STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JIMMY WILSON, JR.,

APPELLANT

APPELLATE CASE NO. 2011-198488

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court reversibly erred by allowing an impermissible comment on Appellant's right to remain silent where the State was permitted to elicit testimony from the arresting officer that Appellant did not give a statement after he was Mirandized?

STATEMENT OF THE CASE

Appellant Jimmy L. Wilson, Jr., was indicted by the Florence County Grand Jury on March 5, 2001, for possession of cocaine base, third offense (Possession). R. 5—R. 6; R. 205 (Indictment). His case proceeded to trial in his absence before the Honorable Thomas A. Russo and a jury on March 10, 2010. R. 1; R. 4; R. 9; R. 13. Carrington S. Wingard (Counsel) represented Appellant, while Patricia S. Parr represented the State. R. 1.

The jury found Appellant guilty of Possession, and the trial court sealed his sentence. R. 188; R. 196. On August 25, 2011, Judge Russo held Appellant's sentencing hearing. Appellant was represented Jay Johnson, while the State was again represented by Patricia S. Parr. R. 197. The trial court sentenced Appellant to ten years incarceration, and imposed a fine of $12,500. R. 203.

ARGUMENT

The trial court reversibly erred by allowing an impermissible comment on Appellant's right to remain silent where the State was permitted to elicit testimony from the arresting officer that Appellant did not give a statement after he was Mirandized.

The State deliberately sought to introduce testimony regarding Appellant's silence after he was arrested and Mirandized by police. Over Counsel's objections, the trial court permitted this testimony from the arresting officer. This testimony violated Appellant's due process rights as an impermissible comment on his right to remain silent. See, e.g., Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240 (1976). Moreover, Appellant was prejudiced by the impermissible testimony because it was given in the context of why officers did not apprehend the other person who was driving the car suspected in drug activity; in short, it helped supply the State's reason for why it failed to apprehend a different person who could likely have been the true dealer of drugs from the suspected vehicle. As a result, Appellant was prejudiced by the State's impermissible comment on his silence. Accordingly, he respectfully requests reversal of his conviction, and remand for a new trial.

At approximately 4:00 pm on September 16, 2008, four "plain clothes" Florence Police Department officers—John Calhoun (Calhoun), Kendrick Thomas Spears (Spears), Robert Raymond Drulis, Jr., (Drulis), and William Joseph Nida (Nida)—were driving in an unmarked car on McQueen Street in Florence, SC. R. 26—R. 27; R. 46—R. 47; R. 70; R. 109; R. 127. A blue and orange Ford Crown Victoria with Florida Gator stickers was seen driving toward them. Based upon an apparent tip, the source of which was never explained at trial, the officers believed the car was being used for drug activity. R. 27; R. 48. Shortly after Calhoun followed the blue and orange car, it ran through a stop sign, and a chase ensued. R. 28—R. 29; R. 48.

After driving several blocks, the blue and orange car stopped; both the driver and passenger exited the vehicle. R. 29. Appellant was identified as exiting the passenger-side of the blue and orange Ford Crown Victoria, and purportedly carried a metal object the size of a bible. R. 35; R. 41. However, under cross-examination, Calhoun later agreed that the report on which he signed-off, and which was written by Nida, did not mention seeing Appellant with a radio—or anything else in his hands—when he exited the car; "the only mention of the radio is that there was a radio found on the ground behind a house on Ingram Street." R. 43—R. 44. Calhoun stopped behind the blue and orange car and stayed with the vehicle, while all three other officers chased only Appellant. R. 29—R. 30; R. 33; R. 112.

The chase went through a wood-line and over several fences with Spears approximately sixty feet behind Appellant, and Drulis about twenty to twenty-five feet behind Spears; Nida ran to the side in hopes of corralling Appellant. R. 49; R. 60; R. 63; R. 74; R. 99. After Appellant jumped over three fences, Nida tazered and arrested Appellant. R. 114—R. 115. He was taken back to the location of Calhoun, and the blue and orange car, in a marked police cruiser. The driver of the vehicle was never caught or identified. R. 79; R. 116; R. 133—R. 135. No contraband was found either on Appellant, or in the blue and orange car. R. 65—R. 66; R. 116.

After walking back, allegedly along the path where the chase occurred, Drulis discovered (1) a small plastic box approximately one foot from the first fence crossed by Appellant, and (2) a car radio approximately six feet from the same fence. R. 75—R. 76; R. 91; R. 104. Douglas Robinson, an expert in chemical analysis at the State Law Enforcement Division (SLED), later identified the contents of the box as .45 grams of crack cocaine. R. 141; R. 145.

During Appellant's trial, and in the context of inquiring about the efforts police took to determine who the other person was from the blue and orange car, the State sought to introduce testimony from Nida that, after being Mirandized, Appellant "would not have any conversation with [the police] and wouldn't say a word." R. 119; R. 120. "Once he was Mirandized he wouldn't acknowledge it, nothing, so we stopped right there at that point." R. 120. Counsel objected, asserting Appellant had "a right to exercise his right to remain silent," and "that cannot be commented on in any way or brought to the attention of the jury . . . ." R. 120; R. 121.

The State argued that Appellant exercised that right, but that it was "important so [the jury] can know that the officer followed the proper protocol." R. 121; R. 122. The trial court ruled as follows:

> Well, I'll let you ask it this way, I'll—think about it and I'll let you respond, [Counsel]. What did you do after you placed him under arrest, we read him his Miranda warnings, did he give you any statements, no. I think that would be appropriate.

R. 122—R. 123 (emphasis added). Trial counsel still requested that her objection be noted. R. 123. Upon the jury's return to the courtroom, the following questioning occurred between the State and Nida:

> Q. Who arrested [Appellant]?
>
> A. I did.
>
> Q. Okay, and what did you do after arresting [Appellant]?
>
> A. He was transported back and was Mirandized, read his rights.
>
> Q. Okay, and did he make any statements?

A. No, Ma'am.

R. 124—R. 125. Pursuant to federal and state law, this testimony was impermissible.

The State deliberately sought to introduce testimony regarding Appellant's silence after he was arrested and Mirandized by police. This testimony constituted an impermissible comment on Appellant's right to remain silent. McFadden v. State, 342 S.C. 637, 640, 539 S.E.2d 391, 393 (2000) (citing Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240 (1976) (holding an accused's exercise of his right to remain silent cannot be used against him)). Generally, "the State may not comment on a defendant's exercise of a constitutional right." Id. (citing Edmond v. State, 341 S.C. 340, 534 S.E.2d 682 (2000). Doyle violations in particular extend not only to direct comments by the State on a defendant's exercise of his right to remain silent, but also to other indirect comments touching upon the same right. "Specifically, the solicitor must not comment, either directly or indirectly, on a defendant's silence, failure to testify, or failure to present a defense." Id. (emphasis added).

As indicated above, the State explicitly sought and was permitted to introduce testimony directly implicating Appellant's exercise of his right to remain silent over Counsel's objections. R. 124—R. 125. Simply stated, the trial court erred by permitting the State to elicit testimony directly commenting on Appellant's right to remain silent; indeed, it was the court itself that crafted the specific questioning for the State regarding Nida's comment on Appellant's exercise of his right to remain silent. R. 122—R. 123. Thus, Appellant's due process rights were violated as a result of the trial court's error.

Additionally, Appellant was prejudiced by the trial court's error. "[B]efore a federal constitutional error can be held harmless, the court must be able to declare that it was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24, 87 S.Ct.

824, 828 (1967). "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Id. 386 U.S. at 23, 87 S.Ct. at 827. The conjunctive factors considered when determining whether a Doyle violation was harmless are: (1) whether the reference to the defendant's right to remain silent and not testify was singular; (2) whether the single reference was repeated or alluded to in either the jury trial or in argument to the jury; (3) whether the State tied the defendant's silence directly to an exculpatory story; (4) whether the exculpatory story was totally implausible; and (5) whether the evidence of guilt was overwhelming. See, e.g., State v. Hill, 360 S.C. 13, 17-18, 598 S.E.2d 732, 734 (Ct. App. 2004) (quoting State v. Truesdale, 285 S.C. 13, 18-19, 328 S.E.2d 53, 56 (1984)); McFadden, 342 S.C. at 641, 539 S.E.2d 391, 393.

In the case at bar, the State commented only once, yet it tied Appellant's silence to its reason why the driver/owner of the blue and orange car suspected of dealing drugs was not identified or apprehended. Appellant's defense was that he did not possess the contraband. Further, with only two individuals in the blue and orange car, and with the car suspected of being used in selling drugs, it is certainly plausible that any drug dealing was being conducted by the driver rather than Appellant—especially since the car did not belong to Appellant. R. 35; R. 40. Indeed, if the State's theory was that the small plastic box containing crack cocaine was located inside the radio, and that the car was not Appellant's, then it is likewise plausible that Appellant was unaware that the drugs were in the radio if he indeed threw it prior to jumping over the first fence. Thus, the State's comment on

Appellant's silence in the context of seeking the car driver's identity is also an attack on Appellant's defense.[1]

Finally, the evidence against Appellant was essentially circumstantial and much less than overwhelming. No drugs were found on him or in the passenger area where he sat in the blue and orange car. Furthermore, no one saw Appellant throw a plastic box prior to jumping over the first fence, and no fingerprints or DNA linking the box to Appellant were recovered. R. 42; R. 43; R. 104. Thus, even if he took the car stereo with him, there was no evidence the small plastic box was ever located inside of it; and, even if the State could somehow prove the small plastic box came from inside the stereo, there was no evidence Appellant knew of its presence or touched it.

Moreover, although the State went through great pains to elicit testimony that the specific house near where the plastic box of crack was located never had any drug related police calls, it could not hide the fact that the area in general in which the foot chase occurred was indeed a well documented drug-drug area. R. 39; R. 40; R. 80; R. 81; R. 130. As a result, the small plastic box could have been dropped or placed near the fence by any number of persons traveling through that high crime area. Therefore, Appellant was prejudiced by the impermissible testimony commenting upon his right to remain silent because "there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Id. 386 U.S. at 23, 87 S.Ct. at 827.

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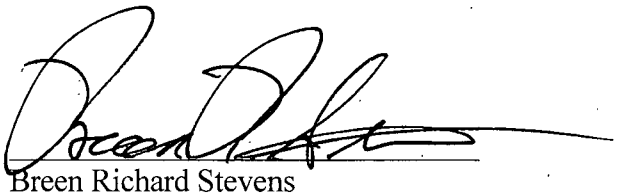
[1] Appellant also submits that whether his defense was plausible was a matter for the jury to determine in its capacity as sole judge of credibility. See, e.g., State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (2012) ("The assessment of witness credibility is within the exclusive province of the jury.") (citing State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977).

CONCLUSION

For the foregoing reasons, Appellant Jimmy Wilson respectfully requests reversal of his conviction, and remand for a new trial.

Respectfully submitted,



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of May, 2013

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

May 23, 2013

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, 23rd day of May, 2013.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 23rd day of May, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.