

**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS**

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

**APPEAL FROM CHARLESTON COUNTY
Court of General Sessions**

Kristi L. Harrington Circuit Court Judge

Opinion No. 2013-UP-294 (S.C. Ct. App. filed June 26, 2013)

State of South Carolina,

Respondent,

v.

Jason Thomas Husted,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on September 27, 2013.

QUESTION PRESENTED

1. That the Court of Appeals should have held that the failure of the Trial Court to charge the jury what a lawful arrest was and the elements of a lawful arrest was reversible error.

STATEMENT OF THE CASE

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. 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. 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. Lt. Riccio later went to the back of the strip center. When Officer Ferguson and DeVasto arrived at the scene, they went to the back of the small strip center. These officers were told that other people possibly involved in the fight had went to the back of the small strip center. While in the back, 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 back parking lot area. All

three officers testified that they were conducting an investigation into what occurred and they were making an investigative stop as to the Appellant. In the back parking lot area, the Appellant continued to walk pass Officers Ferguson and DeVasto. 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. The officers physically restrained the Appellant and the Appellant was pepper sprayed by Lt. Riccio in order to effect the seizure of the Appellant.

The Appellant was arrested on June 13, 2009 for disorderly conduct and assault on a police officer while resisting arrest. He was indicted on May 10, 2010 for assault on a police officer while resisting arrest.

At the trial, the Trial Court did not charge the jury or explain to the jury what a lawful arrest was. The failure of the Trial Court to charge the jury that issue was appealed and the Court of Appeals affirmed the Trial Court's jury instructions. Petitioner seeks a writ of certiorari to review that decision.

ARGUMENT

I. THAT THE COURT OF APPEALS FAILED TO RECOGNIZE THAT THE FAILURE OF THE TRIAL COURT TO CHARGE THE JURY THE ELEMENTS OF A LAWFUL ARREST WAS ERRONEOUS AND PREJUDICIAL AND REVERSIBLE ERROR.

At the trial of the case on the charge of assault on a police officer while resisting arrest, the Trial Court failed to charge the jury what constituted a lawful arrest. The Court of Appeals reiterated part of the jury charge stating that the Trial Court "...imparted this information to the jury by including instructions that: 1) 'the State had to prove beyond a reasonable doubt that Husted 'knowingly and willfully resisted a lawful arrest,' 2) '[a] citizen is not required to

submit to an illegal arrest,' and 3) 'a person who flees a police officer's demand to stop is not committing resisting arrest.'" (App. p. 251)

There are specific elements for making an arrest, i.e., that there is probable cause that a crime has been committed and that the defendant allegedly did it. State v. Williams, 237 S.C. 252, 259, 116 S.E.2d 858, (1960). The Court of Appeals should have reversed the case because of the failure to properly charge the jury was erroneous and prejudicial. The key matter in the trial revolved around the Appellant's conduct prior to being physically detained by the police. If the Appellant did not commit a crime prior to the arrest, then there was no basis for the police arresting him and he could lawfully resist the detention. The jury could not understand what an illegal arrest was unless given proper terms or definitions to determine that there was probable cause that a crime (disorderly conduct in this case) had been committed prior to the police physically arresting the Appellant. Failure of the Trial Court to define the elements of a lawful arrest was definitely erroneous and highly prejudicial since the whole case revolved around whether the Appellant's conduct prior to being detained by the police was lawful or not.

In order to prove a resisting charge, there must be a lawful arrest. That is an essential element of the resisting arrest statute. See S.C. Code §16-9-320(B) (Cum. Supp. 2012). The Indictment in this case mentions a lawful arrest (App. p. 6). The jury needed to know what defines a lawful arrest. Merely stating the words "lawful arrest" without defining what a lawful arrest meant is an incorrect and confusing jury charge. The jury needed to realize that the State needed to prove that there was probable cause that a crime had been committed prior to the arrest of the Appellant. The Trial Court did mention "lawful arrest" (App. 194, lines 1-6), but the Trial Court did not define what a lawful arrest was or what conduct required the arrest of the Appellant. The definition of disorderly conduct as stated in S.C. Code §16-17-530 (Cum. Supp.

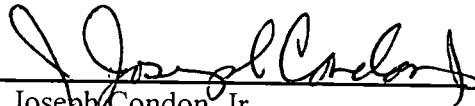
2012) was never mentioned to the jury. The Trial Court's jury charge was insufficient, erroneous and prejudicial. The jury was left to its own thoughts of what was a lawful arrest and what conduct required the arrest of the Appellant. In a sense, the burden shifted to the Appellant to explain his conduct rather than the State proving that the Appellant was disorderly prior to his arrest. The resisting arrest statute does not address the issue of detention and therefore the State was required to prove a crime had been committed prior to the Appellant's arrest.

It is important to review this case because the Court of Appeals' decision failed to address an important issue of the elements of a lawful arrest and the deficiency of the resisting statute.

CONCLUSION

For the reasons stated, petitioner asks the Court to grant the petition for a writ of certiorari and review the decision of the Court of Appeals.

Respectfully Submitted,



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October 28, 2013

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PROOF OF SERVICE

I certify that I have served the Petition for a Writ of Certiorari and Appendix on Respondent, by regular U.S. Mail, postage prepaid, on October 28, 2013, addressed to its attorneys of record as follows:

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