The fact that he had stayed in the bedroom in question in no way showed any knowledge of or control over the cocaine in the cooler. Furthermore, the presence of Det. Baer's card in the drawer of the bedside table where no contraband was found, in no way links appellant to cocaine found in a closed cooler in the bedroom. Proof of constructive possession rests on circumstantial evidence, so " all necessary circumstances proved must be consistent with guilt and inconsistent with innocence and exclude every reasonable hypothesis of innocence." *Garland v. Commonwealth*, 225 Va. 182, 184, 300 S.E.2d 783, 784 (1983). In *Brickhouse v. Commonwealth*, 276 Va.

682, 668 S.E.2d 160 (2008), the defendant's conviction for possession of cocaine with the intent to distribute was reversed because although she lived in the house where the cocaine was located and drug paraphernalia was in plain view, and she knew that the house was being used for drug trafficking, there was no evidence that she was the person who possessed the cocaine or gave permission for it to be in her home. If in *Brickhouse* a defendant who has knowledge of an illegal substance cannot be held to be in possession of it, then in the case at hand, appellant, who had no knowledge of the cocaine and nothing linking him to items in the closed cooler, clearly cannot be in possession of the cocaine at issue.

The Commonwealth failed to establish any link between appellant and the cocaine. Appellant reported a break-in at 169 Finley Square on September 29, 2007 and told the responding officer that his uncle owned the house, but that he had been staying there. (App. 9-10, 11) In the statement appellant wrote for Officer Brown that night, appellant wrote that his address was 111 Clearbrown, in Newport News, VA. (App. 16) Over a month later, on November 14, 2007, Det. Baer finally called appellant to talk with him about the break-in. (App. 21) On November 18, 2008, Det. Baer went to 169

Finley Square and met the owner of the house, Mr. Whitmeyer. (App. 22) Appellant stopped by the house on that date, but there was no indication that he was still staying there. (App. 22) Two days later the warrant was executed. (App. 24) Det. Baer did not testify that he had seen the cooler in the house on his previous visits there, nor that he had ever see appellant with the cooler. The fact that appellant had stayed in the room where the cocaine was found in no way proves he was in possession of he contraband, especially in light of the fact that a cooler, by its very nature is portable and easy for anyone to carry. Det. Baer did not perform any surveillance of the house and he admitted that he did not know who put the cocaine in the room or when it was placed there. (App. 39) After his arrest on this charge, appellant denied living at 169 Finley Square. (App. 34) It was impermissible for the Circuit Court to infer appellant's awareness and control of the cocaine because of his presence at 169 Finley Square two days before the cocaine was found. *Huvar v. Commonwealth*, 212 Va. 667, 187 S.E.2d 177 (1972).

The Commonwealth's reliance on *Rawls v. Commonwealth*, 272 Va. 334, 634 S.E.2d 697 (2006) to prove that appellant was aware of the presence of the cocaine in the cooler is misplaced. In

Rawls the police were directed to an upstairs bedroom in a residence when looking for the accused. *Rawls*, 272 Va. at 341, 634 S.E.2d at 700. They knocked on the bedroom door of the room where the accused was sleeping and woke him. *Id.* When he saw the police and learned they were there to arrest him for a probation violation he immediately denied that the room where he was sleeping was his bedroom. *Id.* His unprompted denial was an indication to police that there was some contraband in the room and during their search they located a firearm in the bed where the accused had been sleeping. *Rawls*, 272 Va. at 341-42, 634 S.E.2d at 700. *Rawls* relies on *Lane v. Commonwealth*, 223 Va. 713, 292 S.E.2d 358 (1982), in which the accused becomes fidgety when police approach the chair she is sitting in during the execution of a search warrant and exclaims, "there's nothing behind the chair." *Lane*, 223 Va. at 716, 292 S.E.2d at 359. Police looked behind the chair and found a bag with 1,000 pills in it. *Id.*

In the case at hand, appellant told police that he was staying at his uncle's home at 169 Finley Square on September 29, 2008 while his uncle was out of town, when the robbery occurred. (App. 11) However, he also told police that he lived at 111 Clearbrown in

Newport News when he filled out the police incident report. (App. 13, 16) When the police executed the search warrant at 169 Finley Square approximately six weeks later on November 20, 2008, appellant was not there and there was no indication that he was currently living in the bedroom he had identified as his when the robbery occurred. (App. 24, 36, 44) Police had not performed any surveillance to discover who had been at the house and who had carried the cooler inside. (App. 39) Det. Bear testified that there were some papers in the room with appellant's name on them, but he did not know who owned the items in the room, including the clothes in the closet. (App. 39-40)

A week after the warrant was executed, Det. Baer interrogated appellant about the cocaine found at 169 Finley Square. (App. 34) Det. Baer told appellant that the cocaine was found in the bedroom and appellant denied living there. (App. 34) Appellant's denial was not like that of *Rawls* or *Lane* because it was not a red flag to police to look for contraband. Appellant denied possession of the cocaine because he was no longer staying at his uncle's house. (App. 34) The fact that he was staying at the house when the robbery occurred

did not prove that he lived there when the police executed the search warrant six weeks later.

Appellant acknowledges that a trial court's findings of historical fact are reviewed only for "clear error" and that this Court gives due weight to inferences drawn from those findings. *Commonwealth v. Redmond*, 264 Va. 321, 327, 568 S.E.2d 695, 698 (2002), *Ornelas v. United States*, 517 U.S. 690, 699 (1996). However, the Circuit Court's finding of guilt in this case exhibits such a clear error. When the Circuit Court announced its finding, it relied on the evidence that appellant told the police that his uncle owned 169 Finley Square, but he resided there at the time of the break-in. (App. 48) The Circuit Court then went on to say that "the icing on the cake" was that the calling card Det. Baer had given appellant was "found with the items in question." (App. 48) A review of the transcript clearly shows that the card in question was located in the drawer of a bedside table in which no controlled substances or contraband were found. (App. 29) The card was not found in the cooler with the cocaine. The Circuit Court's mistake concerning an important fact of the case, a fact that was relied on to convict appellant of possession of cocaine is a clear error that demands the reversal of appellant's conviction.

CONCLUSION

For the foregoing reasons, appellant, Hugh Lincoln Cordon, Jr., respectfully requests this Court reverse the decision of the Court of Appeals and thereby the Circuit Court for the City of Hampton and dismiss the charge against him.

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CERTIFICATE

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I, Kimberly Enderson Hensley, hereby certify that on this 12th day of July, 2010, pursuant to Rule 5:26(h), I caused fifteen (15) bound copies of this Opening Brief and the Appendix, and one (1) electronic copy on CD, to be hand-filed with Ms. Patricia Harrington Clerk, Supreme Court of Virginia, 100 North Ninth Street, Richmond, VA 23219. On this same date, I caused three (3) bound copies of the Brief and two (2) bound copies of the Appendix to be served, via UPS Ground, upon Counsel for Appellee, Joshua M. Didlake, Assistant Attorney General, 900 East Main Street, Richmond, VA 23219.

I further certify that this Brief complies with the page limit requirement as set forth in Rule 5:26(b).

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