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Apr 25 2023

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

H. Steven DeBerry, IV, Circuit Court Judge

Case No. 2022-0001644

Jawan White, Appellant,

Vs.

State of South Carolina, Respondent,

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the PCR judge erred in finding that Appellant's trial counsel was not ineffective, where he failed to object to the trial judge's decision to charge the jury that it could find Appellant guilty under the legal principle of conspiracy to traffic in twenty-eight grams or more?

2. Whether the PCR judge erred in holding that the trial judge did not erroneously charge the jury that Appellant's guilt could be based upon conspiracy to possess twenty-eight grams or more of heroin?

3. Whether the PCR Court erred in deny Appellant's Rule 59(e) motion to reconsider its denial of Appellant's application for post-conviction relief?

STATEMENT OF THE CASE

On August 20, 2011 Appellant, Jawan White ("White"), was arrested during a reverse, imitation drug sting operation lead by Agent Randy Miller ("Agent Miller") of the Fifteenth Circuit Drug Enforcement Unit ("DEU"), through the use of a confidential informant ("State CI") under his management. (App., pp. 74, 108-109, 117-119, 207, 124). The drug string originated with the United States Drug Enforcement Agency ("DEA"). (App., pp. 202-203). A DEA confidential informant ("Federal CI") had negotiated the sale of heroin to White. (App., pp. 97, 104-105, 129-130). For reasons unknown, the DEA decided to abandon the operation and offered it to the DEU, which it accepted. (App., pp. 202-203).

On August 16, 2011, the Federal CI and State CI meet with White for the purpose of introducing the State CI into the sting as the supplier, and handing-off the operation to the DEU. (App., 109-110, 202-203). At the meeting, which was recorded, White agreed to purchase four ounces of heroin from the State CI for the sum of Ten Thousand and 00/100 ($10,000.00) Dollars. (App., pp. 81-83, 104-105, 113, 204). White lacked all the money on hand; so, it was agreed that he would call the State CI once he had the total

sum. (App., pp. 83-84, 134-135) The Federal CI and the DEA existed the operation after the meeting. (App., pp. 109-110, 133, 204).

On April 19, 2011, White called the State CI to arrange the exchange the following day. (App., pp. 83-85, 113-114). Immediately before to the exchange, the State CI meet with Agent Miller at a police station and was outfitted with an audio and video recording devise and four ounces of imitation drugs. (App., pp. 84-86, 117-118). The State CI met White in the parking lot of a local mall to complete the buy. (App., 86-87, 117-119, 204-205). Immediate after the imitation drugs and money were exchanged, DEU agents arrested White on the scene for trafficking in heroin. (App., pp 117-119, 204-205).

On June 13, 2013 White was tried by jury in his absence. (App., p. 264). During opening argument, Martin Spratlin (the "prosecutor") argued to the jury, "on August 20th, 2011 Jawan White fully attempted, ***fully conspired*** to purchase four ounces of heroin, gave Adrian Chavez (State CI) Ten Thousand Dollars cash for what he fully believed to be four ounces of black --- brown powder heroin." (App., p. 66) (Emphasis added). At the conclusion of the evidence and closing arguments, the trial judge charged the jury with the language of the trafficking in heroin statute, Section 44-53-370(e). (App., pp. 163, 323). Additionally, the trial judge charged the jury with the following language upon request by the prosecutor:

> In order to find the Defendant guilty the State must also prove, beyond a reasonable doubt, that the amount of heroin, or any mixture containing heroin, was twenty-eight grams or more. Under trafficking in heroin, twenty-eight grams or more**, *the presence of only imitation heroin at the transaction is irrelevant if the State proves, beyond a reasonable doubt that the Defendant "conspired or attempted" to purchase more than twenty-eight grams of real heroin***.

(App., pp. 163, 323-324) (Emphasis added). John Hilliard ("defense counsel") made a general objection to the requested charge on the basis that it constituted a comment on the facts, but no objection on the basis that a charge of conspiracy was inappropriate because no evidence of conspiracy was presented. (App., p. 139). The jury was given a general verdict form with the options of guilty or not guilty. (App., pp. 165). The jury returned a verdict of guilt at the conclusion of deliberation, with no indication whether based upon conspiracy to purchase twenty-eight grams of heroin or attempt to purchase. (App., p 172).

White timely filed a motion for a new trial requesting the trial judge to exercise his power under the thirteenth juror doctrine to hang the jury. White argued he was prejudiced when the trial judge charged the jury that his guilt could be found under the principle of conspiracy, and that testimony was entered into evidence in violation of White's right of confrontation. The trial court denied White's motions.

White timely filed a direct appeal with the South Carolina Court of Appeals, arguing the same issues raised in his motion for new trial before the trial court. (App., p. 200). The court of appeals declined to hear the case on the merits on the basis that that the issues had not been preserved for review.

On or about October 25, 2019 White filed an application for post-conviction relief with the Horry Court of Court of Common Pleas. (App., p. 183-188). White alleged three grounds of wrongful detention: (1) defense counsel was ineffective for failing to object to the jury charge that his guilty could be found upon the principle of conspiracy to traffic in twenty-eight grams or more of heroin; (2) the trial judge erroneously charged the jury that White's guilt could be found on principle of conspiracy to the traffic in twenty-eight

grams or more of heroin; and (3) defense counsel failed to object to testimony presented at trial in violation of hearsay and White's right of confrontation under the Confrontation Clause. (App., p. 185).

After a hearing on June 1, 2022, the PCR judge denied White's application for relief by order dated October 10, 2022 on the basis that, "United States Supreme Court and South Carolina law makes (sic) clear that a court may define an offense to a jury by charging the full language of the statute, even when not every term is applicable in the given case." (App., pp. 296-297) White timely filed a Rule 59(e) motion, requesting reconsideration, which was denied. (App., pp.300).

LAW AND ARGUMENT

I. Conspiracy

First, the court must determine what constitutes a conspiracy, and whether there was evidence of a conspiracy before determining if charging it was reversible error? "A conspiracy is defined as the "combination between two or more persons for the purpose of accomplishing an unlawful object or lawful object by unlawful means." S.C. Code Ann. § 16-17-410 (2003), *See also, State v. Fleming*, 243 S.C. 265, 133 S.E.2d 800 (S.C. 1963). However, a conspiracy can never be achieved between a defendant and an informant. "This would contradict the rule that ***one cannot enter into a conspiracy with another who only feigns acquiescence in a crime; such as an informer or undercover agent***." *State v. Holmes*, 277 S.C. 232, 233, 285 S.E.2d 353 (S.C. 1981) (citation omitted); *See also*, *State v. Crocker*, 621 S.E.2d 890, 366 S.C. 394 (SC, 2005); *State v. Adams,* 462 S.E.2d 308, 319 S.C. 509 (S.C. App., 1995); *United states v. Chase*, 372 F.2d 453 (4th Cir. 1967). Nevertheless, … "participation of an undercover agent '[i]n

conjunction with more than one person to violate a law...will not preclude a conviction of the others for a conspiracy among themselves.'" *State v. Holmes*, 243 S.C. at 234; *Citing, State v. Wilkins*, 34 N.C. App. 392, 238 S.E.2d 659, 665 (1977).

i. White was acting alone and there was no evidence he was involved in a conspiracy.

Agent Miller was the investigator leading the drug sting against White from its inception until its conclusion. He was in the best position, with the except of White, to know if any other non-government actor was involved.[1] On cross examination at trial, Agent Miller clearly indicated that the only non-government act involved in the operation known to him was White:

> Q: Right. Okay. And he (White) didn't have any backup, or any people with him?
>
> A: Not that I saw.
>
> Q: I mean, you were there looking for back up and ---
>
> A: Yes. I did not --- nobody else was seen, other than Jawan White, during the whole operation.

(App., pp. 132-133). Moreover, the prosecutor testified on several occasions at the PCR hearing White was acting alone in the operation:

> Q: Okay. And at that particular period of time, before the 15th Circuit Drug Unit got involved, this was an operation that was completely done by … the DEA, and of course, only their informant (Federal CI) was involved, alone with Mr. White, is that correct?
>
> A: I believe so, yes. (App., p. 203).
>
> * * *
>
> Q: Okay. Okay. All right. Now, there were actually at least three persons that we know of that was involved in this, … buy deal; it that correct? And

[1] White did not testify at trial nor at hearings on pretrial motions.

those three persons where the federal CI, the state CI, and Mr. White; is that correct?

A: Yes.

Q: No other person that you can identify by name?

A: No, Sir. (App., pp. 217-218).

* * *

Q: Okay. So the federal CI … cannot be counted for purposes of getting the two people necessary to be a conspiracy, and neither could the state (CI)?

A: No, sir.

Q: And so that would only leave one person and that would be Mr. White, is that correct?

A: As far as the three that I could name, yes. (App., p. 218).

* * *

Q: Do you know whether or not … evidence was presented to the jury that there was someone other than Mr. White? And that's what we're concerned about, what evidence - - what was entered into evidence (at trial) and was presented to the jury?

A: Without reviewing the videos I don't.

Q: Okay. And when you reviewed the transcript (of the trial), and did you review the transcript in preparation for your testimony?

A: I did. I looked through the transcript.

Q: Did you see anything in the transcript that suggested an argument was made [at trial] that [there] was a third person , other than Mr. White, another person other than Mr. White, that was involved?

A: No, sir? (App., pp. 221-222).

In further circumstantial support of the direct evidence presented that there was no evidence of a conspiracy, the prosecutor also testified that it was his intention to

prosecute the case solely on the attempt element of the trafficking statute instead of conspiracy.

> Q: Okay. Now, in this particular case it does not involve manufacturing, cultivating, delivering, purchasing, or buying heroin; did it not?
>
> A: No. It was [an] attempt case.
>
> Q: Okay. It was an attempt case. And of course, because it was an attempt case there was only, I guess, two theories underneath the conspiracy doctrine (trafficking statute) that was relevant; is that correct? And that was the two theories as [to] whether or not he conspired or attempted?
>
> A: Attempt was what the state proceeded under at trial. I think that was the theory of the state at trial. But the conspiracy may have been applicable to, but I'm not sure really exactly what the question is.
>
> Q: The state did not proceed under the theory of conspiracy at trial?
>
> A: I don't believe so. I think -- and if I'm wrong, please correct me if I'm wrong. My recollection was an attempt argument was what the state went with at trial. (App., pp. 206-207).

The prosecutor's testimony that his case was based upon the attempt element of the trafficking statute is consistent with his closing argument to the jury. The prosecutor argued at closing:

> I'm going to … show you the trafficking statute and read it to you. I'm going to read the whole thing to you but a lot of it does not apply, or is not necessary here today, but the Judge is going to read the whole thing to you so I want you to have a chance to hear it twice. "Any person who knowingly sells, manufactures, cultivates, delivers, purchases, or brings into this State, or who provides financial assistance, or otherwise aids, abets, attempts or conspires to sell, manufacture, cultivate, deliver, purchase, or bring into this State, or who knowingly in actual or constructive possession, or who knowingly attempts to become in actual or constructive possession of more than twenty-eight grams of heroin is guilty of trafficking in heroin.

> ***Specific to this case, ladies and gentlemen, the Defendant knowingly attempted to purchase more than twenty-eight grams or heroin.***
>
> * * *
>
> ***Ladies and gentlemen, when you look at the evidence here objectively, I submit to you you can't find that he didn't attempt to purchase more than four ounces, or more that twenty-eight grams of heroin***. (App., pp. 142-143).

The prosecutor claimed conspiracy as a theory of guilt once during opening argument, and his request to charge. No evidence of conspiracy was presented during the evidence stage of the trial and prosecutor never argued conspiracy in closing. When asked why he never argued conspiracy during his closing argument, the prosecutor conceded: "But I mean there was no named third party for me to point to other than the CIs, so I'm sure that factored into my decision, but I can't tell you exactly." (App., pp. 219-220). The principle of conspiracy was never made relevant to the trial through the introduction of evidence, and never should have been charged.

The State may argue the prosecutor suggested there might have been a person who assisted White in raising the ten thousand dollars needed for the purchase; however, he could not identify such person by name or deed. In fact, the prosecutor eventually admitted that he was not sure if such person ever existed:

> Q: Okay. And without having to go through the entire transcript, it's my understanding … that the testimony at trial was that there was only three people involved in connection with this transaction; is that correct to your understanding?
>
> A: I believe the only other evidence being introduced about anybody else being involved was in a statement Mr. White said to a CI about having to get the money from somebody else, or having to come up with the money. I remember there being something about that during the trial.

Q: Could you find that in the transcript, where that's located at in this transcript because I've read the transcript and I don't see where that is contained within the transcript. But if I'm wrong ---

A: It may very well have been on one of the videos or something to that affect because I just remember there being an issue, and again, forgive me I'm going off of ten year old information. I've refreshed my recollection beforehand, but I've not had access to the videos or anything. I no longer work in the solicitor's office, so I didn't have -- wasn't able to really get much of the information beforehand.

I believe there was some statement where he was going to have to come up with the money and ***I don't remember if that was in the meeting with the CI, the two CIs at Broadway, or if that was in the phone call with the CI, or if that was -- there was something where he was going to have to come up with [t]he money.*** That's my recollection. (App., pp. 214-215).

* * *

Q: And of course, transcript page 97, bate number 104 they discuss the four ounces and the $10,000; is that correct?

A: John Hilliard's (defense counsel) asking him some questions about the money and the four ounces and $10,000. Yes, sir.

Q: Anywhere in these pages where you see or he indicated, Mr. White indicated, that he needed to get this money from another person?

A: No. I do not see anything in the transcript. ***And I'm not certain if my recollection is correct or not, and I don't recall if he specifically said another person or if he just needed to get up with the money, or get the money. I'm not sure, but there was something about him having to, that' why they couldn't do a deal right away***. They had to –- he was going to go out, get the money, and then contact the CI when he had the money.

Q: Okay. So he was going to go out and get the money and contact the CI when he had the money?

A: Yes. And my belief -- and again, I can only speak to my recollection, which may very well be wrong, but I thought there was something in one of those videos or one of those tape recordings about him having to like go talk to people or something like that***. But I might be wrong on that, my recollection of that video is not very fresh***. (App., p. 217).

The prosecutor is correct that White stated he would call the State CI when he had ten thousand dollars for the purchase. That State CI testified that White agreed to call him when he was "ready," and that he interpreted "ready" to mean when he had the money. He never testified or suggested that White would be getting the money from some other person.

> Q: Now, Adrian (State CI), you said that Jawan White wanted to purchase four ounces of heroin from you.
>
> A: Yes.
>
> Q: When was this transaction suppose to take place?
>
> A: When he was ready.
>
> Q: How was he going to get in touch with you?
>
> A: He was going to call me on my phone.
>
> Q: And did you give him your phone number that day?
>
> A: Yes.
>
> Q: All right. Now, Adrian (State CI), on August 19th, 2011, three days later, did you hear from Jawan White?
>
> A: Yes.
>
> Q: How did he get in touch with you?
>
> A: He called me on the phone and told me he was ready.
>
> Q: Is that same phone number that you had given him earlier at Broadway at the Beach?
>
> A: Yes.
>
> Q: What did you take him saying "I'm ready" to mean?
>
> A: That he had the money ready. (App., pp. 83-84).

Agent Miller's description of the facts where the same as the State CI when questioned at trial. Agent Miller testified that it was his understanding that White would contact the State CI when he was ready; never an allegation White would be getting the money from some unknown person.[2]

> Q: All right. Now, after that initial meeting at Broadway at the Beach what was your understanding of the next step in the operation against Jawan White?
>
> A: My understanding was that Jawan White and the informant had exchanged numbers, they had agreed on the four ounces of heroin for the Ten Thousand Dollars. Once Jawan was able to raise the money, and have the Ten Thousand Dollars, he was going to contact the information; Adrian (State CI). (App., p. 113).

For the sack of argument, should White had received some of the $10,000.00 from another person, that fact alone still would not have constituted a conspiracy, nor would it have warranted a charge of conspiracy to the jury. The State is required to present some evidence that this unnamed, unknown party had knowledge White intended to use the money he or she contributed to buy illegal drugs, and after having such knowledge, voluntarily give White the money with the intent to participate in the conspiracy. *See, State v. Gunn*, 313 S.C. 124, 134, 437 S.E.2d 75, 80 (S.C. 1993) ("The gravamen of the offense of conspiracy is the agreement or combination"); *State v. Hammitt*, 341 S.C. 638, 644, 535 S.E.2d 459 (S.C. App. 2000) ("Although the gravamen of the offense of conspiracy is the agreement, it is the individual participation of the actor by agreeing which subjects him to criminal liability as a coconspirator.").

Now that it has been established no evidence of a conspiracy was present at trial, the second analysis the court must undergo is whether the trial judge wrongfully charged

[2] This is consistent with the previous referenced testimony of Agent Miller who stated that during the entire operation he never know of any other person to be involved except White.

the jury that conspiracy was a criminal theory which it could find White guilty, and if so, whether charging the jury such was reversable error.

ii. There is no credible dispute that the jury was charged by the trial judge it could consider conspiracy when deliberating White's guilt.

Upon the prosecutor's request, the trial judge instructed the jury with the following after reading the trafficking statute verbatim:

> Under trafficking in heroin, twenty-eight grams or more, the presence of only imitation heroin at the transaction is irrelevant ***if the State proves, beyond a reasonable doubt, that the Defendant conspired or attempted to purchase more than twenty-eight grams of real heroin*.** (App., p 163).

The trial judge also instructed the jury that it must accept and importantly apply the law as he instructed.

> I have the additional duty to charge you the law applicable to this case. As the Presiding Judge (sic) I am the sole judge of the law of this case, and ***it's your duty, as jurors, to accept and apply the law as I now state it to you***. If you already have an idea as to what the law is, as what the law ought to be, and it doesn't agree with what I now tell you the law is, you must abandon this idea, because ***you are sworn to accept the law and apply the law exactly as I state it to you***. (App., p. 158).

It's clear that the trial judge instructed the jury, without objection from defense counsel, that White's guilt could be founded under either the criminal theory of conspiracy or attempt to trafficking in twenty-eight grams or more of heroin. Next, the court must decide whether it was reversible error to give such an instruction in the absence of evidence presented at trial.

iii. It was reversible error to charge the jury it could consider conspiracy when deliberating White's guilt, where no evidence supporting the charge was presented at trial, and the charge was confusing to the jury and prejudice to White.

"An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court committed an abuse of discretion. *Clark v. Cantrell*, 339

S.C. 369, 389, 529 S.E.2d 528, 539 (2000). An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence." *Cole v. Raut*, 663 S.E.2d 30, 33, 378 S.C. 398 (S.C., 2008).

The PCR Order denying White's argument that defense counsel was ineffective for failing to object to the trail judge charging the jury it could find White guilty under the criminal principal of conspiracy, and the trial judge charging such charge, where no evidence was introduced at trial upon which conspiracy could be found, on the reasoning that the, "United States Supreme Court and South Carolina law makes (sic) clear that a court may define an offense to a jury by charging the full language of the statute, even when not every term is applicable in the given case." (App., pp. 296). The Order referenced *City of Columbia v. Moser*, 280 S.C. 134, 311 S.E.2d 920 (1983); *Schad v. Arizona*, 501 U.S. 624 (1991); and *Crain v. United States*, 162 U.S. 625 (1896) in support.

In *City of Columbia v. Moser*, Moser was charged and conviction for lewd act and operating a massage parlor without a license in violation of a city ordinance. *Id*. at 135. Moser challenged his conviction for lewd act, *inter alia*, on the ground that it was error for the trial court to charge the jury the entire statute where no evidence was present on the criminal principals of assignation and prostitution found in the language of the ordinance. *Id.* at 137. The ordinance read, in pertinent part:

> It shall be unlawful to: (5) Reside in, enter or remain in any place, structure, building, vehicle, trailer or conveyance ***for the purpose of lewdness, assignation or prostitution***;
> ....
> (7) Receive any person ***for purposes of lewdness, assignation or prostitution*** into any vehicle, conveyance, trailer, place, structure or building;

> (8) Permit any person to remain ***for the purpose of lewdness, assignation or prostitution*** in any vehicle, conveyance, trailer, place, structure or building;
> ....
> (10) Lease or rent or contract to lease or rent any vehicle, conveyance, trailer, place, structure or building or part thereof believing or having reasonable cause to believe that it is intended to be used for any of the purposes herein prohibited.

City of Columbia v. Moser, 280 S.C. at 136 (S.C. 1983). The South Carolina Supreme Court sustained Moser's conviction on appeal. The Court reasoned: "[w]e hold that the language complained of is not so ***offensive or confusing that reasonable minds would be mislead or prejudiced*** by the reading thereof." *Id.* at 137. *Moser* was decided in 1983. The *Moser* Court, appears to have created an exception to the general rule that: "[i]t is reversible error to charge a correct principle of law as governing a case when such principle is inapplicable to the issues on trial." *Cole v. Raut*, 617 S.E.2d 740, 743, 365 S.C. 434 (S.C. 2005); *quoting*, *Miller v. Schmid Laboratories, Inc*., 307 S.C. 140, 142-143, 414 S.E.2d 126, 127 (1992). This general rule can be traced back in South Carolina jurisprudence to at least 1881 in the South Carolina Supreme Court's decision *Thompson v. Sexton*, 15 S.C. 93 (S.C. 1881), and has been consistently applied in many opinions over the centuries. I think the rule was best expressed in our Supreme Court's decision in *Wright v. Harris*, where the court stated that:

> ***[I]t is reversible error to charge a correct principle of law as governing a case when such principle is inapplicable to the issues on trial***. *Thomson v. Sexton*, 15 S.C. 93. Conflicting and irrelevant instructions constitute reversible error. *Citizens Bank of Darlington v. McDonald*, 202 S.C. 244, 24 S.E.2d 369; and ***a trial Judge ought to take care not to confuse the jury by charging them on legal principles which are inapplicable to the case on trial***, *Jennings v. Clearwater Manufacturing Company.*, 171 S.C. 498, 172 S.E. 870.

Wright v. Harris, 228 S.C. 144, 148, 89 S.E.2d 97, 98 (S.C. 1955). *See also*, *State v. Washington,* 338 S.C. 94, 526 S.E.2d 709 (SC 2000) ("Because Defendant's 'technicality' theory has no merit, the trial judge did not err in refusing to charge the statutory sections inapplicable to the current case. ***Jury instructions by the court of irrelevant and inapplicable principles may be confusing to the jury and can be reversible error***."); *McCullough v. The American Workmen*, 200 S.C. 84, 20 S.E.2d 640 (S.C. 1942) ("We are of the opinion that the complaint did not state an action for fraud in inducing the contract, and that ***the charge as to this question was irrelevant, immaterial, misleading, and prejudicial, and therefore erroneous***. We are also of the opinion that his Honor erred in refusing appellant's motion for a new trial, made upon the ground that the question of fraud in inducing the contract had been erroneously submitted to the jury, and that the plaintiff had elected to sue for a fraudulent breach of the contract"); *Miller v. Schmid Laboratories, Inc.*, 307 S.C. 140, 142-143, 414 S.E.2d 126, 127 (S.C. 1992) ("***The instructions by the court of irrelevant and inapplicable principles of law was clearly erroneous and may have been confusing to the jury***.")

iv. Charging the jury that it could consider the principle of conspiracy when considering White's guilt was reversible error because it was prejudicial.

Finally, the court must decern whether the erroneous jury charge on conspiracy constituted reversable error. "The giving of an erroneous instruction is not reversible error, unless the appellant can show that he was injured and prejudiced thereby." *Cole v. Raut,* 617 S.E.2d at 743 (S.C. 2005); *quoting*, *Ellison v. Simmons*, 238 S.C. 364, 372, 120 S.E.2d 209, 213 (1961). The United States Supreme Court and the South Carolina Supreme Court have found in multiple opinions the existence of confusion and prejudice

in cases similar to White's, where a jury was told that guilt could be found on multiple independent principals of guilt, and at least one of those principals were inappropriate charged.

In *Stromberg v. People of State of California*, the defendant was charged with violating a state statue which made it illegal to display a red flag, badge or banner in a public or private place for any of the following purposes: (1) displayed, as a sign, symbol, or emblem of opposition to organized government; or (2) was an invitation or stimulus to anarchistic action; or (3) was in aid to propaganda that is of a seditious character. 283 U.S. 359, 361, 51 S. Ct. 532, (1931). The trial court instructed the jury as follows:

> ***[I]t is only necessary for the prosecution to prove to you beyond a reasonable doubt that said flag was displayed for only one or more of the three purposes alleged in said information, and it is not necessary that the evidence show, beyond a reasonable doubt, that said red flag was displayed for all three purposes charged in said information. Proof, beyond a reasonable doubt of any one or more of the three purposes alleged in said information is sufficient to justify a verdict of guilty*** under count one of said information.

Stromberg, 283 U.S. at 364 (1931) (Emphasis added).The defendant's challenge to the constitutionality of the statute was denied by the trial court, and the jury returned a general verdict of guilty.

On appeal, the California appellate court concluded that the first of the three unlawful purposes for displaying a red flag was unconstitutionally overbroad because it could prohibit constitutional protected speech. *Id*. at 361. However, the appellate court concluded that the remaining two unlawful purposes for displaying a red flag were constitutional. *Id.* at 361. The appellate court affirmed the defendant's conviction on the ground there was sufficient evidence presented at trial to support the defendant's conviction on any one of the two remaining constitutionally, prohibited purposes for

displaying a red flag. The California Supreme Court declined to hear the case on petition. *Stromberg*, 283 U.S. at 361 (1931).

On appeal to the United States Supreme Court, the court reversed the judgment affirming the defendant's conviction and remanded the case for further consideration. The *Stromberg* Court reasoned that:

> ***The verdict against the appellant was a general one. It did not specify the ground upon which it rested. As there were three purposes set forth in the statute, and the jury was instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses, which the state court has held to be separable, was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause***. It may be added that this is far from being a merely academic proposition, as it appears, upon an examination of the original record filed with this Court, that the State's attorney upon the trial emphatically urged upon the jury that they could convict the appellant under the first clause alone, without regard to the other clauses. It follows that instead of its being permissible to hold, with the state court, that the verdict could be sustained if any one of the clauses of the statute were found to be valid, the necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld.
>
> * * *
> ***The first clause of the statute being invalid upon its face, the conviction of the appellant, which so far as the record discloses may have rested upon that clause exclusively, must be set aside***.

Stromberg, 283 U.S. at 367-370 (Emphasis added); *See also*, *Zant v. Stephen*, 462 U.S. 862, 881, 103 S.Ct. 2733 (1982) (*One rule derived from the Stromberg case requires that a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground.*). The cases in which this rule has been applied all involved general verdicts based on a record that left the

reviewing court uncertain as to the actual ground on which the jury's decision rested. *See, Street v. New York*, 394 U.S. 576, 585-588, 89 S.Ct. 1354 (1969) (A general verdict of guilty must be set aside if it cannot be satisfied from the record that the verdict was not based upon the unconstitutional theory.); *Williams v. North Carolina*, 317 U.S. 287, 292, 63 S.Ct. 207 (1942) ("It therefore follows here as in *Stromberg v. California*, 283 U.S. 359, 368, 51 S.Ct. 532, 535, 75 L.Ed. 1117, 73 A.L.R. 1484, that if one of the grounds for conviction is invalid under the Federal Constitution, the judgment cannot be sustained."); *Yates v. United States*, 354 U.S. 298, 312, 77 S.Ct. 1064 (1957) ("Further, in order to convict, the jury was required, as the court charged, to find an overt act which was 'knowingly done in furtherance of an object or purpose of the conspiracy charged in the indictment,' and we have no way of knowing whether the overt act found by the jury was one which it believed to be in furtherance of the 'advocacy' rather than the 'organizing' objective of the alleged conspiracy…. ***In these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected.****"*).

This issue has also been clearly decided by the South Carolina Supreme Court. In *Cole v. Raut*, Cole filed suit against Raut for medical negligence during the birth of her son, who suffered severe complications during delivery and later died. *Cole v. Raut*, 617 S.E.2d at 741 (S.C. 2005). Prior to surgery, Cole elected to have a vaginal birth after cesarean section ("VBAC") induced by medications. *Id.* at 741-742. She signed a form acknowledging the risks associated with VBAC, and the need of delivery by C-section in event of an emergency. *Id.* at 742. During the course of VBAC delivery, Raut concluded

that complications arose that necessitated C-section birth. *Cole v. Raut*, 617 S.E.2d at 742 (S.C. 2005). Expert witness testimony conflicted as to whether Raut failed to timely abandon the VBAC delivery and proceed to C-section birth. *Id.* at 742.

During trial, Raut moved to amend her answer to include a defense of assumption of the risk, which the court reserved ruling until after the close of evidence. *Id.* at 742. Over the objection of Cole, the trial judge granted Raut's request to charge the jury with assumption of the risk. *Id.* at 742. The jury returned a general verdict in favor of Raut. *Id*. at 742. The case rose on appeal to the South Carolina Supreme Court on the issue of whether the trial jury errored by charging the jury with assumption of the risk defense. *Id.* at 743. The Supreme Court found the trial court err, and reasoned:

> The doctrine of assumption of risk involves an intelligent and deliberate choice between a course known to be dangerous and what is not dangerous. It involves the taking of a calculated risk… The doctrine is predicated on the factual situation of a defendant's acts alone creating the danger and causing the accident, with the plaintiff's act being that of voluntarily exposing himself to such an obvious danger with appreciation thereof which resulted in the injury.
>
> * * *
>
> In the present case, Cole signed a consent form acknowledging the risks associated with the VBAC procedure (vaginal birth)… However, ***nothing in the record suggests Cole assumed the risk associated with a delayed C-section delivery of her child following her decision to undergo the VBAC***. Cole had no knowledge of the danger posed by a delay between the warning signs and the time the C-section was commenced… ***As a result, the trial judge erred in charging the jury on assumption of risk***.
>
> * * *
>
> ***In the present case, the erroneous charge of assumption of risk was irrelevant and inapplicable to the Coles' allegations***. The evidence demonstrates that while Cole may have assumed the risk for the VBAC procedure, she never assumed the risk for a delayed C-Section delivery, which was the basis of the Coles' causes of action. ***The assumption of risk charge had the potential to confuse the jury concerning the underlying factual basis of the Coles' claims and availed Raut with a defense that***

> ***was not supported by the evidence***. As a result, the Coles were prejudiced by the erroneous charge.

Cole v. Raut, 617 S.E.2d at 743-744 (S.C. 2005).

Just as in *Cole*, *Stromberg*, and *Yates*, White was prejudice by charging the jury his guilt could be found criminal liable on the principal of conspiracy, where no evidence was presented at trial to support the charge, because it provided the State with an additional avenue of guilt it should not have had, and wrongfully increased the probability of a guilty verdict. There are only three possible scenarios that could explain the jury's general verdict of guilt: (1) all twelve jurors could have individually concluded beyond a reasonable doubt that White "conspired" to purchase twenty-eight grams or more of heroin with no reliance on the attempt language in the jury instructions; (2) all twelve jurors could have individually concluded beyond a reasonable doubt that White "attempted" to purchase twenty-eight grams or more of heroin, with no reliance on the conspiracy language in the jury instructions; or (3) all twelve jurors could have individually conclude beyond a reasonable doubt White was guilty, with some having been persuaded by the principal of conspiracy and some having been persuaded by the principal of attempt. If scenarios one or three occurred, the jury verdict of guilty was based upon an erroneously charged principal of law. Therefore, there is at least a two-thirds (2/3) or sixty-six percent (66%) chance that the verdict was based upon an error of law.

Furthermore, the prosecutor acknowledged in his testimony the prejudice presented to White by telling the jury conspiracy was one of the acceptable principles of guilt it could consider.

Q: So the Judge charged … the jury that it could find Mr. White guilty under either the theory of conspiracy or the theory of attempt … to purchase 28 grams or more even though it wasn't heroin?

A: Yes, sir. (App., pp. 212-213).

* * *

Q: And the reason that I'm asking that question is that I'm trying to figure out whether or not there was any language that was contained within the jury instructions that would clarify to the jury, or make clear to the jury that the theory of conspiracy was not being offered by the State as a theory in which they could find Mr. White guilty of trafficking?

A: I do not recall anything specifically being said to that effect.

Q: Okay. All right. So the jury is informed that they could find him guilty based upon the theory of conspiracy?

A: They are charged on the law that the Judge charged them on. I don't know, I guess, yes, there could be a way that you would read that to say that they could find him guilty under the conspiracy theory.

Q: Okay. Is it possible for the jury, and that's what I'm trying to figure out … is it a real possibility that the jury could conclude that a conspiracy is a theory that is available to us in which we could find the defendant guilty?

A: Based upon my reading of the transcript I would think so. (App., pp. 213-214).

* * *

Q: And I think you've already established that you said that it's reasonably possible, no one knows but it's reasonably possible that the jury could have concluded that conspiracy was a valid theory in which they could find him (White) guilty?

A: I ready don't know if I can speculate on what a jury decided to do. I mean the conspiracy was charged to the jury under the charge it's one of the options that they could have found him guilty. Yes sir. (App., p. 223).

It is reasonably foreseeable that the State may argue that the verdict should be affirmed based on the two-issue rule. Reliance on such rule under the circumstances would be misplaced. "Under the 'two issue' rule, when the jury returns a general verdict

involving two or more issues and its verdict is supported by as to at least one issue, the verdict will not be reversed on appeal." *Anderson v. South Carolina Dept. Highways and Public Transp*., 322 S.C. 417, 419-420, 472 S.E.2d 253, 254 (S.C. 1996), *quoting*, *Todd v. South Carolina Farm Bureau Mut. Ins. Co*., 287 S.C. 190, 193, 336 S.E.2d 472, 473-474 (S.C. 1985). However, the Supreme Court in *Raut* made clear the two-issue rule will not defeat an Appellant's claim of prejudice where a reasonable probability exists a jury was confused by principles of law erroneously charged. Furthermore, the Court reasoned to apply the two-issue rule under the circumstances present in this case would discover trial judges from correcting errors of law and would place a heavy burden on trial lawyers to request a special verdict form in every case.

CONCLUSION

Appellant's trial counsel was ineffective where he failed to object to trial court charging the jury that his guilt could be found under the principle of conspiracy where there was no evidence present at trial warranting the charge.

Sincerely,

April 17, 2023

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