STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Dec 27 2024

S.C. SUPREME COURT

Appeal from Lexington County

Honorable Debra R. McCaslin, Circuit Court Judge

Opinion No. 2024-UP-358 (S.C. Ct. App. Filed October 16, 2024)

Lower Court Case Nos. 2019-GS-32-01484-1488

THE STATE,

RESPONDENT,

V.

ANGEL MISAEL IBARRA,

PETITIONER

APPELLATE CASE NO. 2022-000774

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that pursuant to the South Carolina Court of Appeals' Opinion issued on October 17, 2024, a petition for rehearing was filed on October 31, 2024, which was denied by the South Carolina Court of Appeals on November 25, 2024.

QUESTION PRESENTED

The Court of Appeals erred in holding that no error was committed when the trial judge charged the jury on the law of accomplice liability where there was insufficient evidence presented at trial to support such a charge because there was no proof offered establishing that petitioner and another were engaged in a drug enterprise in the case.

STATEMENT OF THE CASE

Petitioner Angel M. Ibarra was found guilty of possession of methamphetamine, unlawful carrying of a pistol, trafficking in heroin, and possession of a weapon during the commission of a violent crime during a jury trial held during the May 2022 term of the Lexington County General Sessions Court before Judge Debra R. McCaslin. Petitioner was sentenced to imprisonment for an aggregate twenty-five-year term.

Petitioner appealed his convictions and sentences, but his case was affirmed by the South Carolina Court of Appeals on October 16, 2024. See State v. Angel M. Ibarra, Unpublished Opinion No.2024-UP-358 (S.C.Ct.App. filed October 16, 2024). A petition for rehearing was filed on October 31, 2024. The petition for rehearing was denied by Order dated November 25, 2024. This Petition for Writ of Certiorari seeking review of the Court of Appeals' Opinion in the case follows.

ARGUMENT

The Court of Appeals erred in holding that no error was committed when the trial judge charged the jury on the law of accomplice liability where there was insufficient evidence presented at trial to support such a charge because there was no proof offered establishing that petitioner and another were engaged in a drug enterprise in the case.

Petitioner Angel M. Ibarra was found guilty of possession of methamphetamine, unlawful carrying of a pistol, trafficking in heroin, and possession of a weapon during the commission of a violent crime during a jury trial held at the May 2022 term of the Lexington County General Sessions Court before Judge Debra R. McCaslin. Appellant was sentenced to imprisonment for an aggregate twenty-five-year term.

Investigator Meghan Dabkowski worked on the case involving petitioner and believed that narcotic activities were occurring at petitioner's residence. Officer Dabkowski stated that petitioner was seen entering the shed near the house, and that petitioner and Israel Mendoza Cervantes were seen together as well. Also, Officer Dabkowski was present when the search warrant was executed at petitioner's residence and the shed nearby. During the search, Cervantes was found in the shed and arrested. Petitioner's fifteen-year-old brother found inside the house was released later. Petitioner was neither in the house nor in the shed during the search of the properties. Guns were located in the shed and a gun was found inside the residence. A box containing a powdery substance was found in the shed, along with balloons, and a plastic bag containing a crystal-like substance. Money and scales were found inside the shed as well. Petitioner was arrested shortly after the search per a traffic stop during which time a firearm was found inside the vehicle. R. 116, l.1- R. 117, l.5; R. 153, l.2 - R. 154, l.16.

During the jury charge conference, defense counsel objected to the state's request for an accomplice liability jury charge on the ground that Cervantes' presence in the shed did not establish that he and petitioner were working together as accomplices in a drug enterprise, and hence there was no evidence to support an accomplice liability charge. R. 249, l. 10 – R. 252, l. 23. The trial judge ruled against the defense and gave the following accomplice liability charge to the jury:

> The principal in a crime is one who either in person perpetrates a crime or aids, abets and assists. When one acts in the presence of and with the assistance of another, the act is done by both. Where two or more act with a common design or common intent and are present at the commission of a crime, it does not matter whose immediate agency commits that crime because all would be guilty of that crime.
>
> Intent however is a necessary element. There must be a common design or intent to commit the crime and the crime must have been committed with the Defendant aiding and abetting by some overt act. Mere presence at a scene is insufficient to prove someone guilty of a crime. The burden is on the State to prove every element of the crime charge.
>
> If you find after reviewing all of the evidence that the state has proven that the Defendant was merely present at the scene of the crime and that they have not proven beyond a reasonable doubt any other participation in the crime then you must find the Defendant not guilty. The law says that proof of mere presence at the scene of the crime is not sufficient to find someone guilty. Of course, the law also says that the hand of one is the hand of all. The law states that a crime committed by two or more persons acting together in the commission of a crime is the act of both. R. 304, l.13- R. 305, l.17.

On appeal, the following issue was raised before the Court:

> The trial judge erred in charging the jury on the law of accomplice liability because the facts of the case did not support such a charge as there was insufficient evidence offered to connect any individual to the state's fictitious assertion that a drug enterprise existed in the case.

This Court of Appeals held the following on appeal:

> We hold the trial court did not abuse its discretion in charging the jury on the "hand of one, hand of all" theory because there was sufficient evidence presented for a jury to find that there was an agreement between Ibarra and a second individual to knowingly engage in conduct involving illegal drugs and weapons. See *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) ("An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion."); *State v. Peer*, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996) ("[T]he trial court has the duty to give requested instructions which correctly state the law applicable to the issues and which are supported by the evidence."
>
> *[See] State v. Bultron*, 318 S.C. 323, 334-35, 457 S.E.2d 616 622-23 (Ct. App. 1995) (Concluding the trial court did not err in charging the jury "on the law governing aiding and abetting and accomplice liability" in a case involving the trafficking and transportation of cocaine because, based on the circumstantial evidence presented at trial, "a jury could reasonably conclude not only that the [a]pellants were knowingly involved in the commission of a criminal act, but that there had been some planning and agreement among
>
> [See] S.C. Code Ann. § 44-53-370(e)(3)(c) (2018) explaining that under South Carolina law, a person "who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, cultivate, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of "twenty-eight grams or more of heroin is guilty of "trafficking in illegal drugs");

To the contrary, there was no proof of any accomplice liability in this case. The state attempted to bootstrap Cervantes to the case against petitioner since he (Cervantes) was found at the scene during the search of the premises. However, the state's case involved petitioner only, and any reference to Cervantes was always incidental as if his existence was seemingly happenstance and barely rose to the level of a by-stander according to the evidence presented. Cervantes did not testify at trial and the jury was offered no information about him.

Note that the state repeatedly and constantly excluded and minimized Cervantes' involvement in the case against petitioner. For example, note the following law enforcement officer's responses that indicated a marginal or diminished, and bordering on nonexistent role assigned to Cervantes in the case:

> Solicitor: And there's been a lot of talk about Mr. Cervantes. Did you have evidence that he lived with the defendant [appellant]...?
>
> Officer: No we did not. R. 230, lines 10-13
>
> Solicitor: And did you find where [Cervantes] lived?
>
> Officer: It was somewhere else.
>
> Solicitor: Okay. And did your investigation ever move to the area where Mr. Cervantes lived?
>
> Officer: The investigation stayed focused on [petitioner's address]. R. 207, lines 14-20.

Also, note below the cross examination of the investigator in the case:

> Defense Counsel: Okay. All right. And when – when SWAT came in and executed the search warrant, there was an adult male on the scene; correct?
>
> INV: Located in the shed, yes, sir.
>
> Defense Counsel: In the shed amongst all of the evidence that you collected; right?
>
> INV: Yes, sir.
>
> Defense Counsel: Okay. Who was that?
>
> INV: That was Mr. Cervantes. Israel Cervantes.
>
> Defense Counsel: Okay. All right. And [petitioner] was not there at the time; right?
>
> INV: At the time, no. R. 123, lines 4-15.

Additionally, note the solicitor's closing comments regarding the characterization of Cervantes' role as a non-entity in the case:

> Solicitor's Closing: You heard law enforcement. They had absolutely no information as to the 15-year-old brother being a part of this drug enterprise. Who was the target of that investigation? Ace, [petitioner]. [Petitioner] was the target. He was the one who was involved in this drug enterprise operated out of his home. Guns, money, drugs, and ammo. Now, I imagine that the Defense is going to try and distract you. That's his job. The Defense is going to shift all of this blame onto Israel Mendoza Cervantes. But, remember, Israel didn't live there. He lived out in Gaston. Nowhere near [petitioner]. They were associated together, yes. but law enforcement never shifted their investigation or their surveillance to Israel Cervantes's home. Who was the target? Ace, [petitioner]. R. 269, lines 9-25.
>
> [Petitioner] knows all about this. It's his enterprise that's being run out of his home...the [petitioner] knew about this drug enterprise in his home using his vehicles. R. 268, lines 14-18. [Petitioner] was the target of that investigation and through that investigation they got to Israel Cervantes. R. 261, lines 15-17.

In State v. Washington, 431 S.C. 394, 848 S.E.2d 779 (2020), the Court found that the trial judge erred in charging accomplice liability where there was no proof of the existence of an accomplice and held as follows:

> For an accomplice liability instruction to be warranted, the evidence must be "equivocal on some integral fact and the jury [must have] been presented with evidence upon which it could rely to find the existence or nonexistence of that fact." Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011). In this case, there was evidence petitioner was the shooter. The question becomes whether there was equivocal evidence the shooter, if not petitioner, was an accomplice of petitioner. Based on the evidence presented in this case, Kinloch [was] the only possible person who could fall into the category of petitioner's accomplice. Therefore, if the record contains no evidence Kinlock was the shooter, then the accomplice liability instruction should not have been given.

Thus, per the rationale in Washington, there must be evidence of an accomplice to warrant an accomplice liability instruction. Here, the state clearly recognized petitioner as their sole target with respect to the drugs and the assignment of Cervantes' role as a nonplayer, which meant there was no accomplice liability. Cervantes was merely present at the scene. The state could not hide Cervantes a non-entity, but on the other hand utilize him for insurance as a catch-all to gain a conviction base on the wording of the drug statute.[1] Under the statute, the state attempted to insert Cervantes as a participant in this alleged drug enterprise to ensure a conviction in the event there was a reasonable doubt of petitioner's guilt, or if petitioner established no actual or constructive possession over contents of the shed since he was not present at the crime scene when the search warrant was executed.

It was error to charge accomplice liability to close loopholes in the state's case and bootstrap convictions against petitioner via use of Cervantes' mere presence at the scene, particularly where petitioner was not present at the scene, and where there was no proof that petitioner had knowledge of any activities inside the shed. Furthermore, in Washington, supra, there was evidence that the defendant shot the deceased, but insufficient evidence that Kinloch was armed on that night and could have shot the deceased also, which meant accomplice liability was not applicable in the case. Compare similar facts in Wilds v. State, 407 S.C. 432, 756 S.E.2d 387 (Ct. App. 2014), where an accomplice liability charge was not proper because Wilds was the only shooter of the victim, and there was no evidence that his two associates at the time joined in with any activity (robbery) until after Wilds fired the weapon. The rule is that an alternate theory of liability may not be charged merely on the theory that the jury may believe some of the

[1] S.C. Code Ann. § 44-53-370 (e)(3)(c) (1986) states that 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 is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of four or more grams of heroin is guilty of trafficking in illegal drugs.

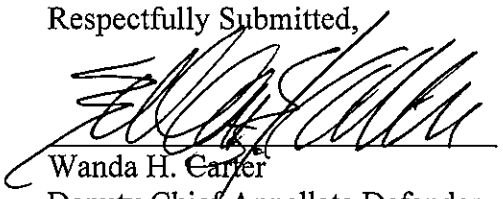
evidence or disbelieve other evidence. State v. Washington, supra. Also, mere presence at the crime scenes is not sufficient evidence of guilt. State v. Mattison, 388 S.C. 469, 697 S.E.2d 578 (2010). Furthermore, mere knowledge of a crime is insufficient evidence of guilt. State v. Mattison, supra. Moreover, mere association is insufficient evidence of guilt. State v. Mattison, supra. Therefore, Cervantes' mere presence at the crime scene on the day the search warrant was executed did not render him an accomplice in support of an accomplice liability charge. Again, Cervantes did not testify at trial and there was no evidence offered in reference to the identity of Cervantes. Finally, note that the Court in Washington held that the accomplice liability charge was not merely error, but prejudicial error because it invited the jury to speculate as to whether an accomplice existed and then return a guilty verdict on aiding and abetting when there was a lack of evidence on the same. The same prejudice resulted here in appellant's case.

The Court of Appeals erred in holding that the trial judge did not err in charging the jury on the law of accomplice liability in the case.

CONCLUSION

Based on the foregoing argument, counsel for petitioner requests that this Court grant the petition and allow full briefing on the above raised issue.

Respectfully Submitted,



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This 27th day of December, 2024.