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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
COURT OF COMMON PLEAS

The Honorable Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2013-001284

Nathaniel Charles Teamer, ... Respondent,

vs

The State, ... Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Statement of the Case

The statement of the case as set forth by the Petitioner adequately sets forth the procedural history of this case.

ARGUMENT

Question I

Did the Post Conviction Relief Judge err in granting Respondent's Application for the failure of trial counsel to move for a dismissal of the felony driving under the influence charge when the arresting officer failed to produce either a video or affidavit that complied with the requirement of South Carolina Code § 56-5-2953?

The South Carolina legislature enacted a comprehensive bill mandating the video taping of a person arrested for driving under the influence or felony driving under the influence. This Court has held that the video taping, as the statute says, is mandatory. *City of Rock Hill v. Suchenski,* 374 S.C. 12, 646 S.E.2d 879 (2007), *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E.2d 278 (2011). In *Suchenski* this Court said "[T]he statute in this case provides for dismissal of the charges when the statute is inexcusably violated." *Id.* at 16, 646 S.E.2d at 881.

Recognizing the harsh impact of the failure of the law enforcement agent to video tape a defendant at the incident site, the legislature provided a reasonable and fair provision that would exempt the case from being dismissed for the failure of the officer to video tape the defendant. That simple requirement is that the officer submit an affidavit explaining why the incident scene was not video taped. This case does not involve the issue of whether the affidavit was adequate or complies with the statute. No affidavit was produced.

This case was tried beginning on September 10, 2007. This Court decided *Suchenski* on June 18, 2007. At the time of this trial the established law in South Carolina was that the absence of the video taping of the incident site requires dismissal of the charges when no affidavit is produced explaining why the incident site was not video taped. Had trial counsel in

this case made the proper motion, the trial judge under *Suchenski* would have been required to dismiss the felony driving under the influence charge.

The state contends that this is an automobile accident case and that automobile accidents are exempt from the requirement of producing a video tape of the incident. This is simply not a correct reading of the stature. First, in the provision where an affidavit is required, the statute provides that "in the alternative, submits a sworn affidavit certifying that it was physically impossible to produce the video recording because the person needed emergency medical treatment, or *exigent circumstances* existed." S. C. Code §56-5-2953 (B)(emphasis added). The phrase "exigent circumstance" is purposefully broad to give the trial judge wide latitude in determining whether the affidavit is acceptable. But the officer must at least produce the affidavit.

This case is not, however, an automobile accident case. The officer was pursuing the applicant because he had not stopped for a blue light. He was for most of the time in visual contact with the applicant's automobile. Had the collision not occurred and the applicant eventually stopped, the case would have been a failure to stop for a blue light and a driving under the influence. The failure to have a video tape would have required dismissal.

If this case is treated as an automobile accident case, the statute still requires that the incident be video taped. The only difference is "as soon as video recording is practicable in these circumstances, video recording must begin and conform with the provisions of this section." *Id.* The video taping in this case did not begin as soon as practicable because the officer never realized that his video taping equipment was not working. Having a new recorder and not knowing how to properly operate the equipment is not an exception to the recording

mandate. Had the officer truly not known how to properly operate his recorder, he could have elected to submit an affidavit to determine if the trial judge would accept it as exigent circumstance under the statute. He did not. Once video taping is practicable, then the officer must comply with the statute. *See, State v. Henkel,* 404 S.C. 626, 746 S.E.2d 347 (2013).

The Post Conviction Relief judge had ample evidence that trial counsel failed to make an objection to the failure to video tape the incident location. Trial counsel testified at the Post Conviction Relief hearing that he tried a number of driving under the influence cases and that he probably should have made the motion. App. at 727, ll 16-25 to 729, ll1-25, The only reason provide by trial counsel was that "prior to 2009 the case law was sort of fluid on that area." App. at 731, ll 1-2. But after the *Suchenski* decision any lawyer who is reasonably competent to handle DUI cases should have known the law was pretty settled.

Question II

Did the Post Conviction Relief judge err in granting Respondent's application in finding that trial counsel was ineffective in failing to properly impeach a key state witness regarding a conviction that was not reported on the NCIC report?

The credibility of Erica Gray, the witness to the alleged burglary, was a vital issue in the trial. The jury obviously wrestled with credibility. Donald Martin, Jr., the alleged victim of the burglary, testified that he was robbed of about $500. App. at 176, ll 3-15; 190, ll 8-12. But he did not mention the amount of money in his original statement. App. at 846. ll Erica Gray testified her cigarettes were stolen. App. at 123, ll 11-13. While every witness who was in the house testified at trial they recognized Charlie Teamer, the applicant, as the person who broke into the house, not a single witness gave the police the name "Charlie Teamer" on the night of

the burglary nor did they give the police any indication they knew who had allegedly broken into their home. The person was only described as "a Black Male wearing all black." App. at 846. Mr. Martin testified at trial he was watching a NFL game. App. at 175, ll 4-8. In his statement that night he said he was watching a basketball game. App. 846. Mary Gray's statement the night of the incident does not identify Mr. Teamer as being the culprit. App. at 845. She described the culprit as "He was tall and he was wear [sic] Black and a mask." App. at 845. Erica Gray never named Charlie Teamer as being the culprit. She simply described the person committing the crime as "a black male dressed in all black." App. at 819.

For any witness to fail to tell the investigating officer the name of the perpetrator when that alleged perpetrator was known to the witness, would cause any reasonable juror to question the credibility of that witness. At the Post Conviction Relief hearing below, the Post Conviction relief Judge found evidence that trial counsel was ineffective in failing to properly investigate the background of Erica Gray to determine that she had a conviction of false statement to a police officer.

The Post Conviction Relief Judge correctly determined the failure to investigate her background was ineffective assistance of counsel. The record at the Post Conviction Relief hearing establishes that Erica Gray had a prior conviction for false statement to a police officer. App. at 821. The conviction was for giving false information concerning a prior burglary and shooting. The information found by Post Conviction Relief counsel shows that Erica Gray was convicted after a bench trial.

The conviction was relevant to the credibility of a key witness for the state. The record in this case contains evidence that the Post Conviction Relief Judge properly found that

the conviction could have led to a different result. In *State v. Harrision,* 298 S.C. 333, 380 S.E.2d 818 (1989) this Court recognized that failure of the trial judge to admit a magistrate court conviction for a fraudulent check was sufficient to reverse the conviction of the defendant accused of criminal sexual conduct. This Court said "Further, refusal to allow impeachment on these charges was not harmless error. The appellant relied solely on the defense of consent. There was little physical evidence establishing that an attack had occurred; witness credibility was therefore a major factor." *Id.* at 336, 380 S.E.2d at 819. The exact same circumstances exist in this case. No physical evidence places Mr. Teamer at the scene. No incriminating evidence was found that connected Mr. Teamer with the crime. Witness credibility was the sole issue.

The state argues that because of an ambiguous comment made in a telephone conversation that the result would not have been different. The record in this case establishes that Mr. Teamer and the complaining witnesses had had disagreements in the past. Mr. Teamer had made accusations against Donald Martin concerning an alleged improper relationship between Mr. Martin and his niece. App. at 125, ll 7-20; App. 113, ll 6-9.[1] The comment could have referred to that dispute. The jury was not completely persuaded the telephone conversation related to the alleged burglary and armed robbery as they acquitted him of the armed robbery. Had the jury known Erica Gray had a history of false statements to law enforcement, they easily could have reached the opposite result.

The state also argues that the perpetrator of the alleged crime identified himself as

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[1] Applicant also argues in an additional sustaining ground that trial counsel was ineffective in failing to properly develop the evidence that Mr. Martin had a vendetta against him for his reporting Mr. Matin's relationship with his underage niece to the Department of Social Services. App. at 625, ll 15-25 to 626, ll 1-21.

"Murda" a name by which Mr. Teamer is known. But the credibility of that statement is from the same individuals whose credibility is questioned. Such an alleged statement adds nothing to the analysis. At the very least, evidence supports the finding of the Post Conviction Relief Judge that Mr. Teamer was prejudiced by the failure of trial counsel to develop the impeaching evidence.

The Post Conviction Relief Judge thoughtfully and carefully made a proper analysis as required by *State v. Coif*, 337 S.C. 622, 525 S.E.2d 246 (2000). Again, the evidence in the record supports the analysis conducted by the Post Conviction Relief Judge. In fact, in their brief the state does not seriously challenge the analysis of the *Coif* factors by the trial judge. They rely almost exclusively upon the fact that Mr. Teamer cannot show prejudice.

Question III

Did the Post Conviction Relief judge err in finding trial counsel provided ineffective assistance for failing to move for a directed verdict in favor of Respondent on the burglary charge where the evidence established that Donald Martin opened the door to his residence when he identified the applicant as the person outside the door?

South Carolina Code § 16-11-310 provides burglary is committed when a person intends "to enter a building by using deception, artifice, trick, or misrepresentation to gain consent to enter from the person in lawful possession." This case is distinguishable from *State v. Dixon,* 337 S.C. 455, 523 S.E. 2d 784 (Ct. App. 1999). In *Dixon,* the subterfuge occurred when the defendant falsely indicated to the victim that she alone upon entering the residence when in

fact her plan was to unlock the door to permit others to enter the residence.[2] Under the facts presented at the directed verdict stage, the state had not established any "deception, artifice, trick or misrepresentation" as required by the statute. According to the state's theory and testimony, Mr. Teamer properly identified himself. He made no representation that was not true. He did not claim "I left something there and I need to get it" which would be a deception or misrepresentation. The state contends he simply said "Murda" and Mr. Martin, who claimed to recognize the voice, opened the door.

Under the state's theory, if a person enters a place of business with the intent not of shopping but to shoplift, that person would have committed the crime of burglary as they entered under the "deception" that they are shoppers. This principle is discussed in *People v. Graves,* 76 N.Y.2d 16, 555 N.E.2d 268, 556 N.Y.S.2d 16 (1990).

Where a person is simply invited into a residence they have not committed burglary unless they make an affirmative misrepresentation as to their identity or purpose. Neither happened in this case. A secret intent to deceive is not sufficient to create the crime of burglary. A person must make an affirmative deception by which the occupant of the house is deceived as to the identity of the person or the purpose of the person in entering the residence. The many cases in other jurisdictions that rely of deception or fraud in finding a burglary occurred rely upon an affirmative deception. *See, e.g., Davis v. State*, 804 So. 2d 1153 (Ala. Crim. App. 2000); *People v. Johnson*, 190 A.D.2d 503, 593 N.Y.S.2d 35 aff'd, 82 N.Y.2d 683, 619 N.E.2d 405

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[2] The conviction in *Dixon* could also have been easily affirmed on the ground that the defendant aided and abetted her co-defendants in entering the house unlawfully. She did not have permission to open the house to her co-defendants and they clearly entered without permission of the owner and with the intent to commit a crime.

(1993); *State v. Newton*, S13G0668, 2014 WL 902261 (Ga. Mar. 10, 2014).

As the evidence in this case, under the theory of the state, shows that Donald Martin permitted the applicant to enter the house with permission, then no crime of burglary was committed. Interestingly, while neither trial counsel nor Post Conviction Relief counsel raised the issue, the only crime the state contended that Mr. Teamer intended to commit was armed robbery. An acquittal of armed robbery should also be an acquittal of the burglary charge. The indictment alleged no other crime. As a defendant may defend a burglary charge by proving he did not intend to commit the crime, a defendant is entitled to know what crime the state contends he intended to commit.

Question IV

Did the Post Conviction Relief Judge err in granting Respondent's application where the trial judge charged the jury that their "sole duty of course is to simply reach the truth in the matter" in violation of the due process clause of Article I, § 3 of the Constitution of the State of South Carolina and the 14th Amendment to the Constitution of the United States of America?

State v. Daniel, 401 S.C. 251, 737 S.E.2d 473 (2012) did not reverse prior precedent nor did it state a new principle of law not previously established. The case simply stated what had been know for a long time. Since *Sandstrom v. Montana*, 442 U.S. 510 (1979) criminal defense lawyers have known they should look carefully at charges to the jury concerning burden shifting charges. This is exactly what the charge in this case does.

The trial judge in this case told the jury their "sole objective . . . is simply to reach the truth in the matter." App. at 437, ll 20-24. What the trial court did not tell the jury, nor does

any other charge so inform the jury, is that if they are unable to determine the truth, then they should acquit the defendant as the state has failed in it's burden of proof. A "tie" was not given as an option for the jury. The jury was told to find the facts that are the truth.

As said by one court "The jury's role was to determine whether the State had proven its case against this defendant beyond a reasonable doubt." *State v. Buscham*, 360 N.J. Super. 346, 365, 823 A.2d 71, 82 (App. Div. 2003). The jury's role is not to "simply reach the truth." In this case the Post Conviction Relief Judge had adequate facts to conclude that the failure of trial counsel to object to the charge was ineffective assistance to counsel.

As discussed earlier, the credibility of the prosecuting witnesses was questionable. To tell a jury they must "reach the truth" forces the jury to conclude they must either believe the witnesses or determine if they are liars. In fact if the jury was unsure as to whether to believe the state's witnesses, they were required to acquit. The charge as given, forced the jury to draw the line between believing the witness or finding they were liars. As such, the burden on the state was lessened.

Question V

Should this Court affirm the decision of the Post Conviction Relief Judge under the cumulative error theory?

Whether cumulative error should entitle an applicant to relief " is an unsettled question in South Carolina." *Simpson v. Moore*, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006). Mr. Teamer contends that the cumulative errors in this case should affirm the decision of the post conviction relief judge even if this court finds each assignment of error individually is not sufficient to affirm the decision below.

In *Kyles v. Whitley*, 514 U.S 419 (1995) the United States Supreme Court held in evaluating a *Brady* violation, "the prejudice must be considered collectively, not item by item." *Id.* at 436. *See, also, Williams v. Taylor*, 529 U.S. 362, 398-399 (2000)("In our judgment, the state trial judge was correct both in his recognition of the established legal standard for determining counsel's effectiveness, and in his conclusion that the entire post conviction record, *viewed as a whole* and cumulative of mitigation evidence presented originally, raised 'a reasonable probability that the result of the sentencing proceeding would have been different' if competent counsel had presented and explained the significance of all the available evidence.)(emphasis added); *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) (citations omitted) ("cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial"); and *State v. Blurton*, 342 S.C. 500, 537 S.E.2d 291 (Ct. App. 2000) (cumulative effect of prosecutor's closing argument when coupled with improper exclusion of evidence warranted reversal).

Taken as a whole, the errors by trial counsel, both those found by the post conviction relief judge and those raised in Mr. Teamer's appeal, demonstrate that Mr. Teamer was not adequately represented in his defense of the murder and assault and battery with intent to kill charge. While the state may argue that any one of the errors by trial counsel may not have changed the verdict, one cannot rationally argue that the errors by counsel taken as a whole, would not have had an impact on the jury.

ADDITIONAL SUSTAINING GROUNDS

Nathaniel Teamer also contends that the decision of the Post Conviction Relief Judge can be sustained on the following ground:

In 1990 this Court said "Because of our present 'war on drugs', and because any involvement with cocaine contributes to the destruction of ordered society, we hold that mere possession of cocaine is a crime of moral turpitude." *State v. Major*, 301 S.C. 181, 184, 391 S.E.2d 235, 237 (1990). The use of cocaine by the driver of the other vehicle was admissible to impeach his credibility. At the trial below defense counsel did not argue that the cocaine use was a basis for impeaching the credibility of the witness. App. at 308, ll 13-25 to 311, ll 1-21. Questions concerning the use of cocaine were admissible for that purpose.

At the Post Conviction Relief hearing trial counsel admitted that he had not reviewed the medical record of the driver of the other car. He further did not mention the use of cocaine by the driver to the trial judge. App. at 751, ll 4-19. He did not seriously argue against the ruling of the trial judge that because the witness was found not guilty at a bench trial he still should be able to question the witness concerning his drinking and cocaine use on the night of the collision.

In ruling against Mr. Teamer on this issue the Post Conviction Relief Judge ruled that Mr. Teamer's "claim simply boils down to an assertion that trial counsel should have performed better not that his performance was ineffective." App. at 1399. Trial counsel made no argument for the admissibility of the fact that the driver of the other car had been drinking or taking cocaine on the night of the collision. He made no argument that the cocaine use was admissible to attack the credibility of the driver. As one court has said "An acquittal is not

evidence of innocence but rather evidence of the failure of the State to prove guilt of a defendant beyond a reasonable doubt." *State v. Turner*, 352 S.W.3d 425, 430 (Tenn. 2011). Thus, the not guilty by bench trial would not be proof the driver was not in fact under the influence of alcohol and drugs. *See, also, People v. Parham,* 147 A.D.2d 944, 537 N.Y.S.2d 384 (1989)(holding impeachment of defense witness with acquitted conduct to be proper)

The Post Conviction Relief Judge further found that "trial counsel provided a valid reason for employing his strategy in attempting to admit the records and question James Young." App. at (25). But the Post Conviction Relief Judge never states what the strategy was nor does the transcript reveal any true strategy concerning how he handles the trial judge's refusal to admit the evidence of drinking and drug use. As the record at the Post Conviction Relief hearing established that the driver of the other car had cocaine in his system, the Post Conviction Relief Judge could also have granted a new trial on the failure of trial counsel to use the evidence to impeach the credibility of the driver.

CONCLUSION

For the foregoing reasons the findings of the Post Conviction Relief judge are adequately supported by the facts presented at the Post Conviction Relief hearing. This Court should deny the petition for writ of certiorari.

June 23, 2014

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S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2013-001284

Nathaniel Charles Teamer, ... Petitioner,

vs.

State of South Carolina ..... Respondent.

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Traynham who, after being duly sworn, deposes and says that she is the receptionist for C. Rauch Wise, Attorney for the Appellant in the above entitled case. That on June 23, 2014, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Petition for Writ of Certiorari and Return of Petition for Writ of Certiorari in the above case addressed to Suzanne H. White, Asst Deputy Attorney General Attorney General Office, PO Box 11549, Columbia, SC .

Sandy Traynham

SWORN to and Subscribed

before me this 23 day

of June, 2014.

Mary Jane Harter (L.S.)
Notary Public for South Carolina
My Commission expires: 11/30/22

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June 23, 2014

Daniel E. Shearouse, Clerk
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Nathaniel Teamer vs. State of South Carolina, Appellate Case No. 2013-001284

Dear Mr. Shearouse:

I am enclosing herewith for filing the original Petition for Writ of Certiorari and the original Return of Petition for Writ of Certiorari together with the original Affidavit of Service in the above matter. Your help is greatly appreciated.

With kindest regards, I am

Very truly yours,

C. Rauch Wise

C. Rauch Wise

CRW/slt
Enclosure

cc Suzanne H. White, Asst Depty Attorney General