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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County
General Sessions
Kristi L. Harrington, Circuit Court Judge

THE STATE,

Respondent,

vs.

JASON THOMAS HUSTED,

Petitioner.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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STATEMENT OF ISSUES ON APPEAL

Petitioner asks whether the court made an error of law in failing to define “lawful arrest” for the jury when that lawful arrest was a necessary element of resisting arrest.

COUNTERARGUMENT

Petitioner failed to provide any specific language in his request for a “definition” of lawful arrest, the trial court’s instructions to the jury were sufficient, and the statute no longer requires that the arrest being resisted would be a lawful arrest.

STATEMENT OF THE CASE

The Charleston County Grand Jury charged Husted with assault on a police officer while resisting arrest (2010-GS-10-2968). Husted proceeded to jury trial December 8-9, 2010, with the Honorable Kristi L. Harrington, Judge presiding. The jury found Husted guilty of resisting arrest, and Judge Harrington imposed a sentence of one year imprisonment suspended upon service of sixty days’ imprisonment and a year of probation.

Husted appealed his conviction and sentence, which was affirmed by the Court of Appeals in an unpublished opinion. State v. Husted, 2013-UP-294 (S.C. Ct. App., filed June 26, 2013). Husted now petitions this Court for writ of certiorari. The State’s return follows.

STATEMENT OF FACTS

Officer Riccio responded to a parking lot fight in progress that involved many individuals. Coincidentally, he was close to the Back Nine Pub and was on the scene seconds after receiving the call at about 2:20 AM on June 13, 2009. The Pub is in a strip-mall building, and a storage facility lies in the back of the building. R. pp. 6-8.

Officer Riccio arrived in an unmarked vehicle and turned on his blue lights. When he saw an unrelated individual carry a handgun to a truck, Officer Riccio drew his weapon and

handcuffed that person. Officer Riccio requested back-up support. Officers Devasto and Ferguson reached the scene while Officer Riccio's attention was on the man with the gun. People were still screaming. Officers Devasto and Ferguson immediately pursued two people fleeing into a wooded area. Officer Riccio followed after another officer took over the handcuffed person and Officer Riccio saw the other two officers escorting Husted - "kind of holding onto him" - out of the woods where he was hiding with another person. Both Husted and the other person that was with him were covered in blood. Husted was intoxicated and requested to not be tazed. When he reached the parking lot, he broke loose and began running toward the rear of the Back Nine Bar. Officers Devasto and Ferguson attempted to stop him. R. pp. 9-13; p. 21, lines 2-5; p. 36, lines 2-11.

Husted was belligerent, intoxicated, and uncooperative while the officers attempted to tell him that they needed to investigate. Officer Ferguson managed to handcuff only Husted's left hand before Husted began swinging the attached cuff - it became a sharp and dangerous weapon. Officer Riccio was concerned for the officers' safety and he twice applied pepper spray, which he found to not have much effect on Husted. Husted proclaimed his military training prepared him to fight through the situation, and he required an uncommon number of applications of pepper spray - at least three - to be restrained and to stop fighting. R. pp. 14-16; p. 24, lines 20-25.

Similarly, Officers Ferguson and Devasto responded to the call about an assault, a person with firearm, and physical activity in progress. On arrival, persons at the scene advised that two people involved in the physical activity fled to the rear of the business. When they went behind the building and into a wooded area, the officers announced that they were police and said, "Don't move." Husted asked the officers not to taze him, and the officers saw that the two

people were “actually covered in blood.” R. pp. 44-46; p. 60. In order to assess the situation, the officers directed the blood-covered men out of the woods. But Husted was not cooperative and ignored Ferguson’s directions and attempted to leave. Officer Ferguson testified Husted smelled of alcohol and Husted began using foul language and became belligerent and disorderly. Officer Ferguson testified that people at the front of the business would have heard Husted. Officer Ferguson, other involved persons, and everybody in the area, knew at that point that Husted was being arrested. After Ferguson put the handcuff on Husted’s left arm, Husted began swinging the other “really sharp” open part of the handcuff so aggressively that Ferguson feared for her life. R. p. 46-47; p. 57, lines 2-10; p. 58, line 10 -p. 59; p. 63; p. 69, line 13 - p. 70, line 2.

Husted testified. He claimed he tried to break up the fight and tried to get Robert Morris out of harm’s way by taking him around back and away from Jason Ayers. Husted claimed that when he was walking out of the woods, he made a smart remark but used no foul language. He put out his arms and explained to officers that he was not doing anything. He indicated who they were looking for, announced that he was going to the front of the building, and took some three or four steps. The defendant anticipated getting to the front of the bar, and police would question everyone. Instead, a female officer grabbed him. Officers put a handcuff on one wrist, and Riccio pepper sprayed him. R. pp. 127-131; p. 138; pp. 144-145. Husted claimed he did not flail a handcuff at the officers. R. p. 135. Husted also denied threatening police officers and denied he tried to hurt anybody. R. p. 138.

ARGUMENT

Petitioner failed to provide any specific language in his request for a “definition” of lawful arrest, the trial court’s instructions to the jury were sufficient, and the statute no longer requires that the arrest being resisted would be a lawful arrest.

Husted complains that the trial court erred in not instructing the jury on the definition of a lawful arrest and that it was a required element of resisting arrest. However, he never explained to the trial court what language he wanted in defining a lawful arrest. Further, the instruction was sufficient. Finally, the statute no longer requires that the arrest being undertaken is lawful.

First, the issue is not preserved for review. At trial, Husted never explained precisely what language he wanted in defining a lawful arrest. The definition of lawful arrest is not included in any of the six requests to charge that were presented to the trial court. R. pp. 199-205. Since Husted failed to make this request, the issue should not have been reviewed by the Court of Appeals.

This Court explained the preservation rule on requested charges as follows:

When given the opportunity, counsel must articulate a reason for the requested charge. Counsel need not object to the charge when given if the basis of the requested charge is clear from the record. **It is not for the trial judge to study the requested charge and make an informed decision with no further input from counsel,**

....

Gilchrist v. State, 364 S.C. 173, 178, 612 S.E.2d 702, 705 (2005) (emphasis added). What is lacking in the instant case was a proposed definition of lawful arrest for the trial court to consider vis-à-vis the instructions already provided to the jury. As discussed in Gilchrist, the trial court was not required to search for additional language or anticipate the desired supplemental language without further input from Petitioner. Therefore, the trial court did not err.

Further, the Court of Appeals correctly noted 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. If the instructions given to the jury afford the proper test for determining the issues, the failure to give one side’s requested instructions is not prejudicial. State v. Hughey, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000) *overruled on other grounds by* Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009). This language is sufficient, and as discussed above, Petitioner offered no specific language to augment the instructions. The trial court did not err.

The Court of Appeals also astutely noted that S.C. Code §16-9-320 no longer requires that the arrest being resisted is a lawful one, following the 1990 amendment to the statute. 1990 S.C. Acts 598 (cited and discussed App. pp. 250-51).

Our courts “have long acknowledged the presumption that in adopting an amendment to a statute, the Legislature intended to change the existing law.” Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 60, 644 S.E.2d 675, 678 (2006). “Because the amendment materially changed the terminology of the statute, a departure from existing law clearly was intended, rather than a clarification of original intent.” Id., 373 S.C. at 61, 644 S.E.2d at 678. The words of a statute will be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation. Hitachi Data Sys. Corp., v. Leatherman, 309 S.C. 174, 420 S.E.2d 843 (1992).

The change is consistent with the trend away from an antiquated self-help remedy to a law consistent with the needs of modern urbanized society:

Under common law, a citizen generally is permitted to use reasonable force to resist an illegal arrest. However many states have abrogated the common law by statute, or through court

holdings, reasoning the common-law rule is no longer consistent with the needs of modern society. . . .

5 Am. Jur. 2d Arrest § 89.

The policy behind such a change is well articulated by the Alaskan Supreme Court in Miller v. State, 462 P.2d 421 (Alaska 1969) as follows:

The weight of authoritative precedent supports a right to repel an unlawful arrest with force. . . . this was the rule at common law. It was based upon the proposition that everyone should be privileged to use reasonable force to prevent an unlawful invasion of his physical integrity and personal liberty.

But certain imperfections in the functioning of the rule have brought about changes in some jurisdictions. A new principle of right conduct has been espoused. It is argued that if a peace officer is making an illegal arrest but is not using force, the remedy of the citizen should be that of suing the officer for false arrest, not resistance with force. The legality of a peaceful arrest may frequently be a close question. It is a question more properly determined by courts than by the participants in what may be a highly emotional situation. Because officers will normally overcome resistance with necessary force, the danger of escalating violence between the officer and the arrestee is great. What begins as an illegal misdemeanor arrest may culminate in serious bodily harm or death.

The control of man's destructive and aggressive impulses is one of the great unsolved problems of our society. Our rules of law should discourage the unnecessary use of physical force between man and man. Any rule which promotes rather than inhibits violence should be re-examined. Along with increased sensitivity to the rights of the criminally accused there should be a corresponding awareness of our need to develop rules which facilitate decent and peaceful behavior by all.

Miller, at 426. Accordingly, "the legality of a peaceful arrest should be determined by courts of law and not through a trial by battle in the streets." Miller, at 427.

For these reasons, the Court of Appeals did not err in affirming the conviction and this Court should deny the petition for writ of certiorari.

CONCLUSION

For the above stated reasons, the petition should be denied. If this Court sees fit to grant this petition for writ of certiorari, respondent would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

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February 19, 2014

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Certiorari to Charleston County

The Kristi L. Harrington, Circuit Court Judge

THE STATE,

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JASON THOMAS HUSTED,

PETITIONER.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing party by mailing two (2) copies in the United States mail, postage prepaid:

J. Joseph Condon, Esquire
3842-C Leeds Ave.
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This 19th day of February, 2014


NORMA BIGBEE
LEGAL ASSISTANT