RECEIVED
Dec 12 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions
The Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No. 2019—001570

State of South Carolina……Respondent,

vs.

Devin Zachary Elijah Ruttle……Appellant.

MOTION FOR REHEARING
PURSUANT TO RULE 221, SCACR

Appellant hereby moves the Court for rehearing pursuant to Rule 221, SCACR. This Motion is being made in good faith and for good cause as the Court has overlooked several of Appellant's main arguments, resolution of which in the favor of Appellant would result in a decision in favor of Appellant. Specifically, and despite briefing and extensive argumentation during oral arguments, the Court has overlooked and failed to address Appellant's following arguments:

1. The fact that the trial judge requested a hearing on Appellant's Motion for New Trial clearly evidences that Appellant's established a prima facia case of juror concealment based on Appellant's written Motion and supporting Affidavits and photographic and video evidence. Despite having established a prima facia case of juror concealment and the fact that "[i]t is the duty of the trial judge to ascertain the qualifications of the jurors, and when the discharge of this

responsibility is thwarted by mischance, or otherwise, it is within the court's inherent power to remedy the situation when brought to his attention," this Court's opinion completely overlooks the fact that the trial judge has an obligation and duty to act and inquire into the question of juror concealment and, if necessary to answer questions brought to the court's attention, to sua sponte summon and question jurors himself to protect the fundamental right of all parties to a fair and impartial jury. State v. Coaxum, 410 S.C. 320, 327, 764 S.E. 2d 242 (2014). Accordingly, in the face of a prima facia case of juror concealment that warranted an evidentiary hearing and the absence of any countervailing evidence from the State refuting the unity of identity of the juror in question and the girl who attended Appellant's church, the trial judge had a duty to summon and question the juror in question if he felt questions remained as to her identity or whether she engaged in juror concealment. Overlooking the duty of the trial judge to inquire into the apparent juror concealment brough to his attention also resulted in this Court apparently requiring that Appellant establish the question of juror concealment by clear and convincing evidence. Although other areas of juror misconduct do impose such a burden on movants, the Court clearly overlooks that the clear and convincing standard has never been applied to the question of juror concealment. This oversight clearly resulted in the Court imposing an incorrectly elevated burden on Appellant to establish that he was entitled to a new trial.

2. The Court's opinion clearly overlooked the case of State v. Johnson, and numerous other opinions from jurisdictions throughout the country that hold that, even in a criminal case where identity must be established beyond a reasonable doubt, concordance of name alone is sufficient to show unity of identity particularly where the name in question is sufficiently uncommon and the opposing party offers no evidence to rebut the unity of identity. 350 S.C. 543, 548, 567 S.E.2d 486, __ (Ct. App. 2002) ("The State proffered certified copies of court records showing that a

Demarco Johnson pled guilty in 1997 to two [charges]. Johnson offered no evidence to suggest he was not that Demarco Johnson. Under these circumstances, the evidence was sufficient to show that Johnson and the individual previously convicted were one and the same."); id. at 548 n.17, 567 S.E.2d at __ n.17 (citing Lewis v. State, 234 Ga.App. 873, 508 S.E.2d 218, 222 (1998) for the holding that "where the defendant presented no evidence contradicting that he was the person named in the certified court documents, '[c]oncordance of name alone is some evidence of identity' and was sufficient to show the defendant and the individual previously convicted were the same person" and Murphy v. State, 399 So.2d 340, 346 (Ala.Crim.App.1981) for the holding that a "certified copy of prior conviction of individual with the same name as the defendant was sufficient as it 'raised a prima facie presumption of the sameness of the person' and '[t]here was no attempt to rebut that presumption'); see also State v. Wooten, 92 S.C. 61, 64, 75 S.E. 212 (1912) (affirming conviction and increased repeat offender sentence based on identification of defendant "Ed Wooten" through the admission of court records that disclosed the prior conviction of one "W.E. Wooten"); California v. Luckett, 1 Cal.App.3d 248, 253 (Cal. App. 1969) (holding "the name Samuel Luckett is sufficiently uncommon that, quite apart from the testimony of the witnesses, the finding of identity of person is supported by an inference based on identity of name" and that "the strength of the inference will depend in particular cases on whether the name is common or unusual."); Hefferman v. United States, 50 F.2d 554, 557 (3rd Cir. 1931) (holding that evidence of the "same very unusual name" with the "same address" in the "same city" was sufficient to establish identity); see, e.g., Idaho v. Lawyer, 244 P.3d 1256, 1260 (Idaho App. 2010) (compiling cases and holding that "a combination of personal and nonpersonally identifying evidence, when considered together, may at some point be sufficient to establish identity beyond a reasonable doubt. To hold otherwise is to require absolute certainty which the reasonable doubt

standard does not require."). In addition to overlooking for foregoing weight of cases from both South Carolina and numerous other jurisdictions, the Court also overlooked the numerous and unrefuted corroborating facts presented to the trial court through live testimony and documentary evidence and to this court through analysis of Social Security Administration, Baby Names from Social Security Card Applications - National and State-Specific Data that clearly supported the conclusion, to a high degree of certainty, that a unity of identity existed between Nysha and Juror 92, Nysha Jefferies.

3. The Court's opinion clearly overlooks the fact that a grandparent is in fact a parent and that the recent jurisprudence of this Court, the South Carolina Code, and Code of Regulations all include a grandparent in the definition of "immediate family." Dorchester Cnty. Assessor v. Middleton Place Equestrian Ctr., LLC, 414 S.C. 453, 467, 778 S.E.2d 919, 926 (Ct. App. 2015) ("Our review of the record reveals that in 1970, Duell inherited this property from his grandfather, an immediate family member."); see S.C. Code Ann. § 8-11-40(C) (defining "immediate family" for state employee sick leave as including a grandparent of an employee or his spouse); S.C. Code Ann. § 8-11-177(A) (defining "immediate family" for state employee bereavement leave as including a grandparent of an employee or his spouse); S.C. Code Ann. § 7-15-310(8) (stating for purposes of absentee voting that "Immediate family" includes a person's grandparents); S.C. Code Ann. § 37-22-110(21) ("Immediate family member" includes a grandparent); S.C. Code Ann. § 12-36-1710(E) (establishing that for taxation purposes "immediate family" includes grandparents); S.C. Code Ann. Regs. 61-106.1.2 (establishing sick leave for state employees to care for ill members of "immediate family," which includes grandparents); S.C. Code Ann. Regs. 19-712.01 (establishing "Death in Immediate Family Leave" for state employees and defining "immediate family" as including grandparents of either an employee or a spouse). Mr. Rosemond

was clearly an immediate family member of Juror 92 and it is clear oversight for the Court to deny this common sense fact.

4. The Court overlooks the fact that only well after the new trial hearing was held and even after this appeal had been submitted for this Court's consideration did the Supreme Court completely change the framework for the analysis of juror concealment issues. The complete break from forty years of juror concealment jurisprudence completely shifted the focus of the analysis and the relevant elements that should be considered in determining whether a party is entitled to relief. If the Court intended to decide this appeal based on the new framework, including imposing a requirement upon Appellant to establish bias, it should have directed the parties to hold a new hearing on the new trial motion to ensure that both parties had the opportunity to examine, inquire into, and establish facts relevant to the new framework established by the Supreme Court. Failure to give the parties the opportunity to reexamine the case before the trial court essentially denied Appellant an opportunity to be present his case and be meaningful heard.

5. Despite the Supreme Court in State v. Andrews, 427 S.C. 178, 181, 830 S.E.2d 12, 13 (2019) clearly rebuking, rejecting, and overturning a trial court's denial of immunity based on the trial court incorrectly and inappropriately relying on State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013), the completely overlooked the fact that the trial court's denial of immunity to Appellant was based on the expressly rejected language of Curry and the misapplication of a misquoted civil directed verdict standard stated in Terwilliger v. Marion, 222 S.C. 185, 188, 72 S.E.2d 165, 155 (1952). Further, the Court's opinion also overlooks the fact that affirmatively citing and emphasizing Terwilliger for the proposition that "[i]f there is anything tending to create distrust in his truthfulness, the question must be left to the jury" plainly and substantially raises the burden imposed on defendants to obtain immunity under the Protection of Persons and Property Act

("PPPA"), an outcome that is clearly contrary to the legislative findings stated in the PPPA. See S.C. Code Ann. § 16-11-420(B) ("The General Assembly finds that it is proper for law-abiding citizens to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others.").

6. The Court also overlooks the fact that doing something that may in retrospect be unwise because it affords an opportunity for conflict does not forfeit one's right to self-defense where the act was not willingly and knowingly calculated to conflict. State v. Douglas, 411 S.C. 307, 321 n.8, 768 S.E.2d 232, 240 n.8 (Ct. App. 2014) (affirming grant of immunity under subsection 440(C) and trial court's "implicit finding" that respondent was without fault despite respondent having prior violent experience with decedent whereby he "should have known that sharing almost two full bottles of vodka with [decedent] was a bad idea" because "[o]ne who merely does an action [that] affords an opportunity for conflict is not thereby precluded from claiming self-defense…Before an act may cause forfeiture of the fundamental right of self-defense it must be willingly and knowingly calculated to lead to conflict") (emphasis in original; citation omitted). Regardless of the fact that a Monday-morning quarterback sitting on the bench or in a jury box might see Appellant's desire to speak with the decedent as unwise and creating the possibility for conflict, none of the actions cited by the Court, i.e. Appellant's friend had problems with the decedent, Appellant drove by the decedent going to and from a store, and approaching the decedent with a weapon that was concealed until the decedent pulled out a knife and charged Appellant, establish that Appellant's actions were willingly and knowingly calculated to lead to conflict.

7. The Court overlooks the fact that it was an error of law to affirm the trial court's decision despite this Court clearly making factual findings that are directly contrary to essential findings of the trial court that were necessary to support the denial of immunity to Appellant. Specifically the

Court overlooks the fact that its findings are clearly contradict the trial court's findings that decedent was approached by three men and that Appellant confronted the decedent with a gun. The absence of these clearly unsupported findings by the trial court completely undermines the denial of immunity to Appellant. Moreover, the Court ignores the fact that the absence of these unsupported facts from the trial court's opinion further highlights the fact that necessary elements of the trial court's decision to deny immunity were based on rank speculation and not evidence.

8. Finally, while applying the new framework for the juror concealment question despite the fact that the new framework was not and could not have been argued by the parties either before the trial court of the Court of Appeals, the Court, despite acknowledging that the trial court did in fact err with regard to undercutting Appellant's Constitutional right to self-defense, refused to find that the issue concerning the jury instructions could be properly raised. The parties could no more have raised the issue stated in State v. Smith, 430 S.C. 226, 229, 845 S.E.2d 495, 496 (2020) than they could have the new juror concealment framework. Despite the rule laid down in Smith clearly constituting a new rule that arose subsequent to the trial of this case, both the United States and the South Carolina Supreme Courts have clearly stated that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." Griffith v. Kentucky, 479 U.S. 314, 328,(1987); State v. Jones, 312 S.C. 100, 439 S.E.2d 282 (1994) (holding that a new rule of criminal law that does not warrant full retroactivity shall apply retroactively only in those cases pending on direct review at the time the new rule was decided). Moreover, in finding the trial court's error harmless the Court also ignores the holding in Smith which further states that "[f]or a constitutional error of this magnitude, '[w]e need go no further than saying we cannot conclude the error was harmless beyond a reasonable doubt.' [State

v.]Belcher, 385 S.C. [597,] 611, 685 S.E.2d [802,] 809 [(2009)] ('[W]e are firmly convinced that instructing a jury that malice may be inferred by the use of a deadly weapon is confusing and prejudicial where evidence is presented that would reduce, mitigate, excuse or justify the homicide. A jury charge is no place for purposeful ambiguity."). 430 S.C. at 233-34, 845 S.E.2d at 498-99.

BRUMBACK & LANGLEY, LLC

s/Christopher T. Brumback
Christopher T. Brumback
Spencer D. Langley
531 South Main Street, Suite 307
Greenville, SC 29601
(864) 414-9097
chris@brumbacklangley.com
Attorneys for Appellant

RECEIVED
Dec 12 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
General Sessions Court
The Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No. 2019—001570

State of South Carolina……Respondent,

vs.

Devin Zachary Elijah Ruttle……Appellant.

PROOF OF SERVICE

I certify that I have filed with the Court of Appeals and served Appellant's Motion for Rehearing on Respondent's attorneys by email on December 12, 2024.

Respectfully submitted,

BRUMBACK & LANGLEY, LLC

s/Christopher T. Brumback
Christopher T. Brumback / S.C. Bar No. 75410
Spencer D. Langley / S.C. Bar No. 77898
531 South Main Street, Suite 307
Greenville, SC 29601
(864) 414-9097
(866) 728-1205 (Fax)