

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County

John C. Hayes, III, Circuit Court Judge

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AUG 16 2013

S.C. Supreme Court

MASON JOHNSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-213721

BRIEF OF APPELLANT
PURSUANT TO WHITE V. STATE

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INDEX

INDEX..... 1

ISSUE PRESENTED 2

STATEMENT 3

ARGUMENT

The trial judge erred in allowing prejudicial hearsay testimony into evidence at trial because this allowed the solicitor to introduce appellant’s private confession to another through the back door when appellant neither testified at trial nor gave a statement to police and where the admission of this hearsay testimony was not harmless error as it contained information (alibi evidence) that was not cumulative to other evidence presented at trial..... 4

CONCLUSION 9

ISSUE PRESENTED

The trial judge erred in allowing prejudicial hearsay testimony into evidence at trial because this allowed the solicitor to introduce appellant's private confession to another through the back door when appellant neither testified at trial nor gave a statement to police and where the admission of this hearsay testimony was not harmless error as it contained information (alibi evidence) that was not cumulative to other evidence presented at trial.

STATEMENT

Appellant Mason Johnson was convicted of second degree burglary and grand larceny per jury trial held during the May 2010 term of the York County General Sessions Court before Judge Lee S. Alford. Appellant was sentenced to imprisonment for an aggregate period of fifteen years. App. 1-349. Kenneth D. Snow represented appellant at trial. Appellant did not enjoy the benefit of a direct appeal of his convictions and sentences.

On February 14, 2011, appellant filed a PCR application with the York County Office of the Clerk of Court. App. 353-371. Appellant's chief allegation was trial counsel's ineffectiveness in failing to file a proper notice of appeal after he (appellant) was convicted and sentenced. The respondent filed a return dated August 18, 2011, requesting that a hearing be held in response to appellant's PCR action. App. 360-365.

On December 27, 2012, appellant filed an amended PCR application alleging allegations of ineffective assistance of counsel in the case. App. 356-313.

A PCR hearing was convened on August 15, 2012, at the York County Courthouse before Judge John C. Hayes, III. App. 374-406. Appellant was present at the hearing and represented by Brad Rawlins.

On August 20, 2012, Judge Hayes issued an order including a finding that appellant did not waive his right to a direct appeal and granting his request for a belated direct appeal via White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). App. 408-411. This brief follows.

ARGUMENT

The trial judge erred in allowing prejudicial hearsay testimony into evidence at trial because this allowed the solicitor to introduce appellant's private confession to another through the back door when appellant neither testified at trial nor gave a statement to police and where the admission of this hearsay testimony evidence was not harmless error as it contained information (such as alibi evidence) that was not cumulative to other evidence presented at trial.

At trial, York County resident Earnest Gordon testified that around 8 :00 pm on November 18, 2009, he was pulling into the driveway of his home when he saw two males come from around the side of his next door neighbor's house pushing a lawnmower and other appliances toward Izzard Street nearby in Rock Hill. Gordon stated that one of the males wore a striped colored shirt and that the other wore a khaki or brown colored shirt and a matching baseball cap. Thereafter, Gordon asked his wife to call neighbor William Jackson, who was the owner of the residence next door, about this matter. Gordon recalled also that the male wearing the striped shirt stopped walking while the other male walked on toward Jones Grocery Store on Izzard Street. When police arrived at the scene per a call reporting the incident, the male wearing the striped shirt disappeared, but the male wearing the ball cap, i.e. Stephen Robinson, was arrested at the store. With respect to the male wearing the striped shirt, Gordon claimed that he had seen him "around town" and went on to make an in-court identification of appellant as one of the males he saw coming from his neighbor's house with the lawnmower and appliances. Note that no pretrial identification was made by Gordon. App. 61, l. 15-p. 67, l. 24; App. 83, l. 9-p. 86, l. 10; App. 90, l. 4-p. 91, l.7; App. 95, l. 10-p. 98, l. 1; App. 107, l. 16-p. 108, l. 4.

State's witness William Jackson testified that he arrived at the house in question, which he owned as rental property, shortly after receiving a call from the Gordons, and found that the back

door of the house had been forced open from being kicked in, and that several air conditioning units, a lawnmower, and a dryer were missing from inside the house. App. 149, l. 2-p. 54, l. 16.

Stephen Robinson testified for the state at trial. Robinson stated that on November 18, 2009, he and appellant and Monalisa MacIntosh were all living at a house located near Izzard Street in Rock Hill, and that on that same date, he and appellant entered William Jackson's rental property by breaking in the door, and that they "got" a dryer, a lawnmower, and two small air conditioning units, which they pushed (items were on top of mower) to the local store in the area. Robinson added that he was arrested in connection with the event when police appeared at that store. App. 174, l. 7-p. 184, l. 22; App. 193, l. 23-25.

State's witness Monalisa MacIntosh testified that around 9:30 p.m. on that same evening, police officers appeared at the home where she and her boyfriend (appellant) and Robinson lived and placed appellant under arrest when an air conditioning unit was seen inside their residence. App. 159, l. 2-p. 163, l. 10; App. 171, l. 20-p. 172, l. 6. Also, MacIntosh stated that petitioner wrote letters to her while he was jailed and added that one letter read as follows:

Solicitor: Now, do you remember the substance of the letter that you received from Mr. Johnson?

Ms. Macintosh: Yeah. Basically it was telling me that he wanted me to come up.

Defense Counsel: Objection.

The Court: Hold it just a minute counsel. If you're going to object, stand and object. State the nature of your objection. I can't tell who said what if you just set there.

Defense Counsel: Sorry, Judge. I apologize, Your Honor. Your Honor, it's hearsay.

Solicitor: And again, could you tell us, do you remember what it said?

Ms. Macintosh: Yes. He basically was asking me to come up to the police station make a statement saying he was with me that day and [say] Stephen was drunk and he would get probation because he doesn't have a record.

Defense Counsel: Your Honor, Judge, I'm gonna definitively object to this, Judge. Hearsay.

The Court: I sustain the objection here. That's as far as you'll go there.

App. 163, l. 14 – p. 164, l. 24.

In other words, the gist of the meaning of the letter was that appellant asked MacIntosh to create an alibi defense for him. Note that MacIntosh testified at trial that petitioner and Robinson were not in their house during the entire evening on the date in question because he (appellant) and Robinson left their home at 7:30 p.m. en route to the local store nearby. App. 160, l. 2-p. 161, l. 24. Thus, an alibi defense would have been contrary to MacIntosh's testimony. Also, Robinson's accomplice liability testimony contradicted any alibi defense as well.

As a rule, hearsay is defined as an out-of-court statement offered to prove the truth of the matter asserted. Rule 801 (c), SCRE; State v. Lindsey, 394 S.C. 354, 714 S.E. 2d 554 (Ct. App. 2011). The admission of improper hearsay into evidence would constitute reversible error where such an admission results in prejudice in a case. State v. Garner, 389 S.C. 61; 697 S.E. 2nd 615 (Ct. App. 2010); State v. Jennings, 397 S.C. 493, 716 S.E. 2d 91 (2011).

Here, the hearsay evidence was offered to prove the truth of the matter, i.e., that appellant committed the crimes and was guilty as charged, and that the proof was in his planned cover-up. The prejudice was apparent because not only was appellant's guilt inferred from the letter, but appellant's character was impugned also as the inference was that he was willing to have his girlfriend (MacIntosh) obstruct justice by requiring her to fabricate an alibi defense in connection with this case.

Moreover, the admission of this hearsay testimony was not harmless error. An admission of improper hearsay evidence is harmless when the evidence is cumulative to the other evidence presented at trial. State v. Lindsey, 394 S.C. 354, 714 S.E. 2nd 554 (2011). The substance of this hearsay evidence included alibi information, which was not cumulative to other evidence presented at trial. To the contrary, the hearsay evidence here was totally different from the evidence offered at trial as alibi was not raised or addressed at any point at trial. For example, Robinson's testimony was built around appellant's contribution as an accomplice and Gordon gave in-court identification testimony that appellant was one of the perpetrators. In Lindsey, the Court held that it was error to admit the police officer's notes regarding the interview with the defendant because this was inadmissible hearsay that improperly bolstered the police officer's testimony. Nonetheless, the Lindsey Court held that the hearsay error was not reversible error because the notes were cumulative to the defendant's statement and another police officer's testimony given at trial. Again, in the case at bar, alibi was not injected into the case at all and could not have been considered cumulative to any other evidence presented at trial.

Error is harmless if it does not contribute to the jury verdict or could not have affected the result of the trial. The materially and prejudicial character must be determined from its relation to the entire case. State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2002), citing to State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985). A court will not set aside conviction due to substantial errors not affecting the result because this is viewed as harmless, particularly when guilt has been conclusively proven by competent evidence such that no rational conclusion could have been reached. State v. Martucci, 380 S.C. 232, 669 S.E. 2d 598 (2008). In the case at bar, the state's case was strengthened and bolstered by admitting appellant's otherwise inadmissible confession through the back door, especially since appellant gave no statement and did not testify at trial. Clearly this

backdoor information, which was tantamount to appellant's testimony, surely contributed to the jurors' decision to convict appellant in the case. The instant hearsay error cannot be deemed harmless error.

This the case boiled down to Robinson's testimony implicating appellant as an accomplice and Gordon's in-court identification of appellant as a perpetrator. At first blush, the state's case might seem convincing, but a closer inspection would ultimately reveal that Robinson's testimony was not believable because he was not a credible witness. For example, Robinson admitted that he was slated to receive special considerations on the charges against him in the form of probation sentences in exchange for his testimony against appellant. App. 187, lines 2 – p. 188, l. 23; App 198, lines 9-23. Moreover, Gordon's identification held little weight because it was an in-court identification rather than an out-of-court identification that occurred prior to trial. How easy it is for a witness to point to the defendant after he has been apprehended, charged, and sitting in court to say in-court that that of course he must be the perpetrator. In other words, a careful review of the case would show that there was insufficient evidence presented to prove appellant's guilt in the case.

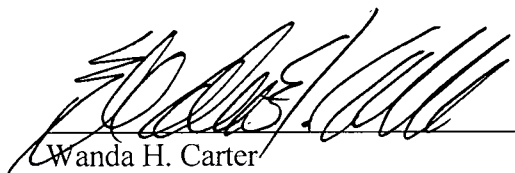
Appellant had every right to plead not guilty and put the state to its burden of proving every element of the offenses charged against him beyond a reasonable doubt. See State v Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987). The hearsay inadmissible evidence erroneously submitted in this case was tantamount to a confession and cover-up by appellant and was also extremely prejudicial. But for the hearsay evidence admitted in the case, there was insufficient proof of appellant's guilt on the offenses charged against him in the case. Hence, the hearsay evidence in question undoubtedly contributed to the jury verdicts handed down in appellant's case.

In the case at bar, the trial judge erred in allowing the jury to hear this inadmissible hearsay testimony in question at trial. This error denied appellant his right to a fair trial in the case in violation of the Fourteenth Amendment to the United States Constitution and article 1, §3 of the South Carolina State Constitution.

CONCLUSION

Based on the foregoing argument, appellant requests that the Court reverse his convictions and sentences and remand his case to the circuit court for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', is written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of August, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County

John C. Hayes, III, Circuit Court Judge

MASON JOHNSON,

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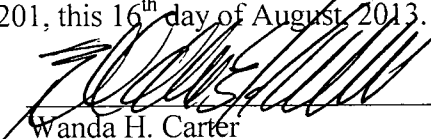
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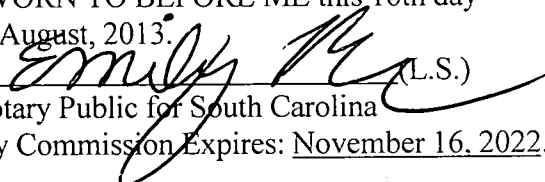
RESPONDENT

Appellate Case No. 2012-213721

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on J. Rutledge Johnson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, and Mason Johnson, #229175, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, Columbia, SC 29201, this 16th day of August, 2013.


Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 16th day
of August, 2013.

Notary Public for South Carolina
My Commission Expires: November 16, 2022.