IN THE SUPREME COURT

STATE OF SOUTH DAKOTA

No. 26588

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,
v.
SEAN WHISTLER,
Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

HONORABLE Randall Macy
Circuit Court Judge

APPELLANT'S BRIEF

G. Matthew Pike
Lawrence County Public
Defender's Office
90 Sherman Street
Deadwood, SD 57732

Attorney for Defendant and
Appellant

John Strohman
Assistant Attorney General
500 East Capitol Avenue
Pierre, SD 57501

Attorney for Plaintiff and Appellee

Notice of Appeal filed January 14, 2013

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IN THE SUPREME COURT

STATE OF SOUTH DAKOTA

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STATE OF SOUTH DAKOTA,

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SEAN WHISTLER,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, the Defendant and Appellant, Sean Whistler, will be referred to as "Defendant" or "Whistler." The State of South Dakota, Plaintiff and Appellee in this matter, will be referred to as "State." Documents cataloged in the Clerk's, Index on Appeal, will be referred to as "SR" for "settled record." Reference to the transcript of the trial transcript will be designated as "TT." The appropriate page number will follow all citations. Any reference to the Defendant's appendices will be designated as "AX" followed by the identifying letter.

JURISDICTIONAL STATEMENT

The Defendant appeals from a Judgment of Conviction entered by the Honorable Randall H. Macy, Circuit Court Judge, Fourth Judicial Circuit, on January 3, 2013. SR 165; AX A. This appeal is by right pursuant to SDCL §15-26A-7 and §23A-32-2. A Notice of Appeal was filed on January 14, 2013. SR 175; AX B. The Defendant, through counsel, filed his Notice of Appeal on January 14, 2013. SR 124; AX B.

STATEMENT OF LEGAL ISSUES

Appellant appeals on the following two issues:

I

WHETHER THE CURRENT STATUTORY REGIME IN SOUTH DAKOTA CRIMINALIZING POSSESSION OF A CONTROLLED DRUG OR SUBSTANCE SHOULD BE ALLOWED TO SUSTAIN A CONVICTION WHEN ONLY THE METABOLITE OF A CONTROLLED SUBSTANCE IS DETECTED IN THE DEFENDANT'S URINE

II

WHETHER THE TRIAL COURT ERRED BY INSTRUCTING THE JURY IN A MANNER THAT IMPERMISSIBLY SHIFTED THE BURDEN TO THE DEFENDANT TO DISPROVE KNOWLEDGE OF POSSESSION

MOST RELEVANT CASES AND STATUTES

State v. Ireland, 133 P.3d 396 (Utah, 2006)

State v. Opperman, 89 S.D. 25, 247 N.W.2d 673 (1976)

State v. Schroeder, 2004 SD 21, 674 NW2d 827 (2004)

SDCL §22-42-1(1)

SDCL §22-42-5

S.D. Constitution, Art. VI, §7

STATEMENT OF CASE AND FACTS

In the early morning hours of March 9, 2012, Spearfish Police Officer Aaron Jurgenson observed a pick-up truck, driving on Main Street in Spearfish with only its running lights activated. Officer Jurgenson initiated a traffic stop and later identified the driver as Sean Whistler. Dispatch reported Whistler's driver's license was suspended. The Officer asked Mr. Whistler to speak with him in his patrol vehicle. Once inside his patrol vehicle, Officer Jurgenson noticed signs of alcohol consumption, and he detected the odor of marijuana. Officer Jurgenson asked Mr. Whistler to perform a series of field sobriety exercises. At the conclusion of those exercises, he placed Mr. Whistler under arrest for Driving Under the Influence of Alcohol. A search incident to arrest revealed a small baggie of marijuana in one of Whistler's pants pockets, as well as loose marijuana leaves in a jacket pocket. An inventory search of the vehicle revealed additional marijuana and a package of rolling papers.

Upon advisement of South Dakota statutory authority, Whistler provided a urine sample at the Spearfish Police

Department and Officer Jurgenson issued uniform complaints for Driving Under the Influence, Possession of Marijuana, Possession of Drug Paraphernalia in a Motor Vehicle, Ingesting, Driving Under Suspension, and Possession of a Suspended License. On April 5, 2012, a Lawrence County Grand Jury issued an Indictment charging alternative counts of DUI; Possession of Marijuana; and Ingesting. SR 12.

Following the results of the urinalysis, on April 19, 2012, the case was re-submitted to the Grand Jury and a Superseding Indictment was filed for the additional charges of Possession of a Controlled Substance (cocaine) and Possession of Suspended License. SR 14. On June 28, 2012, Whistler was arraigned on the Superseding Indictment and he entered a plea of not guilty to each of the charges.

A jury trial commenced on November 20, 2012. During its case-in-chief the State called Spearfish police officers, Aaron Jurgensen and Colin Simpson and Detective Jason DeNeui. The State also called forensic examiner for the Rapid City Police Department, Richard Wold, who testified that he weighed and analyzed the plant material and determined it to be marijuana. TT, page 84 lines 2-5. The State also called Kathryn Engle, forensic chemist for the State of South Dakota.

Ms. Engle testified that she works in the Public Health Lab in Pierre and her educational background includes a bachelor's degree from South Dakota State University in biochemistry and was working toward her master's in forensic toxicology from the University of Florida. TT, page 87, lines 9 – 19. Ms. Engle's duties include testing urine samples for the presence of controlled substances including cocaine and its metabolite and she was the chemist who tested the urine sample collected from Whistler. Engle testified that the sample tested positive for the presence of the metabolites for marijuana and cocaine and the major metabolite of cocaine is benzoylecgonine. TT, page 92, lines 17 – 19. The amount of the metabolite found in Whistler's urine was 0.90 micrograms per milliliter. TT, page 94, 14-15 and Trial Exhibit 11. A microgram is one-millionth of a gram. TT, page 101, line 5. The instrument used to test and measure urine samples by the State is a gas chromatograph/mass spectrometer, an instrument that costs between $70,000 and $90,000. TT, page 99, line 7 to page 100, line 16. This instrument is required to detect the presence and weigh the amount of the substance benzoylecgonine because a microgram is not otherwise detectable. TT, page 101, line 6 – 7.

Engle testified that the metabolite of cocaine can remain inside the body for approximately three days without the host's knowledge and without noticeable effect. TT, page 102, line 16 to page 104, line 9. In contrast, the euphoria from ingesting cocaine only lasts between twenty minutes and two hours. TT, page 102, lines 3 to 15. The only means of elimination of cocaine once ingested is the body's regular metabolic process wherein the substance breaks down over time and is eliminated through the kidneys and into the urine. TT, page 104, lines 17 – 23. As to whether someone can exercise control over the metabolite, the expert testified as follows:

Q Now, if it's inside your body, you can't manipulate it, can you?

A No.

Q And you can't control it; right?

A No.

TT, page 104, line 24 to page 105, line 3.

The expert further testified that it is impossible to determine from a urinalysis result how long ago someone had ingested the substance, where it was ingested, how much was ingested, or how it was ingested. TT, page 105, lines 4–21.

The State called further witnesses relevant to the Driving Under the Influence charge. At the conclusion of the evidence, Whistler moved for a judgment of acquittal on all charges. TT, page 141, line 18 to page 146, line 20. In support of his Motion for Judgment of Acquittal as to the Possession of Controlled Substance charge, Whistler submitted his Brief in Support and the audio recording of House Judiciary Committee testimony to the South Dakota legislature as an exhibit. SR, SEP. The trial court granted Whistler's Motion for Judgment of Acquittal as to Count V, Driving under Suspension and Count VI, Possession of Drug Paraphernalia. TT, page 145, lines 16 – 17 and page 148, lines 16 – 20.

During the settling of Jury Instructions, the trial court submitted Instruction #13, over Whistler's objection. TT, page 150, lines 7 – 10 and AX D. Whistler objected to the second sentence of that instruction, which stated: "Possession occurs if a person knowingly possesses an altered state of a drug or substance absorbed into the human body." Whistler also objected to the trial court's Instruction #17 which stated: "In a charge of knowing possession of a controlled substance, a positive urinalysis that reveals the presence of controlled substances in a

defendant's urine may be sufficient in and of itself to support a conviction." TT, page 151, line 15 to page 152, line 11 and AX E.

At the conclusion of the trial the jury returned a verdict of Guilty on the remaining counts, including Possession of Controlled Substance. Instruction #17 was exclusively focused on during the deliberations of the jury; but for that instruction the verdict as to Possession of Controlled Substance would have been different. (See, Affidavit of Francis Toscana, Jury Foreman, AX F.)

On January 3, 2013, the trial court sentenced Whistler to four years in the South Dakota State Penitentiary, suspended upon Whistler serving eighty days in County Jail and abiding by a series of terms and conditions as set forth in the Judgment of Conviction. AX A.

On January 14, 2013, Whistler filed a Notice of Appeal. AX B.

ARGUMENT

I

THE CURRENT STATUTORY REGIME IN SOUTH DAKOTA CRIMINALIZING POSSESSION OF A CONTROLLED DRUG OR SUBSTANCE SHOULD NOT BE ALLOWED TO SUSTAIN A CONVICTION WHEN ONLY THE METABOLITE OF A CONTROLLED SUBSTANCE IS DETECTED IN THE DEFENDANT'S URINE

Prosecutions based solely upon the presence of

metabolites or the altered state of a controlled substance in a person's blood or urine bends decades of common law rule beyond its breaking point. In this case, the State offered no controlled substance for the jury's consideration and relied only on the presence of a metabolite of one controlled substance. This "blur(s) the line between use and possession, (and) also eliminates the *mens rea* element of possession by reducing the state's burden to a single positive drug test" and finding no controlled substance. John Thomas Richter, *State v. Schroeder: South Dakota Performs Legal Alchemy and Transmutes 'Use' Into 'Possession'*, 50 S.D. L. Review 404, 406 (2005).

In its 2004 opinion in State v. Schroeder, the Court offered that Schroeder "concedes that '[t]he sole issue before this Court is the sufficiency of the evidence[.]'" State v. Schroeder, 2004 SD 21 (2004) at ¶9. This case raises the panoply of issues that Schroeder failed to address: whether "ingestion" precludes "possession"; whether the prosecution should be excused from proving the venue of the offense, and; whether the actual legislative record of the 2001 amendment to SDCL §22-42-1(1) reflects an intent different from its current application in

prosecutions of violations of SDCL §22-42-5.

A. "Ingestion" precludes "possession."

In State v. Schroeder, 2004 SD 21, 674 NW2d 827 (2004), the Court concluded, "There is still no need to decide this related issue of whether an ingestion statute precludes a conviction for possession when the only evidence is a positive urinalysis." Id. at ¶9.

Since Schroeder, South Dakota has continued to prosecute defendants under SDCL §22-42-5 based merely on what has been detected in the defendants' blood or urine. This is inconsistent with all of the remaining 49 states in our union. In 2011, the National Conference of State Legislatures studied all 50 states' controlled substance and ingestion statutes and cases. That study confirmed that South Dakota is the *only* state that classifies the offense as a felony for merely what is detected in bodily fluids. Only a minority of states criminalize "use" of a controlled substance (South Dakota, Arizona, Idaho, Michigan, Nevada, among them), but only South Dakota does so as a felony.

Where other states have considered the question at their highest Courts, not one has concluded what the State argues is the law in South Dakota. Maryland, as one

example, requires proof of criminal possession beyond what might be found within bodily fluids and rejects the notion that presence in the body constitutes possession. Under Maryland law, "once [a] drug is ingested and assimilated into the taker's bodily system, it is no longer within his control and/or possession." Franklin v. State, 8 Md. App. 134, 138 (1969). Thus, in the State of Maryland, evidence of ingestion cannot, by itself, support a charge of possession. This is consistent with a decades-old common law understanding of the difference between "possession" and "ingestion."

Other jurisdictions, notably California, Alaska, Ohio, Minnesota, Washington, Indiana, Kansas, Montana, New Mexico, Texas, and Wisconsin, similarly hold that the mere presence of a controlled substance in a person's body cannot by itself constitute criminal possession. *See* People v. Palaschak, 9 Cal. 4th 1236, 1241 (1995) and People v. Spann, 232 Cal. Rptr. 31, 33-335 (Cal. Ct. App. 1986) (crimes of "use" and "possession" should not be merged); State v. Thronsen, 809 P.2d 941, 943 (Alaska App. 1991) (positive drug test could not sustain conviction for cocaine possession because defendant ceased having control of it once it entered his body); State v. Lowe, 86 Ohio

App. 3d 749, 755 (1993); State v. Lewis, 394 N.W. 2d 212, 217 (Minn. App. 1986) ("evidence of a controlled substance in a person's urine specimen does not establish possession... absent probative corroborating evidence of actual physical possession"); State v. Hornaday, 105 Wash. 2d 120, 126 (1986); State v. Vorm, 570 N.E.2d 109, 111 (Ind. Ct. App. 1991)(positive drug test alone fails to prove defendant knowingly and voluntarily possessed cocaine); State v. Flinchpaugh, 232 Kan. 831, 835 (1983) (once drug is in a person's blood, he no longer controls it, and positive drug test alone is insufficient to establish knowledge); In re R.L.H., 116 P.3d 791, 795-96 (Mont. 2005)(presence of drug in body insufficient evidence that such drug was knowingly and voluntarily ingested); State v. McCoy, 864 P.2d 307, 313 (N.M. 1993) (positive drug test alone insufficient to prove knowledge and intent to possess controlled substance); Jackson v. State, 833 S.W.2d 220, 223 (Tex. App. 1992)("[t]he results of a test for drugs in bodily fluids does not satisfy the elements of the offense of possession of cocaine"); State v. Griffin, 584 N.W.2d 127, 131 (Wis. Ct. App. 1998) ("mere presence of drugs in a person's system is insufficient to prove that the drugs are knowingly possessed by the person or that the

drugs are within the person's control").

Only *once* has Schroeder even been cited by another state Supreme Court (or its equivalent high court of appeals). In State v. Harris, 178 N.C.App. 723 (2006), the North Carolina Court of Appeals reviewed the possession question, citing Schroeder. They declined to follow South Dakota, stating, "we hold that a positive urine test, without more, does not satisfy the intent or the knowledge requirement inherent in our statutory definition of possession. As the New Mexico Court noted,

> it is quite possible that a defendant may have involuntarily ingested the drugs either through coercion, deception, or second-hand smoke. Accordingly, without some corroborating proof of knowledge and intent, the cases have uniformly held that a positive drug test alone does not prove a defendant's knowledge of the drug or intent to possess it . . . . Moreover, we believe the State's argument ['that knowledge and intent can be properly inferred from the positive drug test'] impermissibly shifts the burden of proof to Defendants. In our view, it would be

difficult if not impossible for a defendant to present credible evidence that he or she ingested drugs unknowingly.

(State v. McCoy, 864 P.2d 307, 312-313 (N.M. 1993)). The Montana Court similarly stated that, 'without more than proof that a person had a dangerous drug in their system, there is no evidence to establish that such drug was knowingly and voluntarily ingested.' R.L.H., 116 P.3d at 795." Harris at ____.

South Dakota does not prosecute individuals for *possessing* an alcoholic beverage as a minor upon evidence of a positive preliminary breath test, but rather it prosecutes for *consumption* of alcohol as prohibited based upon age. *See* State v. Sorenson, 758 P.2d 466, 468 (Utah Ct. App. 1988)("the mere presence of alcohol in the bloodstream does not constitute possession").

The laws of this state should not deviate from a common understanding of the basic and foundational concepts of "possession" as opposed to "ingestion" simply based upon the type of substance. No statutory framework should twist our language or centuries-old jurisprudence to such a degree.

In fact, but for the 2001 amendment to SDCL §22-42-

1(1), South Dakota provides a perfectly adequate framework to distinguish between "possession" and "ingestion." It was that amendment and its limited interpretation in Schroeder that confused the issue. However, in the instant case, Whistler faced the double jeopardy of prosecution for both felony "Count I: Possession of a Controlled Substance (Class 4 Felony)(Cocaine)" (contrary to §22-42-5) and "Count IV: Ingesting Substance (sic), Except Alcoholic Beverages, For The Purpose of Becoming Intoxicated" (contrary to SDCL §22-42-15). The jury convicted on both. And, yet, those two convictions rested only upon the presence of a metabolite of some controlled substance in Whistler's urine but the substances themselves were not found in the urine sample. The convictions should be reversed.

B. When relying on solely the presence of a metabolite in a Defendant's urine, the State cannot prove the venue of any violation of SDCL §22-42-5, which results in a violation of Article VI, §7 of the South Dakota Constitution.

Schroeder, along with prosecutions like the present case, fail to meet the most basic requirement of jurisdiction or venue, specifically that the prosecution

failed to present evidence that the crime charged occurred within Lawrence County. This violates the guarantee found in Article VI, §7 of the South Dakota Constitution. Additionally, given that South Dakota stands unique among all states in the union by authorizing felony prosecutions for merely the presence of a metabolite of a controlled substance, a violation of the Fourteenth Amendment of the U.S. Constitution results.

Pursuant to State v. Opperman, 89 S.D. 25, 247 N.W.2d 673 (1976), our citizens are granted greater protection under the State Constitution than the United States Supreme Court recognizes under the United States Constitution. [Accord State v. James, 406 N.W.2d 366, 369 (SD 1987); State v. McDowell, 391 N.W.2d 661, 665 (SD 1986); and Daugaard v. Baltic Co-op Bldg. Supply Ass'n, 349 N.W.2d 419 (SD 1984)]. In the past, this Court has directed that where a party relies on Opperman, that party should identify how the cited State Constitutional protection differs or supersedes the Federal. Since South Dakota sets itself so far outside the majority rule on the issue at hand (by standing alone), the Opperman rule seems properly applied in this case.

Like those states noted in the above section, Utah considered the question of "possession" versus "ingestion," reaching a similar conclusion as those other states but on the basis of jurisdiction rather than the critical distinction between the definitions of those two terms. In State v. Ireland, 133 P.3d 396 (2006), Utah stated, "'consumption,' where it was used in the possession or use subsection, is a catchall phrase for methods of introducing a substance into the body. It does not include mere metabolization of the controlled substance. Accordingly, we hold that the existence of any measurable amount or metabolites of (a controlled drug or substance) alone is insufficient to show that (the defendant) possessed or used a controlled substance within the State of Utah."

However, through specific language found in SDCL §22-42-15 – language wholly absent from the §22-42-5 framework found in §22-42-1(1) or elsewhere – our legislature, attempts, though imperfectly, to provide some guidance to address the problem of determining the matter of venue in which the offense occurred.

In South Dakota, this jurisdictional question remains undecided and is a matter of first impression. SDCL §22-42-5 has none of the language present in South Dakota's

ingestion statute (SDCL §22-42-15), which legislatively creates and defines the jurisdiction for that misdemeanor offense. The last sentence in SDCL §22-42-15 states, "The venue for a violation of this section exists in either the jurisdiction in which the substance was ingested, inhaled, or otherwise taken into the body or the jurisdiction in which the substance was detected in the body of the accused." SDCL §22-42-15.

The felony possession statute under which Whistler was convicted has no similar language, and the Supreme Court of South Dakota has not addressed the important question that a person might not actually possess or use the drug or substance in our state. Additionally, the Court has not yet addressed the question of whether the Legislature can grant to the prosecution authority to avoid proving the element of venue (and, thus, show its jurisdiction over the accused) simply by including waiver-type language within a statute (as with SDCL §22-42-15). Whistler maintains that the answers to both important questions are the same: no. And on that basis his conviction for violation of SDCL §22-42-5, as well as SDCL §22-42-15, should be reversed.

C. Prosecutions for violations of SDCL §22-42-5

based solely upon the presence of the metabolite of a controlled drug or substance in the urine run contrary to the initially stated legislative intent of an amendment to SDCL §22-42-1(1).

Finally, in deciding Schroeder in 2004, the Supreme Court of South Dakota relied substantially on interpreting the intent of the South Dakota legislature, as they understood its reasons for adopting an amendment to SDCL §22-42-1(1) in 2001. Applying a rule of strict construction ("plain meaning") to the amended definition, taken together with SDCL §22-42-5, the Court concluded that the two intended to support convictions despite "the historic dichotomy between 'possession' and 'use' in the criminal law." Schroeder at ¶14.

However, in Schroeder, the Court was not presented with the actual record of the hearing before the Judiciary Committee of the South Dakota House of Representatives as they considered whether to act on that proposed amendment (considered during the 2001 South Dakota Legislative session as HB 1092). Without this recording, a "plain meaning" interpretation was inevitable. In this case, the recording from that hearing was introduced into the record as an exhibit. (See "Legislative Day 11, HB 1092 – altered

state of a controlled drug or substance" available at http://www.sdpb.org/statehouse/archives/2001/committees/hju.asp as of June 18, 2013. Please note: This recording was made available in CD media to the trial court accompanying Defendant's Brief In Support of Judgment of Acquittal. It is included in the court's file accompanying the trial judge's notes.)

In that 2001 legislative hearing, under direct questioning from the committee members, the bill's proponent explicitly stated that the bill was not intended to create a new method for prosecuting under SDCL §22-42-5:

> Q: Representative Brown, I guess, is the intent of this bill to make it possible for a person who's got some controlled substance or a metabolite of a controlled substance in their bodily systems to be able to charge those people with possession of those controlled substances because they're within the body?
>
> A: Well, as you probably know, we have a problem with some judges saying whether it's in your system whether that's really consumption of it. But this is the same old thing: if the substance has been altered by any method at all then you

can arrest them and that substance has been put into the body for the purpose of becoming intoxicated, then they can be arrested for violation of possession... er, consumption of that particular drug.

Q: So, then the purpose of House Bill 1092 would be to clarify that a controlled drug or substance was ingested.

A: Correct.

Q: To get back to the ingesting.

A: Correct.

Q: Okay.

Id. at 4:40-5:50. There was no confusion in this matter. Plain questions were asked. Answers were given. The House Judiciary Committee passed a proposed bill considering an amendment to SDCL §22-42-1(1) to the full House following testimony tying the proposed amendment to a misdemeanor ingestion offense and not felony possession.

The Defendant prays that this Court will conclude that this record unequivocally shows that the Legislative intent of the 2001 amendment to SDCL §22-42-1(1) was as stated in that hearing. Through proof of misdemeanor ingestion, the amendment was intended to aid law enforcement in

determining who is responsible for controlled substances when the substances are physically present on the scene of an investigation. The amendment was never intended to prosecute individuals for trace amounts of substances (or worse, only their by-products, as here) present in their bodily fluids. On this basis, Whistler's conviction for violation of SDCL §22-42-5 should be reversed.

II

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY IN A MANNER THAT IMPERMISSIBLY SHIFTED THE BURDEN TO THE DEFENDANT TO DISPROVE KNOWLEDGE OF POSSESSION

The State proposed a jury instruction following the pattern jury instruction for 3-11-9. That pattern jury states:

"Any person who knowingly possesses a controlled drug or substance is guilty of a crime.

Possession occurs if a person knowingly possesses an altered state of a drug or substance absorbed into the human body."

Defendant objected to the second sentence of the pattern instruction because it misquotes and deviates significantly from the statements in State v. Schroeder, 2004 SD 21, 674 NW2d 827 (2004), upon which it relies,

though inaccurately. The accurate quote of Schroeder is "...possession may now occur if a person knowingly possesses 'an altered state of a drug or substance into the human body.'" ¶ 14 (quoting SDCL §22-42-1(1) as applied to SDCL §22-42-5)(emphasis added).

Therefore, the proposed jury instruction misquotes and alters the statement in Schroeder from the permissive or even inconclusive "may" to an implied mandatory directive. Despite the opportunity, the Supreme Court did not conclusively state that the question is as settled as the pattern instruction suggests. Had the Court wished to do so, it easily could have by stating in ¶ 14, "... possession now occurs (in South Dakota) if a person knowingly possesses 'an altered state of a drug or substance into the human body.'" They did not do so. Therefore, the pattern jury instruction is impermissibly flawed, and no jury should be instructed using the pattern because of the deviation between the statement in the Schroeder case and the State's proposed instruction.

Given this error, the Defendant's proposed instruction was the proper instruction. It corrects the error evident in the pattern instruction by deleting the second sentence from that instruction, since the Court in Schroeder did not

reach the conclusion that the pattern reflects. In Schroeder, the Court concludes: "(The 2001 amendment to SDCL §22-41-1(1)) also 'permit(s) a defendant to be convicted of 'unauthorized possession' of a controlled drug or substance when the only ... evidence is from the ingested or absorbed unauthorized [substance in] the defendant's body." Id. ¶ 14.

Given the Court's use of the permissive "may" when discussing "altered states" of controlled substances, the Court simply did not reach a similarly firm conclusion regarding the ability to prosecute under SDCL §22-42-5 when only metabolites of controlled substances are detected in a defendant's blood or urine. In the present case, the State presented evidence of merely one metabolite or altered states of a certain controlled substance in the Defendant's urine.

Whistler objected to Instruction #17. It states:

"In a charge of knowing possession of a controlled substance, a positive urinalysis that reveals the presence of controlled substances in a defendant's urine may be sufficient in and of itself to support a conviction." Instruction #17, AX E. By its very language, Instruction #17 states "knowing possession" and then immediately

overcomes the State's burden to prove knowledge beyond a reasonable doubt to the jury by substituting that the presence of a controlled substance within a defendant's urine "in and of itself" may support a felony conviction. In the present case, no controlled substances were detected in his urine; only 0.90 micrograms per milliliter of a metabolite of one was detected.

Yet, by instructing the jury as it did, the trial court vitiated any "mens rea" requirement of "knowing possession" and improperly shifted the burden from the State to prove knowledge beyond a reasonable doubt, thrusting that burden onto the Defendant to prove that he couldn't possibly have known. Nonetheless, the State own expert witness testified repeatedly that presence of a metabolite of a substance within the body cannot be known (and therefore cannot be proven). TT 103, lines 4-25, 104, 1-9.

Through the phrase "in and of itself," Instruction #17 expressly allows the State to have to prove the element of knowing possession. After an initial poll of the jury, Instruction #17 was exclusively focused on during their deliberations; but for that instruction the verdict as to Possession of Controlled Substance would have been

different. See, Affidavit of Francis Toscana, Jury Foreman, AX F. The jury concluded that the instruction mandated a conviction "in and of itself" for Possession of Controlled Substance. Id.

The Defendant asserts that the Jury was improperly instructed as to Count I, and his conviction should be reversed.

CONCLUSION

The presence of the metabolite of a controlled substance only in an individual's urine, standing alone, should not and cannot support a charge of possession of a controlled substance. Mr. Whistler's conviction for violation of SDCL §22-42-5 should be reversed.

Similarly, language within a statute cannot supersede the Constitutional guarantees and protections regarding venue (thus authorizing jurisdiction) for an offense, so Mr. Whistler's conviction for violation of SDCL §22-42-15 should be reversed.

Respectfully submitted this _____ day of June, 2013.

G. Matthew Pike
Director
Lawrence County Public Defenders
90 Sherman Street
Deadwood, SD 57732
Telephone: (605) 578-3000

TABLE OF APPENDICES

IN THE SUPREME COURT
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APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

THE HONORABLE RANDALL L. MACY
Circuit Court Judge

APPELLEE'S BRIEF

MARTY J. JACKLEY
ATTORNEY GENERAL

John M. Strohman
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

G. Matthew Pike
Lawrence County Public Defender's Office
90 Sherman Street
Deadwood, SD 57732
Telephone: (605) 758-3000

ATTORNEY FOR DEFENDANT
AND APPELLANT

Notice of Appeal filed January 14, 2013

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PRELIMINARY STATEMENT

In this brief, Sean Whistler will be referred to as "Defendant" or "Whistler." Plaintiff and Appellee, State of South Dakota, will be referred to as "State." References to documents will be as follows:

Settled record..... SR

Jury Trial Transcript .....JT

Defendant's Brief.....DB

All documents designated will be followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

On January 7, 2013, Judge Randall L. Macy entered a Judgment of Conviction resulting from guilty verdicts after a trial to Count I, Possession Of A Controlled Drug Or Substance (SDCL 22-42-5); Count II, Driving Or Physical Control Of A Motor Vehicle While There Was .08% Or

More By Weight Of Alcohol In The Blood (SDCL 22-42-1(1)); Count III, Possession Of Marijuana (SDCL 22–42–6); Count IV, Ingesting Substance, Except Alcoholic Beverages, For The Purpose Of Becoming Intoxicated (SDCL 22-42-15). SR 165-69.

Defendant filed a Notice of Appeal to this Court in timely manner on January 14, 2013. SR 172. This Court has jurisdiction of this matter pursuant to SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

WHETHER THERE IS SUFFICIENT EVIDENCE FOR A CONVICTION OF POSSESSION OF A CONTROLLED DRUG BASED ON THE DEFENDANT'S URINE SAMPLE CONTAINING A METABOLITE OF THE CONTROLLED SUBSTANCE?

The trial court found sufficient evidence and denied Defendant's motion for a judgment of acquittal on this charge.

State v. Schroeder, 2004 S.D. 21, 674 N.W.2d 827

State v. Hanson, 1999 S.D. 9, 588 N.W.2d 885

State v. Mattson, 2005 S.D. 71, 698 N.W.2d 538

State v. Groves, 473 N.W.2d 456 (S.D. 1991)

II

WHETHER THE CIRCUIT COURT ERRED IN INSTRUCTING THE JURY REGARDING THE CRIME OF KNOWING POSSESSION OF A CONTROLLED SUBSTANCE?

The trial court gave pattern jury instruction 3-11-9.

State v. Pellegrino, 1998 S.D. 39, 577 N.W.2d 590

State v. Rhines, 1996 S.D. 55, 548 N.W.2d 415

STATEMENT OF THE CASE AND FACTS

During the early morning hours of March 9, 2012, Spearfish Police Officer Aaron Jurgensen noticed a vehicle near the Z Bar on Main Street in Spearfish. JT 17. The vehicle caught the officer's attention because it was being driven with only its parking lights on. JT 15-17. Officer Jurgensen stopped the vehicle. The driver was identified as Defendant Sean Whistler. JT 18. The officer then found out that Whistler's Wyoming driver's license had been suspended. JT 19.

In his discussions with Defendant, the officer could smell alcohol emitting from him. JT 20. He could also smell marijuana coming from inside the vehicle. JT 21. When asked how much he had to drink that night, Defendant said "two." *Id.* When asked what he had been drinking, Defendant refused to answer. JT 21.

The officer asked Whistler to perform some field sobriety tests. JT 21. Officer Jurgensen testified that Defendant correctly recited the alphabet from A to the letter R. He then administered the horizontal gaze nystagmus eye test on Defendant. JT 22. The officer noted that Defendant manifested jerkiness in the eyes, indicative that he was under the influence. JT 23. Whistler then performed the one–leg stand. This test requires the individual to lift one leg 6 inches off the ground and count out loud. JT 24. Defendant lost his balance before the test began

but retried the test, losing his balance at the count of nine. *Id.* The final test was the walk and turn. Defendant lost his balance and was unable to satisfactorily perform this test. *Id.*

The officer had Whistler get into the patrol car. Once inside, the officer asked Defendant if he had any marijuana on him. Defendant denied that he had any marijuana. JT 25. Based on the officer's training and observation, he believed the Defendant was under the influence and arrested him. JT 25-26. Defendant's demeanor was argumentative from the time he was stopped through the time of his arrest. JT 27, 54.

A search was conducted and a bag of marijuana was found in Whistler's pants pocket. JT 27. In addition to the bag, loose marijuana was discovered in Whistler's right sweatshirt pocket. JT 27. A subsequent inventory search conducted by Officer Colin Simpson found "a rather large amount" of marijuana under the front passenger seat of Defendant's vehicle. JT 57. Officer Simpson also found marijuana spread throughout the front area of the truck on both the seats and floor. Zig Zag rolling papers were also found in the car. JT 58-59.

Richard Wold is a forensic examiner for the Rapid City Police Department. His main function is to conduct scientific analysis on illegal substances. JT 78. He examined the substance that was found on Defendant and determined that it was marijuana and that it tested positive for THC. JT 83-84.

A blood draw was taken of Whistler at 3:21 a.m., one hour and twenty minutes after Officer Jurgensen observed him driving, and three hours from when he claimed to have his last drink. JT 38. Jessica Lichty, a forensic chemist with Rapid City Police Department testified that the results of Defendant's blood test was .221 "blood alcohol concentration." JT 126. She also extrapolated out the estimated blood alcohol concentration at the time Defendant was driving at 2 a.m. To determine this she included factors such as Defendant's claim that his last drink was at 12 midnight; that he was stopped by law enforcement at 2 a.m., and that his blood was drawn at 3:20 a.m. (one hour and twenty minutes after driving). The estimated blood alcohol concentration at the time Defendant was driving at 2 a.m. was .24. JT 131–32.

A urinalysis was taken from Whistler at 2:50 a.m. JT 35-36. The preliminary urine test contained cocaine. JT 49-50. Additional testing was conducted by Kathryn Engle, a forensic chemist for the State of South Dakota. JT 87. She testified that Defendant's sample contained the presence of cocaine. JT 91. She informed the jury that cocaine is not available by a prescription. JT 107. She also explained that the half-life of cocaine is between a half-hour to a maximum of three hours. The term half-life refers to the amount of time it takes for your body to get rid of half of the substance that is present. JT 96. She said that cocaine breaks down in the body to a major metabolic called benzoylecgonine, which could remain present in the body for up to

seventy-two hours. JT 96-97. Benzoylecgonine can only come from cocaine. JT 109. Ms. Engle explained that once it is in your body, it cannot be manipulated by the person. JT 104-05. When it is found in urine, it is "indicative of cocaine use because that's the only way that it can be found in your body or in your urine sample." JT 109. She summarized her testimony by stating that the presence of cocaine is typically gone in a day. JT 111.

ARGUMENTS

I

THERE WAS SUFFICIENT EVIDENCE TO SUPPORT A POSSESSION OF A CONTROLLED DRUG CONVICTION BASED ON THE DEFENDANT'S URINE SAMPLE CONTAINING A METABOLITE OF THE CONTROLLED SUBSTANCE.

A. Introduction.

Defendant argues that the statutory definition of a controlled drug or substance in SDCL 22-42-1(1) exposed him to criminal liability when the State was unable to prove jurisdiction, mens rea, or venue. DB 8-20. Defendant also claims that he has been subject to double jeopardy by being convicted of both Possession of a Controlled Substance and Ingesting. Defendant asks this Court to undo the will of the legislature and follow other states that have not allowed a conviction for possession of a controlled substance based on a controlled substance metabolite detected in one's urine. DB 10-13.

South Dakota is not obligated to follow other states that do not criminalize possession of controlled substances found in one's urine. Further, this Court has rejected Defendant's claims about mens rea, jurisdiction and double jeopardy.

B. Standard of Review.

The constitutionality of laws and statutory interpretation is a question of law, and as such, will be considered by this Court de novo (citing *Bergee v. South Dakota Board of Pardons and Paroles*, 2000 S.D. 35, ¶ 4, 608 N.W.2d 636, 638). This Court views jurisdiction as a question of law under the de novo standard of review. *Daktronics, Inc. v. LBW Tech. Co., Inc.*, 2007 S.D. 80, ¶ 2, 737 N.W.2d 413, 416 (citing *Grajczyk v. Tasca*, 2006 S.D. 55, ¶ 8, 717 N.W.2d 624, 727 (citing *State ex rel. LeCompte v. Keckler*, 2001 S.D. 68, ¶ 6, 628 N.W.2d 749, 752)). "[T]he question of venue is for [the trier of fact]. The state need only prove venue by a preponderance of the evidence. On appeal, this Court accepts the evidence and the most favorable inferences that the [trier of fact] might have fairly drawn therefrom to support the verdict." *State v. Sullivan*, 2002 S.D. 125, ¶ 7, 652 N.W.2d 786, 788 (quoting *State v. Haase*, 446 N.W.2d 62, 65-66 (S.D. 1989) (citations omitted)).

C. *Analysis.*

South Dakota law on possession of a controlled drug or substance in a defendant's urine is clear. In 2001, the South Dakota Legislature amended the definition of a controlled drug or substance to include: "a

drug or substance, or an immediate precursor of a drug or substance, listed in Schedules I through IV." SDCL 22-42-1(1). Possession includes the "altered state of a drug or substance listed in Schedules I through IV absorbed into the human body[.]" SDCL 22-42-1(1) (emphasis added). By enacting the expanded definition of controlled drug or substance, "[i]t is reasonable to infer that the Legislature was responding to the questions raised in *Hanson* and elsewhere (including the court decisions in other jurisdictions) regarding the issue of possession of a drug in the body." *State v. Schroeder*, 2004 S.D. 21, ¶ 13, 674 N.W.2d 827, 831. *See State v. Hanson*, 1999 S.D. 9, 588 N.W.2d 885 (this Court declined to address the issue of what proof beyond a positive urinalysis test was necessary for possession because defendant was not charged with possession of marijuana in his body, but possession of marijuana in a car).

Defendant argues that other jurisdictions do not allow a urine sample containing a drug or substance to be sufficient evidence for a possession conviction. DB 9-12. But those jurisdictions do not define a controlled substance to include substances once they have been absorbed in the body. South Dakota does. The South Dakota Legislature and this Court have determined that an individual in South Dakota may be convicted of possession of a controlled substance when a positive urinalysis test for a drug or substance is found in the urine. *See* SDCL 22-42-1(1), 22-42-5; *Schroeder*, 2004 S.D. 21 at ¶ 14, 674 N.W.2d

at 831 (holding a positive urinalysis for a controlled substance is sufficient evidence to support a conviction for possession of a controlled substance). *See also State v. Mattson*, 2005 S.D. 71, ¶ 54, 698 N.W.2d 538, 554 (holding, in part, that defendant's refusal to submit to a urinalysis could be used to infer defendant had ingested methamphetamine and was knowingly in possession of a controlled substance within the definition of SDCL 22-42-1(1)); *State v. Hess*, 2004 S.D. 60, ¶ 44, 680 N.W.2d 314, 330 (Sabers, J., dissenting) (noting that this Court has held a positive urinalysis revealing a controlled substance is sufficient to support a conviction under SDCL 22-42-5).

In *Schroeder*, this Court examined the specific issue of possession of a controlled drug or substance in a defendant's urine. 2004 S.D. 21 at ¶ 4, 674 N.W.2d at 829. Schroeder was charged with one count of possession of a controlled substance in violation of SDCL 22-42-5. *Id.* at ¶ 3. Schroeder was a passenger in a car where a digital scale, which field-tested positive for amphetamines, was found. But Schroeder was charged with possession of a controlled substance based solely upon the presence of methamphetamine in his urine. *Id.* at ¶¶ 2-3. The trial court found Schroeder guilty of possession of a controlled substance. *Id.* at ¶ 3. Schroeder appealed, raising the issue of "[w]hether a positive urinalysis, revealing the presence of a controlled substance in Defendant's urine, is sufficient to support a possession conviction." *Id.* at ¶ 4. This Court held that state law "permit[s] a defendant to be

convicted of 'unauthorized possession' of a controlled drug or substance when the only . . . evidence is from the ingested or absorbed unauthorized [substance in] the defendant's body." *Id.* at ¶ 14 (emphasis added).

Schroeder also answers Defendant's claim about the State not meeting the necessary mens rea of the crime of possession. Under South Dakota law, Defendant possessed cocaine in Lawrence County. SR 45. The 2001 amendment to SDCL 22-42-1(1) "clearly express[ed] the intent of the South Dakota Legislature to reject the historical dichotomy between 'possession' and 'use' in the criminal law." *Schroeder*, 2004 S.D. 21 at ¶ 14, 674 N.W.2d at 831. The crime of possession of a controlled substance was committed by Defendant in Lawrence County when his urine tested positive for cocaine. JT 91. "This Court has clearly held that a positive urinalysis which reveals the presence of a controlled substance is sufficient to support a conviction under SDCL 22-42-5." *Hess*, 2004 S.D. 60 at ¶ 44, 680 N.W.2d at 330 (Sabers, J., dissenting on another issue).

Defendant further claims that the State failed to "show its jurisdiction over the accused . . ." DB 17. A defendant shall be charged where the crime was committed. The Sixth Amendment guarantees: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed[.]" U.S. Const. amend. VI. If the officer

had found cocaine in Defendant's pocket in Lawrence County, Defendant could have certainly been charged in Lawrence County with possession of a controlled substance. Instead, Defendant was found guilty of possession of cocaine based on the positive urine sample obtained from him in Lawrence County. SR 14-15, 157-58. Whether the controlled substance was found in Defendant's pocket or his urine, under SDCL 22-42-5, Defendant was in possession of cocaine in Lawrence County because the substance was found to be present in his urine. *See Schroeder*, 2004 S.D. 21 at ¶ 14, 674 N.W.2d at 831.

Defendant seems to speculate that South Dakota allows possession prosecutions when "a person might not actually possess or use the drug or substance in our state." DB 17. Jurisdiction and venue were properly established by the State. This Court has held "[I]n the context of a charge of knowing possession of a controlled substance, a positive urinalysis that reveals the presence of a controlled substance in a defendant's urine is sufficient in and of itself to support a conviction due to the language of SDCL 22-42-1(1)." *Mattson*, 2005 S.D. 71 at ¶ 54, 698 N.W.2d at 554 (citing *Schroeder*, 2004 S.D. 21 at ¶ 14, 674 N.W.2d at 831). SDCL 22-42-15 grants venue for ingesting in either the jurisdiction in which the substance was ingested or in the jurisdiction in which the substance was detected. Here, jurisdiction and venue are properly established in Lawrence County because Defendant possessed

methamphetamine in his urine in Lawrence County, in violation of SDCL 22-42-5.

In the alternative, jurisdiction and venue may be established through various State statutes. SDCL 16-6-12 grants the circuit court

> exclusive original jurisdiction to try and determine all cases of felony, and original jurisdiction concurrent with courts of limited jurisdiction as provided by law to try and determine all cases of misdemeanor and actions or proceedings for violation of any ordinance, bylaw, or other police regulation of political subdivisions.

Other statutes which provide the State with proper jurisdiction and venue include SDCL 23A-16-2 which states:

> When the commission of a public offense commenced outside this state is consummated within this state, the defendant may be punished in this state, even if he were out of the state at the time of the commission of the offense charged, if he consummated it in this state through the intervention of an innocent or guilty agent or by any other means proceeding directly from himself.

SDCL 23A-16-7 states:

> When a person commences an offense outside this state and consummates it within this state, and this state has jurisdiction of the offense pursuant to § 23A-16-2, the venue is in the county in which the offense is consummated.

SDCL 23A-16-8 states:

> When a public offense is committed partly in one county and partly in another county, or the acts or effects thereof constituting or requisite to the offense occur in two or more counties, the venue is in either county.

SDCL 23A-16-9 states:

> When a public offense is committed on the boundary of two or more counties, or within five hundred yards thereof, the venue is in either county.

However, as stated above, Defendant possessed cocaine in his urine, in Lawrence County, in violation of SDCL 22-42-5. Therefore, jurisdiction and venue were properly established.

Defendant also complains that he is subject to "double jeopardy" because he was convicted of both possession of a controlled substance and ingesting. DB 14. This Court has adopted the "same offense" or test that originated in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). The test states that the same act or transaction can result in two distinct offenses if each offense, as defined by statute, requires proof of some fact or element not required of the other. *State v. Augustine*, 2000 S.D. 93, ¶ 13, 614 N.W.2d 796, 798. Defendant mistakenly believes that if the same evidence is being used, double jeopardy attaches. This Court has held that the *Blockburger* test "focuses on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial." *State v. Groves*, 473 N.W.2d 456, 458 (S.D. 1991) (citing *Illinois v. Vitale*, 447 U.S. 410, 416, 100 S.Ct 2260, 2265, 65 L.Ed.2d 228 (1980)). In *State v. Groves supra,* the Court found that possession was not a lesser included offense of possession with intent to distribute. *Groves*, 473 N.W.2d at 459.

In Defendant's case, he was convicted of ingesting under SDCL 22-42-15. That statute requires the Defendant "intentionally ingests, inhales, or otherwise takes into the body any substance, except alcoholic beverages as defined in § 35-1-1, for purposes of becoming intoxicated, . . ." The possession of a controlled substance statute has very different elements. SDCL 22-42-5 states, "No person may knowingly possess a controlled drug or substance unless the substance was obtained directly or pursuant to a valid prescription . . ." Forensic chemist Kathryn Engle informed the jury that cocaine is not available by prescription. JT 107.

This Court has previously upheld multiple convictions arising out of a single incident. In *State v. Sprik*, 520 N.W.2d 595 (S.D. 1994), the Court held that an individual could be charged with multiple counts of rape for a single incident which involved multiple penetrations. *Id.* at 598. In *State v. Sieler*, 1996 S.D. 114, 554 N.W.2d 477, the defendant was convicted of multiple offenses arising from a single attack on his victim. *Id.* at ¶ 3, 554 N.W.2d at 478-79.

Defendant is not subject to double jeopardy by his conviction of both possession of a controlled substance and ingesting. This Court has held that a single act may be an offense against two statutes, if each statute requires proof of an additional fact which the other does not. *State v. Pickering*, 225 N.W.2d 98, 101 (S.D. 1975). Defendant's convictions for ingestion and possession of a controlled substance

constitute multiple offenses and do not subject him to a double jeopardy violation.

Finally, Defendant spends a significant portion of his brief arguing that South Dakota is not as enlightened as other states about its possession of controlled substance laws. This Court examined the statutory scheme of SDCL 22-42-5 and found evidence is sufficient for a conviction of possession of a controlled substance when the controlled substance is found in a defendant's urine. Defendant seeks to have this Court change the statute or its penalties. "[T]he Legislature is the correct forum for any revision to the statutory scheme." *State v. French,* 509 N.W.2d 693, 696 (S.D. 1993).[*]

II

THE CIRCUIT COURT CORRECTLY INSTRUCTED THE JURY REGARDING THE CRIME OF KNOWING POSSESSION OF A CONTROLLED SUBSTANCE

A. Introduction.

Defendant contends that the trial court erroneously instructed the jury when it utilized South Dakota Criminal Pattern Jury Instruction 3-11-9. DB 21-24. The jury was properly instructed on the law based on the evidence, and this Court's precedent.

Trial courts have considerable discretion in instructing juries. Jury instructions are adequate when, considered as a whole, they give

[*] SDCL 22-47-5 was amended by the Legislature in 2013. SL 2013, ch. 101, § 58. The 2013 amendment to SDCL 22-42-5 does not affect the validity of Defendant's convictions or sentences.

the full and correct statement of the law applicable to the case. *State v. Pellegrino,* 1998 S.D. 39, ¶ 9, 577 N.W.2d 590, 594. Defendant is not entitled to the particular language he requested if the instructions given to the jury properly and fully set out the law. *Id.*

B. Standard of Review.

This Court has reaffirmed its standard of review with reference to proposed jury instructions. *State v. Webster*, 2001 S.D. 141, 637 N.W.2d 392. The discretion of the trial court is "broad" when it comes to instructing the jury. *State v. Rhines*, 1996 S.D. 55, ¶ 111, 548 N.W.2d 415, 443, *cert. denied*, 519 U.S. 1013, 117 S.Ct. 522, 136 L.Ed.2d 410. This Court reviews the trial court's refusal to give Defendant's proposed jury instructions under the abuse of discretion standard. *State v. Black*, 494 N.W.2d 377, 381 (S.D. 1983).

1. *Instructing the Jury*.

As stated above, trial courts possess substantial discretion in instructing the jury. *Pellegrino*, 1998 S.D. 39 at ¶ 9, 577 N.W.2d at 594; *Rhines*, 1996 S.D. 55 at ¶ 111, 548 N.W.2d at 443; *State v. Bartlett*, 411 N.W.2d 411, 415 (S.D. 1987). Jury instructions are adequate when, considered as a whole, they give the full and correct statement of the law applicable to the case. *Pellegrino; State v. Fast Horse*, 490 N.W.2d 496, 499-500 (S.D. 1992); *State v. Grey Owl*, 295 N.W.2d 748, 751 (S.D. 1980), *appeal after remand*, 316 N.W.2d 801 (S.D. 1982). Upon a proper request, defendants are entitled to instructions on their defense theory if

the evidence supports them. *Pellegrino; State v. Helmer*, 1996 S.D. 31, ¶ 42, 545 N.W.2d 471, 478; *State v. Blue Thunder*, 466 N.W.2d 613, 620 (S.D. 1991); *State v. Esslinger*, 357 N.W.2d 525, 531-32 (S.D. 1984); *State v. Woods*, 374 N.W.2d 92, 96-97 (S.D. 1985); *State v. Means*, 276 N.W.2d 699, 700-701 (S.D. 1979). To warrant reversal, however, Defendant must show that failure to grant an instruction was prejudicial, which, in this context, means that the jury "probably would have returned a different verdict if [the] requested instruction had been given." *Pellegrino; Rhines*, 1996 S.D. 55 at ¶ 111, 548 N.W.2d at 443; *State v. Holloway*, 482 N.W.2d 306, 309-10 (S.D. 1992); *Bartlett*, 411 N.W.2d at 415; *Grey Owl*, 295 N.W.2d at 751.

C. Analysis.

The trial court utilized SDCPJI 3-11-9 as part of the instructions given to the jury regarding possession of a controlled drug or substance. SR 126. The pattern jury instruction states, in its entirety, the following:

> Any person who knowingly possesses a controlled drug or substance is guilty of a crime.
>
> Possession occurs if a person knowingly possesses an altered state of a drug or substance absorbed into the human body.

SDCPJI 3-11-9.

The pattern instruction cites as references SDCL 22-42-5, SDCL 22-42-6 and *State v. Schroeder*, 2004 S.D. 21, 647 N.W.2d 827.

When the trial court met with counsel to settle the jury instructions, Defendant objected to the second sentence of Instruction 13. He wanted the second sentence of the pattern instruction, ("Possession occurs if a person knowingly possesses an altered state of a drug or substance absorbed into the human body,") stricken from the instruction. The trial court overruled the objection. JT 150. Defendant claims that the "jury instruction misquotes and alters" the law in *Schroeder*. DB 22.

The South Dakota Legislature and this Court have determined that an individual in South Dakota may be charged with possession of a controlled substance by having a positive urinalysis test for a drug or substance. *See* SDCL 22-42-5; *Schroeder*, 2004 S.D. 21 at ¶ 14, 674 N.W.2d at 831 (holding a positive urinalysis for a controlled substance is sufficient evidence to support a possession of a controlled substance conviction). *See also Mattson*, 2005 S.D. 71 at ¶ 54, 698 N.W.2d at 554 (holding, in part, that defendant's refusal to submit to a urinalysis could be used to infer defendant had ingested methamphetamine and was knowingly in possession of a controlled substance within the definition of SDCL 22-42-1(1)); *Hess*, 2004 S.D. 60 at ¶ 44, 680 N.W.2d at 330 (Sabers, J., dissenting) (noting that this Court has held a positive urinalysis revealing a controlled substance is sufficient to support a conviction under SDCL 22-42-5).

Based on the above, the trial court did not abuse its discretion in utilizing South Dakota Criminal Pattern Jury Instruction 3-11-9. *Black*, 494 N.W.2d at 381.

Defendant also complains about Jury Instruction 17, which states:

> In a charge of knowing possession of a controlled substance, a positive urinalysis that reveals the presence of controlled substances in a defendant's urine may be sufficient in and of itself to support a conviction.

SR 130; JT 151.

Defendant claims that the instruction removes the State's burden of proving "knowledge" beyond a reasonable doubt. DB 23. Defendant mistakenly reads the instruction in isolation. First, the instruction is an accurate statement of the law per *Schroeder*, 2004 S.D. 21 at ¶ 14, 674 N.W.2d at 831 (holding a positive urinalysis for a controlled substance is sufficient evidence to support a possession of a controlled substance conviction). Second, Instruction 15 specifically sets out the burden of proof for each element of the crime:

> each of which the state must prove beyond a reasonable doubt . . . [includes] the defendant knowingly possess a controlled drug or substance. . . .

SR 128.

Third, Instruction 16 states that "defendant must be shown to have knowingly been in possession of cocaine. The mere fact that a person is near a location or had access to a place where cocaine is found is not, by itself, sufficient proof of possession." SR 129. Instruction 13

also instructs the jury that defendant must knowingly possess the controlled substances in his urine.

The instructions, taken as a whole, accurately set out the law. The discretion of the trial court is "broad" and was not abused when instructing the jury. *Rhines*, 1996 S.D. 55 at ¶ 111, 548 N.W.2d at 443. *Black*, 494 N.W.2d at 381. Further, Defendant fails to prove any prejudice, *State v. Gillespie*, 445 N.W.2d 661, 664 (S.D. 1989); let alone prejudice that "would have returned a different verdict. . . ." *Pellegrino; Rhines*, 1996 S.D. 55 at ¶ 111, 548 N.W.2d at 443; *Holloway*, 482 N.W.2d at 309-10; *Bartlett*, 411 N.W.2d at 415; *Grey Owl*, 295 N.W.2d at 751.

CONCLUSION

The State respectfully requests that Defendant's Conviction be affirmed on the basis of the foregoing arguments and authorities.

Respectfully submitted,

MARTY J. JACKLEY
ATTORNEY GENERAL

John M. Strohman
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215

CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellee's Brief contains 4,290 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Dated this 6th day of August, 2013.

_____
John M. Strohman
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 6th day of August, 2013, two true and correct copies of Appellee's Brief in the matter of *State of South Dakota v. Sean Whistler* were served by United States mail, first class, postage prepaid, upon G. Matthew Pike, Lawrence County Public Defender's Office, 90 Sherman Street, Deadwood, South Dakota 57732.

_____
John M. Strohman
Assistant Attorney General

IN THE SUPREME COURT

STATE OF SOUTH DAKOTA

No. 26588

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

v.

SEAN WHISTLER,
Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

HONORABLE Randall Macy
Circuit Court Judge

APPELLANT'S REPLY BRIEF

G. Matthew Pike
Lawrence County Public
Defender's Office
90 Sherman Street
Deadwood, SD 57732

Attorney for Defendant and
Appellant

John Strohman
Assistant Attorney General
500 East Capitol Avenue
Pierre, SD 57501

Attorney for Plaintiff and Appellee

Notice of Appeal filed January 14, 2013

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IN THE SUPREME COURT

STATE OF SOUTH DAKOTA

No. 25688

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

SEAN WHISTLER

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, the Defendant and Appellant, Sean Whistler, will be referred to as "Defendant" or "Whistler." The State of South Dakota, Plaintiff and Appellee in this matter, will be referred to as "State." Documents cataloged in the Clerk's, Index on Appeal, will be referred to as "SR" for "settled record." Reference to the transcript of the trial transcript will be designated as "TT." Reference to the Appellant's initial brief will be designated as "AB." Reference to the State's response brief will be designated as "SB." The appropriate page number will follow all citations. Any reference to the

Defendant's appendices will be designated as "AX" followed by the identifying letter.

JURISDICTIONAL STATEMENT

Please see Appellant's Brief.

STATEMENT OF LEGAL ISSUES

Appellant appeals on the following two issues:

I

WHETHER THE STATUTORY REGIME IN SOUTH DAKOTA CRIMINALIZING POSSESSION OF A CONTROLLED DRUG OR SUBSTANCE SHOULD BE ALLOWED TO SUSTAIN A CONVICTION WHEN ONLY THE METABOLITE OF A CONTROLLED SUBSTANCE IS DETECTED IN THE DEFENDANT'S URINE

II

WHETHER THE TRIAL COURT ERRED BY INSTRUCTING THE JURY IN A MANNER THAT IMPERMISSIBLY SHIFTED THE BURDEN TO THE DEFENDANT TO DISPROVE KNOWLEDGE OF POSSESSION

MOST RELEVANT CASES AND STATUTES

State v. Schroeder, 2004 SD 21, 674 NW2d 827 (2004)

State v. First Nat. Bank of Clark, 3 S.D. 52, 51 N.W. 781 (1892)

State v. Ireland, 133 P.3d 396 (Utah, 2006)

SDCL §22-42-1(1)

SDCL §22-42-5

SDCL §22-42-15

STATEMENT OF THE CASE AND FACTS

Please see Appellant's Brief.

ARGUMENTS

I

THE CURRENT STATUTORY REGIME IN SOUTH DAKOTA CRIMINALIZING POSSESSION OF A CONTROLLED DRUG OR SUBSTANCE SHOULD NOT BE ALLOWED TO SUSTAIN A CONVICTION WHEN ONLY THE METABOLITE OF A CONTROLLED SUBSTANCE IS DETECTED IN THE DEFENDANT'S URINE

Unfortunately, in its response, the State wholly rewords (and in doing so misconstrues) the Appellant's first issue. This is an apparent attempt to mislead the reader into believing that this case is a request for reconsideration of the issue determined in State v. Schroeder, 2004 S.D. 21, 674 N.W.2d 827 (2004). To be clear: this case raises those issues which Schroeder expressly did not address. As much as the State might wish a particular thing to be true, merely saying so doesn't make it so.

Nine years ago, in Schroeder, the Court stated that the question of sufficiency of the evidence to support the conviction was "[t]he sole issue," adding, "There is still no need to decide this related issue of whether an ingestion statute precludes a conviction for possession when the only evidence is a positive urinalysis." Id. at ¶9. Whistler now asks this Court to determine that issue. Further, the Appellant raises the issue of the State's inability to prove the venue of the offense, the problem of

the legislative intent of the 2001 amendment to SDCL §22-42-1(1)(given the record and beyond the "plain meaning"), and the trial court's allowance over objection of a potentially misleading jury instruction that erroneously and injuriously relies upon Schroeder.

These issues have not been decided by this Court.

A. "Ingestion" precludes "possession."

In State v. Schroeder, the Court recognized that a plain reading of the 2001 amendment to SDCL §22-42-1(1) taken together with SDCL §22-42-5, appeared to be a rejection of the historic dichotomy of the concepts of "ingestion" (or "use") and "possession." Id. at ¶¶8-9. However, since Schroeder raised only the question of sufficiency of the evidence, the Court declined to rule on whether this rejection by the Legislature was proper. The State would have the reader believe that the Schroeder decision was far more encompassing than it was and represents the final word on these vexing questions. But wishing it was so doesn't make it so.

The State responds to this question by simply stating that "other jurisdictions do not allow a urine sample containing a drug or substance to be sufficient evidence for a possession conviction," adding, "[b]ut those

jurisdictions do not define a controlled drug or substances to include substances once they have been absorbed into the human body." SB 8. The State offers this wide-sweeping conclusion without analysis or authority and without even a single example upon which the Court might now rely; a neat avoidance of the true issue presented perhaps, but one that's less than helpful to the question. Given this paucity of authority, the Appellant asks the Court to reject the State's baseless conclusion.

Whistler begs that the Court's attention be drawn instead to the more than twelve states presented with specific authority that hold that the mere presence of a controlled substance in a person's body cannot by itself constitute criminal possession. AB 10-13.

Further, and most importantly, Whistler asks this Court to consider the most persuasive fact that no controlled substance was detected in his bodily fluids. Whistler's conviction for violation of SDCL §22-42-5 rests merely and exclusively upon the presence of a minute amount of the metabolite of contraband, the remaining by-product of a substance ingested into his body who knows when and who knows where.

By its exclusive statutory regime, unique among all 50 states, South Dakota criminalizes as a felony the mere

detection of some by-product or altered state of a controlled drug or substance. Trials, like this one, commence and the government is allowed to proceed without providing any evidence as to how the accused is meant to understand that these tiny amounts of contraband or their remnants constitute knowing possession from an act of taking something into the body days earlier. At trial, the State's own expert witness, the chemist Kathryn Engle testified as follows on the question:

> Q How would a person know, one way or the other?
>
> A A person? Just any person?
>
> Q Someone who doesn't have a gas chromatograph/mass spectrometer.
>
> A They wouldn't. I mean, if you're taking about the effects and still feeling under the influence or something, no, you wouldn't necessarily, or even at all. There wouldn't be any effect, but it's still detectable in your body.
>
> Q So you can't feel that microscopic remnant inside your body, can you?
>
> A At 72 hours or - No.

TT 104.

B. When relying on solely the presence of a metabolite in a Defendant's urine, the State

> cannot prove the venue of any violation of SDCL §22-42-5, which results in a violation of Article VI, §7 of the South Dakota Constitution.

By its long recitation of jurisdiction statutes, the State, once again, is misleading or evasive in its response brief, or else reveals a fundamental misunderstanding of the concept of "venue" as distinct from "jurisdiction." The State seems to confuse the two or at least obfuscate in hope that the reader does the same.

Black's Law Dictionary considers the definition of "venue" at length, discussing "the neighborhood, place, or county in which an injury is declared to have been done, or fact declared to have happened." Black's Law Dictionary 1557 (6th ed. 1991)(citing 3 Bl. Comm. 294). It continues by differentiating between the concepts of "venue" as distinct from "jurisdiction," defining the latter just as extensively as the "authority" of a court to hear a case within a prescribed power granted to it. Id. at 853. Therefore, "venue" is about "place," while "jurisdiction" is about "authority." The former is antecedent to the latter.

"It is a rule in criminal law, so old and well established as to have the force of statute, that the *locus delecti* must be shown by the evidence to be within the

jurisdiction of the trial court or else the conviction will not stand... The venue must be shown by the evidence. It cannot be established solely by inferences." State v. First Nat. Bank of Clark, 3 S.D. 52, 51 N.W. 781 (1892)(citations omitted). This tenet remains a constant in our jurisprudence. *See* State v. Burmeister, 65 S.D. 600, 277 N.W. 30 (1937); State v. Dale, 66 S.D. 418, 284 N.W. 770 (1939); State v. Rasch, 70 S.D. 517, 19 N.W.2d 339 (1945); State v. Brewer, 266 N.W.2d 560 (1978); State v. Graycek, 335 N.W.2d 572 (1983); State v. Haase, 446 N.W.2d 62 (1989); State v. Gard, 2007 S.D. 117, 742 N.W.2d 257 (2007); State v. Iwan, 2010 S.D. 92, 791 N.W.2d 788 (2010).

Why should one particular type of offense stand out from all the rest and be exempt from a most basic principle in our Law? Drug prosecutions in South Dakota under SDCL §22-42-5 and §22-42-15 run afoul of this ancient rule. In the first (the felony for possession[1]), the question of venue is left silent, and the State is relieved of any responsibility to prove it – effectively granted a pass on the question, often times the waving of a vial of blood or urine before the jury passing as acceptable to prove the matter, as in this case. In the second (the misdemeanor for

[1] This would include and encompass the recently implemented 2013 amendments to the chapter and section, though Whistler was convicted under the earlier version.

ingesting), the Legislature seeks to circumvent the long-standing venue standard by the addition of a few words (*see* AB 17-18). Whistler asks that this Court deem such trickery an invalid and impermissible exercise of the Legislature's authority and hold as the State of Utah has that the existence of any measurable amount or metabolites of some controlled drug or substance alone is inadequate to show that the Defendant possessed or used a controlled substance within our state. *See* State v. Ireland, 133 P.3d 396 (Utah, 2006).

Again drawing from the trial record, and the testimony of Kathryn Engle:

> Q And you have already testified that you can't tell from a urinalysis how long ago someone had ingested cocaine; correct?
>
> A Beyond that window of the plus or minus 72 hours, no, I cannot.
>
> Q And you can't tell how much they ingested, can you?
>
> A No.
>
> Q You can't tell where the substance was ingested; right?
>
> A Where, as in a park or...
>
> Q Park, Canada; you can't tell, can you?

A Nope. Nope, not at all.

TT 105.

C. Prosecutions for violations of SDCL §22-42-5 based solely upon the presence of the metabolite of a controlled drug or substance in the urine run contrary to the initially stated legislative intent of an amendment to SDCL §22-42-1(1).

As the State offers nothing in the way of a response to this issue, the government appears to concede the question that prosecutions exercised through application of the 2001 amendment to SDCL §22-42-1(1) run contrary to its Legislative intent. Appellant agrees and asks this Court to determine the same.

II

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY IN A MANNER THAT IMPERMISSIBLY SHIFTED THE BURDEN TO THE DEFENDANT TO DISPROVE KNOWLEDGE OF POSSESSION

Since the State, in its final sentence of argument, chose to raise the question of Appellant's burden to prove prejudice when challenging a jury instruction, stating "Defendant fails to prove any prejudice," Whistler now respectfully begs this Court consider the Affidavit of the Jury Foreman, Francis Toscana. The allegation of "failure" being raised by the State, the question should be examined.

"This requires a showing that the alleged error, in all probability, produced some effect upon the jury's

verdict and was harmful to the substantial rights of the party assigning it." State v. Roach, 2012 S.D. 91 at ¶14, 825 N.W.2d 258 (2009).(*See* State v. Klaudt, 2009 S.D. 71, 772 N.W.2d 117 (2009); State v. Cottier, 2008 S.D. 29, 755 N.W.2d 120 (2008); State v. Martin, 2004 S.D. 82, 683 N.W.2d 399 (2004)). The State knows full well that the showing was offered, the burden met, and now opens the door for the Court's consideration by erroneously stating that Appellant has "failed." It is a false and unfounded accusation to say so.

CONCLUSION

Based upon the foregoing arguments, authorities, as well as the State's concession as to the matter of Legislative intent, the Appellant respectfully requests that his convictions for violations of SDCL §22-42-5 and §22-42-15 be reversed. It is plainly obvious that this Court has the authority to reverse the consequences of a statutory scheme that violates basic principles of our Law or results in violations of Constitutional protections.

Respectfully submitted, this 10th day of August, 2013.

_____

G. Matthew Pike
Director

Lawrence County Public Defenders
90 Sherman Street
Deadwood, SD 57732
Telephone: (605) 578-3000