

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
COURT OF GENERAL SESSIONS

Kristi L. Harrington, Circuit Court Judge

Case No.: 2010180066

State of South Carolina..... Respondent,

v.

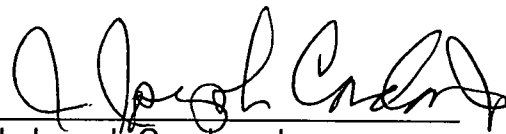
Jason Thomas Husted..... Appellant.

PETITION FOR REHEARING OR REHEARING *EN BANC*

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JUL 15 2013

SC Court of Appeals



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The Appellant petitions this Court for a rehearing of its decision filed on June 26, 2013. In upholding the Circuit Court's decision to deny the directed verdict by the Appellant and the failure to properly charge the jury, this Court likewise overlooked and misapprehend both the facts and the law which require a reversal of the guilty verdict in this case.

FACTUAL BACKGROUND

On June 13, 2009, there was a fight between two men at the Back Nine Pub which is located in a small strip shopping center. The Appellant was not involved in the fight. (R. p. 108, line 24 - p. 109, line 23) The Back Nine Pub is in the City of Charleston located on Ashley River Road. The City of Charleston Police responded to the scene. Three police officers, Lt. Daniel M. Riccio, Officer Terri Ann Ferguson and Officer Christine DeVasto testified about this incident on behalf of the State. The Appellant and several patrons testified for the Appellant. Lt. Riccio arrived first at the scene. He did not observe the fight. The fight was over by the time Lt. Riccio arrived. (R. p. 10, lines 9-11) When Lt. Riccio initially arrived, he handled, in the front of the shopping center, an individual, Robert Gass, who allegedly had illegal possession of a gun. That charge involving Robert Gass was later dismissed. (R. p. 114, lines 15-18). When Officer Ferguson and DeVasto arrived at the scene, they went to the back of the small strip center. These officers, Officers Ferguson and DeVasto, were told that other people possibly involved in the fight had went to the back of the small strip center. While in the back of the strip center, the officers spotted two men, the Appellant and Robbie Morris, in a nearby wooded area and asked them to come out. The two men complied and they proceeded out of the wooded area to the parking lot area in the back of the strip center.

Lt. Riccio, after resolving the incident in the front of the business, went to the area in the back of the strip center. All three officers testified that they were conducting an investigation into what occurred and were making an investigative stop as to the Appellant. In the back parking lot area, the Appellant walked pass Officers Ferguson and DeVasto after leaving the wooded area. The Appellant did not stop and continued to move to the front of the shopping center. Officer Ferguson gave verbal commands to the Appellant to stop. Officer Ferguson testified she handcuffed one hand of the Appellant. (R. p. 47, line 12) The officers physically restrained the Appellant and the Appellant was pepper sprayed by Lt. Riccio in order to effect the seizure of the Appellant.

LEGAL ANALYSIS

- I. THIS COURT IGNORED KEY FACTS AND MISAPPREHENDED THAT THE ISSUE IN THIS CASE WAS THAT THERE NEEDED TO BE PROOF THAT THE CRIME OF DISORDERLY CONDUCT HAD BEEN COMMITTED PRIOR TO THE ARREST OF THE APPELLANT

At the close of the State's case, the Appellant moved for a directed verdict. The basis of that motion was that there was no evidence of the crime of disorderly conduct prior to the Appellant's arrest. The three officers testified that they were making an investigative stop (R. p. 20, lines 15-21; p. 21, lines 20-22; p. 58, lines 10-12; p. 59, lines 19-21; p. 78, lines 8-10). The Appellant was compliant leaving the wooded area (R. p. 13, lines 10-13; p. 46, lines 2-7). The Appellant continued to walk pass Officer Ferguson and did not comply with her command to stop. At that point, Officer Ferguson proceeded to detain the Appellant. In the Indictment, the Appellant was charged under S.C. Code §16-9-320(B) which requires an arrest of the individual (R. p. 4). S.C. Code Ann. §16-9-320(B) does not allow for the detention of

a person, only the arrest of a person. At that point, the detention process by the police began for the Appellant. There was no evidence of disorderly conduct prior to the detention of the Appellant.

This Court combines the information the officers received from bystanders and the acts of the Appellant after detention began to argue that the Appellant was disorderly prior to the Appellant's detention. The officers needed to justify the arrest of the Appellant. The officers agree that the Appellant was compliant leaving the wooded area (R. p. 13, lines 10-13; p. 46, lines 2-7). The video submitted into evidence corroborated that fact (R. p. 197). Even if it is admitted that the Appellant resisted detention, there is no evidence the Appellant resisted an arrest for disorderly conduct. The Appellant was never detained for disorderly conduct but merely because he continued to walk pass the officers. There needed to be an antecedent event or behavior before the arrest. This Court's analysis bootstraps the resistance to the investigative stop into an arrest for disorderly conduct. S.C. Code §16-9-320(B) simply does not allow for a conviction for resistance to detention.

II. THAT A JURY CHARGE NEEDED TO BE GIVEN EXPLAINING WHAT WAS A LAWFUL ARREST AS AN ESSENTIAL ELEMENT OF THE OFFENSE OF RESISTING ARREST OR ASSAULT ON A POLICE OFFICER WHEN RESISTING ARREST.

The Trial Court throughout its jury charge referenced a "lawful arrest." The Trial Court stated that "the Defendant is charged with assaulting a law enforcement officer while resisting a lawful arrest" (R. p. 190, lines 19-20). Again, the Court states that..."the State must first prove beyond a reasonable doubt that the defendant knowingly and willfully resisted a lawful arrest being made by a person that the defendant knew or

reasonably should have known was a law enforcement officer.” (R. p. 191, lines 1-6). Again, the Trial Court in its charge references that “[a] citizen is not required to submit to a illegal arrest and may use such force as is reasonably necessary to prevent an unlawful arrest. Separate and distinct from the law of self defense is the right of any citizen to resist an unlawful arrest” (R. p 191, lines 14-18). The term “lawful arrest” should have been defined by the Court. Only then could the jurors understand what that legal term meant. Black’s Law Dictionary 7th Ed. defines a lawful arrest as “the taking of a person into legal custody either under a valid warrant or probable cause that the person has committed a crime.” By failing to define what a lawful arrest was, there is a presumption that all of the actions of the police officers were lawful. There is prejudice to the Appellant by failing to define what were the requirements of a lawful arrest. It creates a different context if the phrase “lawful arrest” is defined where there is a requirement that a crime be committed, in this case, a misdemeanor, in the presence of the officers. In Article V, Section 17 of the South Carolina Constitution requires the judge to declare the law. This provision requires the judge to explain so much of the criminal law as is applicable to the issues made by the evidence introduced at trial. See State v. Stone, 285 S.C. 386, 330 S.E.2d 286 (1985). The evidence at trial was that the defendant was disorderly but there was no explanation of whether there was probable cause that that crime had been committed prior to the Appellant’s detention. There needed to be an explanation of what a lawful arrest for disorderly conduct was in order for the jury to understand the proper context. The indictment as well as the Trial Court’s charge made whether there was a lawful arrest an issue in the case.

Explaining what a lawful arrest is becomes especially important since S.C. Code

§16-9-320 does not address the issue of detention, but merely arrest. By failing to define what a lawful arrest was, there was presumption that the police were acting lawfully when they detained the Appellant.

In the State v. Williams, 280 S.C. 305, 312 S.E.2d 555 (1984), the Court states that to be guilty of this offense of assaulting a police officer, the officer must be attempting to make a valid arrest (emphasis added). For there to be a valid arrest there must a lawful arrest and the Trial Court in the case should have explained to the jury what that was. That there was probable cause that a crime of disorderly conduct had been committed in the presence of the police officers prior to the detention of the Appellant.

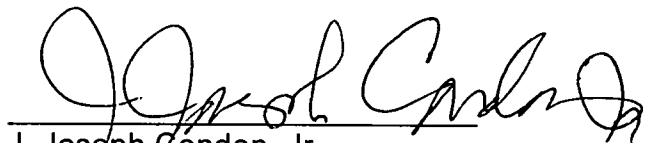
The fundamental question in determining whether an arrest is lawful is whether there was probable cause to make the arrest.” State v. Dunbar, 354 S.C. 479, 581 S.E.2d 840 (2003) (reversed on other grounds State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003) (quoting Wortman v. City of Spartanburg, 310 S.C. 1, 425, S.E.2d 18 (1992)). An explanation of what a lawful arrest requires should have been instructed to the jury. The context would have been totally different in looking at this case if the issue would have been whether the behavior of the Appellant prior to his detention was disorderly. Walking away from the officers is not conducting oneself in a disorderly or boisterous manner. Also, the officers may have testified that the Appellant was intoxicated, but S.C. Code §16-17-530 requires that a person be grossly intoxicated (emphasis added). By failing to define what disorderly conduct was and whether there was a lawful arrest for disorderly conduct, Appellant’s case was seriously prejudiced.

Lastly, S.C. Code §16-9-320, the resisting arrest statute, was modified in 1990 and the express phrase of "lawful arrest" was simply modified to "arrest." Other language was added to §16-9-320 such as "the arrest being made by one whom the person knows or reasonably should know is a law enforcement officer..." 1990 S.C. Acts 598. The legislature could have addressed the issue of detention and did not. The statute still requires an arrest. The legislature may have viewed the phrase "lawful arrest" as redundant. The arrest still needs to be lawful and a crime must still proceed an arrest. That is why an explanation of what a "lawful arrest" was so important and the failure to provide was highly prejudiced.

CONCLUSION

The Appellant prays that this Court reconsider its decision and rehear this matter or revise its opinion and reverse the Circuit Court's ruling and grant a new trial or dismiss this case.

Respectfully Submitted,

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PROOF OF SERVICE

I certify that I have served the Appellant's Petition for Rehearing or Rehearing *En Banc* on Respondents, by fax and regular U.S. Mail, postage prepaid, on July 11, 2013, addressed to its attorney of record as follows:

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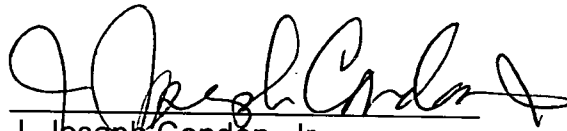
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