STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

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

Op. No. 2013-UP-428 (S.C. Ct. App. filed Nov. 20, 2013).

THE STATE,

RESPONDENT,

V.

ORAN SMITH,

PETITIONER.

Appellate Case No. 2014-000120

RETURN TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rule(s)

QUESTION PRESENTED

I. Whether the trial court committed reversible error in declining Petitioner's request for a second pre-trial *Jackson v. Denno* hearing where Petitioner's first *Jackson v. Denno* hearing was conducted prior to the jury being sworn in Petitioner's first trial which ended in a mistrial?

INTRODUCTION

Cheryl Snow ("Victim") was found dead in her North Charleston apartment on June 4, 2007. (R. 825-26). The subsequent investigation resulted in the arrest, indictment, trial and conviction of Oran Smith ("Petitioner"). (R. 1045, 1235-36, 735, 1213).

STATEMENT OF THE CASE

Petitioner first stood trial before the Honorable Kristi L. Harrington and a jury on June 15-19, 2009 in Charleston. (R. 1). He was represented by Donna Taylor and William H. Nixon, Jr. while the State was represented by Gregory K. Voight and Chad Simpson. (R. 1). After the jury failed to agree on a verdict, Judge Harrington declared a mistrial. (R. 731).

Subsequently, Petitioner was retried on December 7-9, 2009 before the Honorable R. Markley Dennis, Jr. and a jury, again in Charleston. (R. 735). Petitioner remained represented by Taylor and Nixon while the State remained represented by Voight and Simpson. (R. 735). At the conclusion of trial, Petitioner was found guilty as charged and received a sentence of thirty (30) years imprisonment. (R. 1213, 1232). Petitioner sought appellate review and on November 20, 2013 the Court of Appeals affirmed Petitioner's conviction and sentence via an unpublished opinion. (App. 1-3).

STATEMENT OF THE FACTS

On June 4, 2007, Officer Scott Hille was dispatched to Victim's North Charleston residence. (R. 823-24). Upon arriving on the scene, Hille entered Victim's apartment where he discovered her body cold and unresponsive. (R. 826-27). Pajama pants were tied tightly around her neck. (R. 826-27). According to forensic pathologist, Dr. Erin Presnell, Victim was strangled with the pajama pants. (R. 963, 969-70, 976). There was no sign of forced entry. (R. 1053).

During the ensuing investigation, authorities discovered Petitioner's fingerprints, along with two other individuals, Leonard McKelvey and Leonard Geddis, inside of Victim's residence.[1] (R. 886, 885,). As a result, Petitioner was initially interviewed and gave a statement explaining he had sexual relations with Victim over the course of the weekend before leaving on Sunday afternoon. (R. 1021-22, 1062). In his first statement, Petitioner claimed Victim was alive when he left her residence. (R. 1062).

After interviewing Petitioner, McKelvey and Geddis, investigators sent the pajama pants used to strangle Victim to SLED in order to test them for DNA evidence. (R. 1027-28). The results of the DNA testing showed Petitioner's semen was on the pajama pants. (R. 996-97). Additionally, touch DNA tests conducted on the pajama pants revealed Petitioner could not be excluded as minor contributor to the mixed DNA profile found on the pajama pants.[2] (R. 1001-02). Geddis' DNA was not found on the pajama pants. (R. 994-95).

Once investigators received the results of the DNA tests conducted on the pajama pants, they decided to interview Petitioner a second time. (R. 1027). Prior to the interview, Petitioner received his Miranda rights after which he executed an advice of rights form stating he had been advised of, and wished to waive his Miranda rights in order to speak with authorities. (R. 1031, 1032-33). In the interview, Petitioner initially denied killing Victim, however, after he was confronted with the fact his DNA was found on the item used to strangle Victim, admitted killing her. (R. 1041-42). Specifically, Petitioner explained he killed Victim by strangling her first with his arms and then with a pair of pajama pants he found on top of her dresser. (R. 1042-43).

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[1] Investigators also took statements from both McKelvey and Geddis. (R. 1026-27, 1048). McKelvey, admitted he had been with Victim on Friday, June 1, while Geddis, initially denied he was with Victim before giving a detailed statement explaining he had sexual relations with her in the early morning hours of Friday before leaving Victim's residence at approximately 5:45 AM. (R. 1048-49, 1050).

[2] Understandably, Victim was the major contributor to the mixed DNA profiles found on the pajama pants. (R. 1001-02).

PRESENTATION OF ISSUE AT TRIAL

A. The Jackson v. Denno Hearing

Prior to the jury being sworn in Petitioner's first trial, defense counsel moved for a Jackson v. Denno, 378 U.S. 368 (1964) hearing to determine whether Petitioner's statements were freely and voluntarily tendered and taken in compliance with Miranda. (R. 45). Accordingly, Judge Harrington heard testimony from Detective Shawn Patrick (R. 46-90); Detective James Hill (R. 91-106); Petitioner (R. 106-126); and Detective Keith Elmore (R. 126-49). Thereafter, defense counsel argued that when reviewing the totality of the circumstances, Petitioner's second statement "was against his will in that he did not voluntarily waive his right to have counsel." (R. 151). In so arguing, defense counsel relied upon testimony regarding Petitioner's intellectual capacity (R. 150), his education (R. 150) and claims of police coercion. (R. 150-51). In response, the State argued that when reviewing the totality of the circumstances, the evidence from the Denno hearing established, by a preponderance of the evidence, that Petitioner was apprised of his Miranda rights after which he waived those rights and knowingly, freely and voluntarily gave a statement. (R. 152-53). Ruling on the issue, Judge Harrington agreed with the State and looking at the totality of the circumstances, found Petitioner was advised of his rights, waived them and freely and voluntarily gave both of his statements. (R. 154-55). Following its ruling on the issue, other pre-trial matters were discussed. (R. 155-63). Thereafter, the jury was sworn. (R. 163).

B. Petitioner's Request for a Second Jackson v. Denno Hearing

After Petitioner's first trial ended in a mistrial, defense counsel, prior to the jury being sworn in the retrial, moved for a second Denno hearing stating:

> There is another matter, Your Honor, that we spoke about briefly. There is in this case two statements which were taken from Oran Smith, one in June taken by the

> police, and one in July which led to his subsequent arrest. We had argued previously that the second statement was coerced. Mr. Smith has brain damage from a prior injury. He's deaf in one ear, blind in one eye. The circumstances overall, we felt, were coercive and I have requested at that time that that statement be suppressed.
>
> Quite frankly, this is the first case that I've had to retry involving a confession. I did not research that issue. I, of course, assumed the Court essentially will redo the entire trial. But it's my understanding from the Court that that is *res judicata* and will not be litigated again. I did want to just create a continuing objection to that with the determination by the prior Court.

(R. 786). The trial court then confirmed that: (a) the Denno hearing was conducted prior to the jury being sworn in Petitioner's first trial; and (b) Judge Harrington had heard all of the evidence regarding the admissibility of the statement. (R. 786-87, 787).

Next, the trial court determined that while a mistrial does not have a binding effect on either side, a motion for a pre-trial Denno hearing, which did not occur during the trial of the case, stands. (R. 788). Continuing, the trial court noted that if it were to rule otherwise it would be overruling another Circuit Court judge which the trial court explained, it did not have the authority to do. (R. 788). Specifically, the trial court reasoned, "the decision as to whether or not, by the preponderance of the evidence, the requisite standard was established . . . was made by Judge Harrington prior to the trial." (R. 788). Nevertheless, the trial court informed both parties it would still "entertain any objections" on the admissibility of Petitioner's statement adding "if at lunch, you all think we have to have it, let me know and we'll do it at some point in time." (R. 789). After lunch, defense counsel failed to present the trial court with any additional authority supporting its position requesting a second Denno hearing.

Defense counsel subsequently renewed its request regarding the Denno hearing after the State rested arguing the statement was inadmissible based upon the totality of the circumstances because they essentially took Petitioner in under false pretenses and allegedly subjected

Petitioner to coercive interrogation methods. (R. 1129-33). After explaining it was standing by its previous ruling, the trial court added that after hearing the testimony "I understand why it would really be impractical and impossible for another circuit judge to hear this and have a ruling that would be inconsistent. You couldn't do that." (R. 1133-34). Continuing, the trial court said "[g]iven the testimony I've heard today, it doesn't affect [the trial court's ruling] stating "I would have done the same thing, by the preponderance of the evidence." (R. 1134-35).

WHY CERTIORARI SHOULD BE DENIED

Simply put, Petitioner is asking this Court to reverse his conviction and order a new trial despite the fact:

- he had a complete Jackson v. Denno hearing prior to his first trial;
- he is not alleging Judge Harrington erred in her ruling on the first pre-trial Denno hearing;
- counsel for both parties admitted Judge Harrington heard all of the evidence regarding the Denno issue in the first pre-trial Denno hearing;
- Judge Dennis, after hearing all of the evidence regarding the Denno issue agreed with Judge Harrington's pre-trial ruling and made his own findings as to Petitioner's statement on the record, a ruling which Petitioner has not appealed.

In other words, Petitioner, while essentially conceding he received a fair, full blown Denno hearing and acknowleding neither judge erred in ruling on the merits of the Denno issue, believes not only that the trial court erred in relying on established South Carolina law in finding Petitioner was not entitled to a second pre-trial Denno hearing, but further maintains his remedy for such an alleged error is a new trial. The State disagrees.

First, it is clear that South Carolina law does not permit a Circuit Court judge who has ruled on a pre-trial motion, to overrule another Circuit Court judge on a pre-trial motion based on the same set of facts. See Rule 4(b), SCRCrimP. (explaining that once a motion has been denied a party shall not make an additional motion based upon the same set of facts); Enoree Baptist Church v. Fletcher, 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986) ("One Circuit Court Judge does not have the authority to set aside the order of another."); Rule 43(l), SCRCP (West 2012) ("If any motion be made to any judge and be denied, whole or in part, or be granted conditionally, no subsequent motion upon the same set of facts shall be made to any other judge in the action."). Second, it is clear that the effect of a mistrial does not extend to pre-trial rulings made on the same facts, but instead only has the effect of "no trial" as it relates to rulings made after the jury is sworn. See Enoree Baptist Church, 287 S.C. at 603-04, 340 S.E.2d at 547 (holding a mistrial does not affect a Circuit Court Judge's pre-trial rulings). Thus, as explained below, Judge Dennis did not commit reversible error when he denied Petitioner's request for a second pre-trial Denno hearing and, relying on established South Carolina law, found he lacked authority to overrule Judge Harrington's ruling on Petitioner's first Denno hearing. Accordingly, certiorari should be denied.

STANDARD OF REVIEW

In criminal cases, appellate courts sit only to review errors of law and are bound by the factual findings of the trial court unless they are found to be clearly erroneous. State v. Hernandez, 386 S.C. 655, 659, 690 S.E.2d 582, 584 (Ct. App. 2010).

ARGUMENT

I. The trial court did not commit reversible error in declining to conduct a second, pre-trial *Jackson v. Denno* hearing as the motion had already been fully litigated prior to Petitioner's first trial. Petitioner admitted there were no additional facts in evidence to change the trial judge's pre-trial ruling and

Circuit Court judges do not possess the authority to overrule one another in pre-trial rulings.

Petitioner maintains the trial court erred in denying his request for a second Jackson v. Denno, hearing arguing that because the effect of a mistrial is no trial, the trial court was required to conduct a second Denno hearing. In support of this proposition, Petitioner cites to State v. Woods, 382 S.C. 153, 676 S.E.2d 128 (2009) and Grooms v. Zander, 246 S.C. 512, 144 S.E.2d 909 (1965).

While the State agrees with the proposition set forth in both Woods and Grooms, namely that the effect of a mistrial is *no trial*, the State submits this holding does not extend to the *pre-trial rulings* in the present case. Specifically, because Judge Harrington previously ruled on the same set of facts prior to the jury being sworn thereby making Judge Harrington's ruling a *pre-trial ruling*, as opposed to an *in trial ruling*, the State submits Judge Harrington's ruling is law of the case. See Rule 4(b), SCRCrimP. (West 2012) ("If any motion be made to any judge and be denied, in whole or in part, or be granted conditionally, no subsequent motion upon the same set of facts shall be made to any other judge in that action. If upon such subsequent motion any order be made, it shall be void."); Enoree Baptist Church, 287 S.C. at 604, 340 S.E.2d at 547 (citing Circuit Court Rule 60 [now Rule 4(b), SCRCrimP] ("One Circuit Court Judge does not have the authority to set aside the order of another.")).

A. The Trial Court was Correct in Declining to Conduct a second Jackson v. Denno Hearing

As detailed above, the State does not dispute that when the jury fails to reach a verdict and a mistrial is subsequently declared, the effect of the mistrial "is the equivalent of *no trial* and leaves the cause pending in the circuit court." Woods, 382 S.C. at 158, 676 S.E.2d at 131 (emphasis added) (citing State v. Smith, 336 S.C. 39, 518 S.E.2d 294 (Ct. App. 1999)).

Similarly, the State does not dispute that a trial judge's rulings as to admissibility and competence of testimony *made during trial*, which later ends in a mistrial, represents no binding adjudication upon the parties. Woods, 382 S.C. at 158, 676 S.E.2d at 131 (emphasis added) (citing Grooms, 246 S.C. at 514, 144 S.E.2d at 910; Keels v. Powell, 213 S.C. 570, 572, 50 S.E.2d 704, 705 (1948)).

However, as is the case here, where a trial court issues a *pre-trial* ruling after which a mistrial is subsequently declared for failing to reach a verdict, the pre-trial ruling should not be disturbed where the evidence supporting the pre-trial ruling *has not changed.* This is so because South Carolina's Circuit Courts lack the authority to overrule one another on the same facts, in the same case, presumably in an effort to limit judge-shopping. See Rule 4(b), SCRCrimP. (explaining that once a motion has been denied a party shall not make an additional motion based upon the same set of facts); Enoree Baptist Church, 287 S.C. at 604, 340 S.E.2d at 547 ("One Circuit Court Judge does not have the authority to set aside the order of another."); Rule 43(l), SCRCP (West 2012) ("If any motion be made to any judge and be denied, whole or in part, or be granted conditionally, no subsequent motion upon the same set of facts shall be made to any other judge in the action."). This is not to say that trial courts which retry a case after a mistrial are *always* bound by the first trial judge's *pre-trial* rulings. Indeed, the State agrees that where the evidence supporting a second trial judge's pre-trial ruling *is different* from that which supported the initial judge's pre-trial ruling (i.e. the underlying facts supporting the pre-trial motion have changed) the second trial judge, while normally bound by the pre-trial ruling, may in his discretion, come to his own conclusion on the pre-trial motion. See e.g. Smith v. Breedlove, 377 S.C. 415, 421, 661 S.E.2d 67, 70 (2008) (explaining that while a pre-trial motion

may not be reasserted using the same facts, the motion can be renewed once new evidence is gathered).

Understanding this, the State submits Petitioner's assertion that Woods governs this matter is simply incorrect as Woods is the exception to the general rule. Specifically, while Woods admittedly deals with a *pre-trial motion* following a mistrial—an issue by which a second trial judge would *normally be bound* since a mistrial does not disturb pre-trial rulings, the State notes the facts supporting the first trial judge's ruling in Woods, extensive pre-trial publicity and the State's consent to a change of venue, were no longer present when the second trial judge in Woods was presented with the same motion. See Woods, 382 S.C. at 157, 676 S.E.2d at 130 ("Prior to Woods' first trial in 2006, he requested a change of venue due to extensive pre-trial publicity and the fact that the Victim was a well-known teacher who had taught in Clarendon County public schools. With the state's consent, the trial judge granted the motion[.]"). As such, the second trial judge in Woods was free to revisit the first trial judge's ruling on the motion for change of venue since the underlying facts had changed. Therefore, Woods does not apply to the facts of this case since it is the exception rather than the rule.

Furthermore, Petitioner's contention that Grooms, Keels, or Smith govern this case are at odds with the facts. Specifically, neither Grooms, Keels or Smith, all cases cited to by this Court in Woods, stand for the proposition that *pre-trial rulings*, made by the trial court on the same set of facts, are subsequently vacated by a mistrial. To the contrary, Grooms, Keels and Smith each deal with rulings made by the trial judge *during trial*, after which a mistrial was declared. See Grooms, 246 S.C. at 514, 144 S.E.2d at 910 (explaining the ruling at issue was the first trial judge's directed verdict ruling); Keels, 213 S.C. at 572, 50 S.E.2d at 705 (detailing the ruling at issue was the first trial judge's ruling on a directed verdict motion); Smith, 336 S.C. at 42, 518

S.E.2d at 296 (highlighting that the ruling at issue was an *in camera* hearing occurring *at trial*) (emphasis added). Accordingly, the State submits this case is controlled by Enoree Baptist Church which explains a previous trial judge's pre-trial rulings cannot be revisited where the same facts support the first judge's rulings.

In Enoree Baptist Church, the Supreme Court of South Carolina, over a dissenting opinion by Chief Justice Ness, explained a second trial judge erred when, after a mistrial was declared in the first trial, the second trial judge overruled the first trial judge's decision to permit the plaintiff to file an amended complaint. 287 S.C. at 603-04, 340 S.E.2d at 547. In reversing the second trial judge's decision, the Court found the second trial judge's pre-trial ruling that "if the case was mistried, then you're back to ground zero" was error because the second trial judge lacked the authority to overrule the first judge's pre-trial ruling regarding the amended complaint. Id.

Keeping these propositions in mind, the State submits the trial court was correct in determining it was bound by Judge Harrington's pre-trial ruling. Indeed, as detailed above, Petitioner's position—that Woods applies to this case—is incorrect since defense counsel actually agreed the facts supporting its second motion for a Jackson v. Denno hearing were based on the same facts which supported its first motion. As such, a redetermination on this pre-trial issue is barred under Rule 4(b), SCRCrimP. Indeed, as discussed above, since Enoree Baptist Church explains that a first judge's pre-trial ruling, when premised upon the same facts, should not be revisited by a second trial judge after a mistrial is declared, the trial court was clearly correct when it denied Petitioner's motion for a second Jackson v. Denno hearing. Accordingly, the State submits the trial court's ruling is correct.

B. Even if the Trial Court Erred, the error is not Prejudicial

The State further submits that even if the trial court erred in declining to conduct a second Jackson v. Denno hearing, Petitioner was not prejudiced by such an error. Indeed, the record before this Court established that Petitioner received a complete Jackson v. Denno hearing in his first trial and defense counsel admitted it would have made the exact same argument in his second trial had it received an opportunity to do so. With this in mind, because the trial court, after considering the admissibility of the statement at the conclusion of the State's case-in-chief ultimately determined that based upon a preponderance of the evidence it would have issued the same ruling as Judge Harrington did in a Jackson v. Denno hearing, Petitioner was not prejudiced by the failure to receive a second Denno hearing. Finally, as the jury was charged that it had to find Petitioner's statement was voluntary beyond a reasonable doubt in order to consider it and Petitioner was ultimately convicted of Victim's murder, any error in failing to conduct the Denno hearing did not prejudice Petitioner since the jury clearly found Petitioner's statement was voluntary beyond a reasonable doubt. See State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009) (holding that once a court has determined a defendant received and understood his Miranda rights, the court should allow the statement into evidence and let the jury determine, based upon the totality of the circumstances, whether the statement was freely and voluntarily given which the State must prove beyond a reasonable doubt). (R. 1197-99). Accordingly, the State asks this Court to deny certiorari and affirm Petitioner's conviction and sentence.

CONCLUSION

For the aforementioned reasons, the State respectfully requests this Court deny certiorari and affirm the judgment and sentence imposed by the trial court.

Respectfully Submitted,

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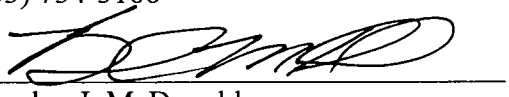

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PROOF OF SERVICE

I, Brendan J. McDonald, counsel for the Respondent, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by depositing two (2) copies of the same in the United States mail, first class, postage prepaid, addressed to his attorney of record, LaNelle Cantey DuRant, Esq., SCCID/Division of Appellate Defense, 1330 Lady St., Ste. #401, Columbia, SC 29201.

I further certify that all parties required by Rule to be served have been served.

This 13th day of March, 2014.

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