STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

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S.C. Supreme Court

Opinion No. 2013-UP-428 (S.C. Ct. App. filed 11/20/2013)

07-GS-10-13172

THE STATE,

RESPONDENT,

V.

ORAN SMITH,

PETITIONER

APPELLATE CASE NO. 2014-000120

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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INDEX

INDEX 1
CERTIFICATE OF COUNSEL 2
QUESTION PRESENTED 3
STATEMENT OF THE CASE 4
ARGUMENT 6
CONCLUSION 11

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 12/23/2013.

QUESTION PRESENTED

Whether the Court of Appeals erred in affirming the trial court's denial of Smith's request for a hearing pursuant to Jackson v. Denno, 378 U.S. 368 (1964) at his December 7, 2009 trial after his first trial ended in a mistrial and a Jackson v. Denno hearing was held in the first trial ?

STATEMENT OF THE CASE

On June 15 through 18, 2009, Oran Smith stood trial in Charleston County, before Judge Kristi L. Harrington and a jury, on an indictment charging him with the strangulation murder of Cheryl Snow. Smith was represented by Donna Taylor and William H. Nixon, Jr. The state was represented by Gregory K. Voight and Chad Simpson. Smith, who was one of several possible suspects, had been shot in the head in 1994 and lost an eye and some additional cognitive ability as a result. (He was already slow.) He admitted to the police that he had sex with Snow – this was not unusual, as they had dated – but insisted that he had returned to his mother's residence before Snow was murdered. Eventually, an expert police interrogator got Smith to admit that "voices" told him to kill Snow. Smith's jury could not reach a verdict, and the judge declared a mistrial.

On December 7 through 9, 2009, Smith again stood trial for Snow's murder, Judge R. Markley Dennis, Jr. presiding. Smith was again represented by Donna Taylor and William Nixon, and the state by Gregory Voight and Chad Simpson. Once again, the State's case hinged upon Smith's purported confession. Although he submitted the case to the jury, the judge first offered this frank assessment of the State's evidence:

> [W]ithout the statement ... I can tell you what this judge would have done. He would have directed a verdict. It's not there. It's just not overwhelming. There's some circumstantial evidence, but it's not substantial. There's no question the statement is a critical factor.

R. 1136, ll. 3-13.

The jury found Smith guilty as charged, and the judge sentenced him to imprisonment for thirty years. R. 1232, ll. 17 – 25.

Smith's attorney filed a notice of appeal. [1] Following oral argument, the Court of Appeals affirmed Smith's conviction and sentence. Smith's appellate counsel filed a petition for rehearing which the Court of Appeals denied on December 23, 2013. This petition for a writ of certiorari follows.

[1] The Initial Brief was originally filed pursuant to Anders v. California, 386 U.S. 738 (1967). The Court of Appeals issued an Order on May 9, 2012 directing the parties to file merits briefs.

ARGUMENT

The Court of Appeals erred in affirming the trial court's denial of Smith's request for a hearing pursuant to Jackson v. Denno, 378 U.S. 368 (1964) at his December 7, 2009 trial after his first trial ended in a mistrial and a Jackson v. Denno hearing was held in the first trial.

Cheryl Snow lived in a halfway house in North Charleston. R. 822, ll. 9-17; R. 824, ll. 8 – 23. On June 4, 2007, her body was found in her apartment. She had been murdered evidenced by the pajama bottoms wrapped around her neck. R. 810, ll. 8 – 24. Fingerprints from the apartment indicated that three men visited her over the weekend she died; Oran Smith was one of them. R. 1014, ll. 2 – 24; R. 1026, ll. 1 - After Smith's DNA was found on the ligature of the pajama pants, he was arrested. R. 66, ll. 16 – 25; R. 67, ll. 1 – 25; R. 1027, ll. 2 – 14.

Smith provided two statements to police. The first statement was the day after the victim's death in June. R. 1020, ll. 1 – 25; R. 1021, ll. 1 – 25; R. 1022, ll. 1 -5; R. 786, ll. 4 – 9. He was not arrested after that statement. In the second statement in July, he told the police voices told him to kill Cheryl after they had consensual sex. R. 1042, ll. 2 – 25; R. 1043, ll. 1 – 25.

Oran Smith did not testify at either of his two trials. R. A hearing pursuant to Jackson v. Denno, 378 U.S. 368 (1964) was held in a pretrial hearing during the first trial. The judge found that his confession statement was voluntary, and therefore was admissible. R. 45, ll. 1 – R. 155, ll. 16.

At the close of the state's case in the first trial, defense counsel renewed their motion to exclude Smith's second statement. R. 641, ll. 1 -25. The trial judge again ruled the statement was given voluntarily and was admissible. R. 660, ll. 24-25; R. 661, ll. 1 – 25; R. 662, ll. 1 -2.

The jury was deadlocked so the judge in the first trial declared a mistrial. R. 725 ll. 1 – R. 733, ll. 8.

During pretrial motions in the second trial on December 7-9, 2009, defense counsel moved for Smith's second statement in July be suppressed. Counsel said she assumed the court would redo the entire trial but she understood that the judge would not relitigate the statement issue again. R. 735; R. 786, ll. 2 – 24. The judge asked if the hearing was conducted prior to the jury being sworn to which the state responded that it was since it was a pretrial hearing. The judge asked if the evidence was fully heard. The state explained that it was, and that it was ruled on again at the closing of the state's case. R. 787, ll. 1 – 25.

The judge stated that he understood that a mistrial did not have any binding effect on either side. However, he said the Jackson v. Denno hearing was conducted specifically on a motion and did not occur during the trial of the case. He said he did not have the authority to overrule a prior decision of a circuit court judge. Therefore, he ruled that the ruling of the first trial judge, Judge Harrington, stood. He declined to have a second Jackson v. Denno hearing. R. 788, ll. 1 – 25; R. 789, ll. 1 – 15.

In State v. Woods, 382 S.C. 153, 676 S.E.2d 128 (2009), the Supreme Court held that a mistrial was the equivalent of no trial and left the cause pending in the circuit court. The Court also held that a court ruling as to the admissibility and competency of testimony during a trial which is later declared a mistrial results in no binding adjudication of the rights of the parties.

In State v. Woods, id, Woods was charged with murder, burglary and criminal sexual conduct (CSC). Woods requested a transfer of venue due to extensive pre-trial publicity. The state consented, and the transfer was granted to another county, Marion. The first trial ended in a mistrial. When the case was called for the second trial, the state withdrew its consent to transfer of venue.

The judge ruled that the trial would be held in Clarendon County, and Woods was convicted. The Supreme Court affirmed the convictions and wrote that since the first trial resulted in a mistrial, it was a nullity and began anew when called again for trial. The motion for a transfer of venue was held in a pretrial hearing before the first trial as the jurors were selected in Marion County and transferred to Clarendon County. The Supreme Court still found the rulings from the first trial were a nullity as shown by their affirming Woods' convictions.

The Supreme Court cited the case of Grooms v. Zander, 246 S.C. 512, 514, 144 S.E.2d 909, 910 (1965) which held that rulings of the trial judge in a proceeding ending in a mistrial represented no binding adjudication upon the parties as the mistrial left the parties in status quo ante.

The Court of Appeals affirmed the trial court by holding that Smith had already received a hearing pursuant to Jackson v. Denno, and since Smith did not claim there was any new circumstance, he would be entitled only to a remand for a new hearing by any judge having jurisdiction in that error. Because he had already received that hearing, the Court found no prejudicial error which was needed for reversal.

The Court of Appeals misapprehended the issue because their ruling focused on the voluntariness of the statement and that a remand would be all that was required, thus since Smith already had a hearing, a remand was not necessary because he suffered no prejudice. The Court failed to address the trial judge's ruling that pretrial motions were not part of the trial and therefore he did not have the authority to overrule the first trial judge's ruling that the statement was admissible. This was in error because the trial judge acknowledged that a mistrial had no binding effect on either side.

This ruling by the trial judge that pretrial motions were not part of the trial was in error as demonstrated by the Supreme Court's ruling in State v. Woods, Id. where the Court affirmed the conviction where the trial court changed the pretrial ruling on venue.

The Supreme Court's ruling in Grooms v. Zander, *supra,* that a mistrial left the parties in status quo ante, clarifies that pretrial motions and rulings have to be part of the trial or else the parties would not be in the same position as before because the pretrial rulings determine what evidence is admitted at trial.

In State v. Victor, 300 S.C. 220, 387 S.E.2d 248 (1989), the case rested almost entirely on the testimony of a witness. The Supreme Court ruled that "because of the egregious error in the trial judge's failure to hold a suppression hearing or to submit the issue of voluntariness to the jury of Victor's statement, which conflicted with the witness's testimony, we reverse appellant's convictions and remand the case for a new trial." The court wrote that a suppression hearing alone was not sufficient because the jury never considered the issue of voluntariness.

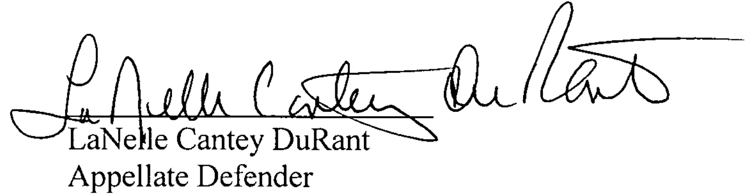
A remand for a hearing only would not be sufficient and would be prejudicial to Smith because Smith already had a mistrial where the jury hung even when the statement was admitted. As the trial judge stated, the case hinged on this second statement by Smith. His statement was the only evidence against him and there were two other potential suspects. Smith had cognitive impairments which was even more reason to insure the voluntariness of the statement. The trial court should have granted Smith's request for a new hearing pursuant to Jackson v. Denno, *supra.* Denying the request for this hearing was not harmless error based on the judge's remarks, as previously cited, and based on the solicitor's extensive referring in his closing argument of Smith's two statements. R. 1161, ll. 21 – 25; R. 1162, ll. 1 -9; R. 1165, ll. 1 – R. 1168, ll. 25.

The trial court should have granted Smith's request for a new hearing pursuant to Jackson v. Denno, *supra.* Denying the request for this hearing was not harmless error based on the judge's remarks, as previously cited, and based on the solicitor's extensive arguments in his closing argument of Smith's two statements. R. 1161, ll. 21 – 25; R. 1162, ll. 1 -9; R. 1165, ll. 1 – R. 1168, ll. 25.

CONCLUSION

Based on the above, certiorari should be granted, and the conviction should be reversed, and the case remanded for a new trial with a full suppression hearing.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER.

This 19th day of February, 2014

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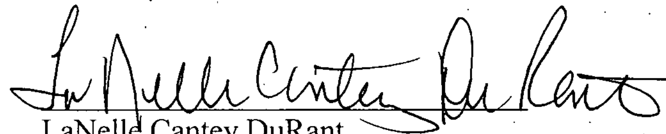
CERTIFICATE OF SERVICE

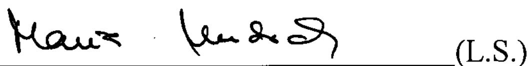
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Brendan J. McDonald, Esquire, the S.C. Court of Appeals, and Mr. Oran Smith, #338325, Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 19th day of February, 2014.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19th day
of February, 2014.


(L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.