STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

Carmen T. Mullen, Circuit Court Judge

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JUL 11 2014

S.C. Supreme Court

Opinion No. 2014-UP-091 (S.C. Ct. App. filed 3/5/2014)

09-GS-07-01405, 01406

THE STATE,

RESPONDENT,

V.

ERIC WRIGHT,

PETITIONER.

APPELLATE CASE NO. 2014-001017

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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INDEX

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on April 11, 2014.

QUESTIONS PRESENTED

1.

Whether the Court of Appeals erred in finding that a solicitor's deliberate violation of a trial judge's order *in limine* barring a witness from identifying petitioner as the shooter based solely on hearsay did not warrant reversal for failure to grant a mistrial?

2.

After the defendant made a Batson challenge because the solicitor disproportionately struck men, the solicitor explained she struck anybody who "hit the radar" for a criminal record "whether they have it [or] not." The defense showed that the solicitor did not strike a female juror whose rap sheet said her criminal history was available from California. Did the Court of Appeals err in deciding that, in responding to a Batson challenge, a solicitor may use her own erroneous notes regarding a similarly situated juror to disprove pretext and that appellant did not prove pretext?

STATEMENT OF THE CASE

On July 30, 2009, Eric Wright was indicted for assault and battery with intent to kill and possession of a weapon during a violent crime. R. 459. On October 24 – 27th, 2011, Wright was tried in Beaufort County before the Honorable Carmen T. Mullen. R. 1. Ian C. Deysach and Gene G. Hood represented Wright. R. 1. Dawn Burke and James Bannon represented the State. R. 1. The jury found Wright guilty on both charges. R. 429, ll. 13 – 23. Judge Mullen sentenced Wright to eighteen years' imprisonment on the ABWIK charge and five years' imprisonment on the weapons charge to run concurrently. R. 448, ll. 9 – 17.

On November 6, 2013, Judges Huff, Geathers, and Lockemy of the Court of Appeals heard oral argument. App. 1. On March 5, 2014, the court affirmed petitioner's convictions in an unpublished per curiam opinion. App. 1. State v. Wright, No. 2014-UP-091 (Ct. App. Mar. 5, 2014). On April 11, 2014, the court denied the petition for rehearing. App. 12. This petition follows.

ARGUMENT

1.

The Court of Appeals erred in finding that a solicitor's deliberate violation of a trial judge's order *in limine* barring a witness from identifying petitioner as the shooter based solely on hearsay did not warrant reversal for failure to grant a mistrial.

Reasons for Granting Certiorari

This case presents the important question of whether the Court of Appeals' use of the standard rationales for upholding denials of mistrial should be applied mechanically when the State acts deliberately and in direct violation of an *in limine* ruling. Rule 242(b), SCACR. The Court of Appeals cited authority noting that curative instructions are "usually deemed to cure any alleged error." App. 2 (quoting State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009) and State v. Dempsey, 340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2009)). Neither of these cases involve a solicitor's deliberate violation of an *in limine* ruling. This rote application of a black-letter principle failed to analyze the issue of the solicitor's willingness to defy the trial judge and elicit evidence she knew was inadmissible.

This cursory affirmance creates an incentive that should greatly trouble this Court. If all the State risks is a curative instruction and the threat of a mistrial is not perceived to be real, then it would embolden solicitors to disregard *in limine* rulings and get inadmissible evidence into the minds of jurors where it cannot be forgotten, despite any curative instruction. This argument was the thrust of petitioner's issue below and the Court of Appeals ignored it both in its decision and in its denial of the petition for rehearing.

Relevant Facts

On July 28, 2008, Troy Jinks ("Jinks") was shot in the leg. R. 70, l. 24 – 140, l. 12. He was treated in the emergency room for a "couple of hours" and then released the same day. R. 174, ll. 1 – 4. The shooting took place in a neighborhood in Beaufort County called Pinckney Hill. R. 81, ll. 14. This neighborhood is called "Pinckney Hill" because only the Pinckney family lives there. R. 81, ll. 11 – 19. The defendant was indicted for the shooting as "Eric Wright aka Joseph Bo Derrick Wright." R. 459 (Indictments). The case was called before the entire jury panel as "State versus Erick Wright; also known as Joseph Bo Derrick Wright." R. 4, ll. 6 – 8. The trial judge repeated the name, including the a/k/a "Bo." R. 4, ll. 18 – 20. During the trial, a recording from a tip line was played in which the defendant denied committing the crime. R. 291, ll. 9 – 24.

Alexus Green was visiting her grandmother on Pinckney Hill and claimed she witnessed the shooting. R. 81, l. 24 – 149, l. 1. 2. At the back of Pinckney Hill is the Chicken Shack. R. 84, ll. 1 – 7. Green saw a car drive onto the hill toward the Chicken Shack. R. 84, ll. 19 – 25. The car then turned around and came back from the Chicken Shack. R. 86, l. 20 – 154, l. 2.

Green saw four people in the car. R. 86, l. 24 – 87, l. 4. She only knew two of the people—Monique Johnson ("Monique") and Octavia Scott ("Octavia"). R. 87, ll. 5 – 6. Green saw a young lady in the front passenger seat and a man sitting in the back. R. 87, ll. 7 – 19. As the car returned, Jinks pointed at the car, yelled, and made hand gestures. R. 87, ll. 20 – 25. Jinks said, "what's he in the car for?" R. 88, ll. 1 – 2. The man got out of the car, said "what you say," pulled out a gun, and shot twice. R. 88, ll. 14 – 21.

Before the trial began, Wright's attorney moved for the court to prohibit the witness Green from testifying about the shooter's name. R. 61, l. 22 – 61, l. 11. The court ruled that such testimony would be inadmissible hearsay in the following exchange:

> MR. DEYSACH: . . . The other issue I wanted to bring up, Your Honor, is that in this case along with the folks that we've already talked about, Octavia, the person – the driver and [Jinks], there are other witnesses who want to say, I saw the shooting. **Alexus – for—for—one witness, for instance, says I don't know the guy, but they call him Bo.** Another witness says something to that effect. I'm not sure – I don't know the guy, but they call him Bo. And I want to make sure that my position is put on the record is clear, to say I don't know who the guy is, but they call him Bo is inadmissible hearsay, certainly when it's told to the police or in a testimonial situation such as this, to say that – I don't know the person, but I've heard that his name is Bo, essentially is what testimony might be.
>
> THE COURT: **I would agree that that's hearsay** other than if they actually with their own eyes saw it, if they were a witness standing there, they can identify him by his picture, let alone – even though by the name – I understand what you're saying. That could be two different things, I don't know him but they call him Bo. I don't know if the question was asked – even though you may not personally know him, have you seen him around and do you know that by his reputation, that that is him and that is Bo.
>
> **If they can ID him at the scene**, and I don't know where these people were, **then they can ID him through his photograph, they can ID him and say this is him. I would agree that if they don't know his name is Bo and they can't look at him and say, that's Bo, by their acknowledgment, they can't say it.**
>
> MR. DEYSACH: Right. That's – that's what I want to make sure. I don't think that these are people that know him by a reputation or know him by anything other than somebody – they've heard somebody call him Bo. They either know the person who did that is Bo, I want to make –
>
> THE COURT: Okay.
>
> MR. DEYSACH: There are people who are shown photo lineups obviously, or else we would have had Neil v. Biggers on that, but I want to make sure that were not eliciting any hearsay just to bolster that somebody may have said the word "Bo" and that be it. And so I want to make sure that is flagged for you.

R. 61, l. 22 – 63, l. 15 (emphasis added).

Green was the State's second witness before the jury. R. 2. Despite the court's ruling that Green could not testify that "they call him Bo" the solicitor asked the following :

> Q. Alexus, the shooter, the person who who you saw [shoot Jinks] twice, do you know his name?
>
> A. **I don't know** his real name, but I know **they call him Bo.**

R. 90, l. 25 – 91, l. 3 (emphasis added). Defense counsel immediately objected stating, "Objection, that's the hearsay that came out, Your Honor." R. 91, ll. 4 – 5. The court then made the following ruling:

> All right. Okay. All right. Your objection is sustained. Ma'am, you can only say what you do know, what you know by your own independent knowledge. Ladies and gentlemen, that last question you are to strike and also her answer wasn't appropriate. She can only testify as to what she knows.

R. 92, ll. 6 – 12.

Defense counsel then objected, asked to approach, and a bench conference occurred. R. 91, ll. 13 – 18. The court noted for the record a bench motion. R. 91, ll. 19 – 20. Defense counsel then stated, "Your Honor, I have a motion I would like to be heard on when – at the appropriate time." R. 91, ll. 21 – 22.

After Green was excused, the court dismissed the jury. R. 99, ll. 3 – 20. Defense counsel then moved for a mistrial. R. 99, l. 5 – 100, l. 17. Defense counsel argued that the court's curative instruction was insufficient. R. 99, ll. 22 – 100, l. 11. Green never made an in-court identification of the defendant as the shooter. R. 100, l. 20 – 25. Green admitted telling police after the incident that she did not know the shooter. R. 95, ll. 14 – 16. The court denied the defendant's motion for a mistrial and stated its belief that the curative instruction remedied any prejudice. R. 102, ll. 8 – 14.

Discussion

The State intentionally violated the trial judge's ruling excluding this testimony. R. 61, l. 22 – 63, l. 15. R. 90, l. 25 – 91, l. 3. R. 92, ll. 6 – 12. R. 102, ll. 8 – 14. The improper question was **the first question** asked **after** a bench conference. R. 90, l. 24 – 158, l. 1. The question was not asked during the rush of trial, but was asked deliberately after a break in the questioning and with the opportunity for reflection. A mistrial should have been granted based on the flagrant and deliberate violation of the trial judge's *in limine* ruling. See State v. Parker, 391 S.C. 606, 707 S.E.2d 799 (2011). The Court of Appeals ignored this important part of appellant's argument.

The State's deliberate violation of Judge Mullen's pre-trial ruling demonstrates the prejudicial impact of this testimony. Without Green's hearsay statement, the State had no way to connect what she saw to the defendant. The State did not attempt to have Green identify Wright at trial. It presented no evidence that Green identified Wright as the shooter through a photographic lineup or otherwise. The State did not ask any questions of Green to lay a foundation that she knew the shooter through his reputation. The State obviously felt its need for this testimony was worth the risk of deliberately violating a pre-trial ruling on its inadmissibility. As defense counsel argued, "the bell was rung" and a mistrial was required.

"The purpose of a motion *in limine* is to prevent disclosure of potentially prejudicial matter to the jury." State v. Floyd, 295 S.C. 518, 520, 369 S.E.2d 842, 843 (1988). While pretrial rulings are not final and are subject to change based on developments during the trial, no developments occurred that would change the admissibility of this hearsay. As defense counsel stated, "[T]he response that the witness gave was exactly the response that she had written in her written statement that was provided as part of discovery." R. 99, ll. 15 - 18. The State knew

what the response would be, knew it was inadmissible, knew it would be highly prejudicial and could not be undone with a curative instruction, and still asked the question. The Court of Appeals did not address this important concern.

The Court of Appeals also erred in erroneously shifting the burden to petitioner of proving that Alexus had no independent knowledge of appellant's nickname. Footnote two of the opinion states that the court was "not convinced this testimony was inadmissible hearsay" and "how Alexus came to understand the shooter's name was 'Bo' was never explored at trial." App. 2, n.2. The State was the proponent of this evidence, not Wright. The fact that Alexus had no independent way of knowing appellant's nickname was not even contested by the State during the trial. The glaring proof of this fact is that the State never sought to have Alexus make **any** identification of appellant during the trial. No Neil v. Biggers, 409 U.S. 188 (1972) hearing was held. The notion that Alexus' statement is not hearsay is also disproved within the very statement itself. She said, "I don't know his real name, but I know they call him Bo." R. 90, l. 25 – 91, l. 3. This sentence contains every element of inadmissible hearsay. She first admits she does not know appellant. She then says she heard another unknown person(s) say his nickname was "Bo." It was offered for the truth of the matter asserted—that petitioner's name was Bo and he was the shooter.

Finally, the court also misapprehended the severe prejudice that petitioner suffered from the solicitor's intentional violation of the trial judge's order. The court emphasized that Alexus had already (in violation of the trial judge's ruling) mentioned the name "Bo" earlier in her testimony. Alexus said "we saw Bo get out of the car" during a long narrative describing the events. R. 80, l. 20 – 81, l. 10. Very likely, trial counsel elected not to object at this point

because her mention of "Bo" was lost in her narration and he did not want to draw attention to it with an objection and a curative instruction.

Trial counsel could not have anticipated the solicitor's egregious violation of the trial judge's order that followed. As stated earlier, the solicitor's question was the first question after a pause in the proceedings when the jury's attention would be highly focused. The solicitor's question directly asked the witness to identify appellant as the shooter when the solicitor knew that she could not do so. It is hard to imagine better evidence of prejudice than the fact that the solicitor was willing to intentionally defy a trial judge's ruling—risking a mistrial or contempt—to get this evidence before the jury. Furthermore, during deliberations, the jury asked for the replay of Alexus' testimony. R.424, l. 18 – 425, l. 16. The record contains no indication that the "Bo" statement was not replayed at that time. Alexus Green was presented as a "neutral" witness and the State's other witnesses were thoroughly discredited during the trial. This Court should grant certiorari to consider this important issue.

2.

After the defendant made a *Batson* challenge because the solicitor disproportionately struck men, the solicitor explained she struck anybody who "hit the radar" for a criminal record "whether they have it [or] not." The defense showed that the solicitor did not strike a female juror whose rap sheet said her criminal history was available from California. The Court of Appeals erred in deciding that, in responding to a *Batson* challenge, a solicitor may use her own erroneous notes regarding a similarly situated juror to disprove pretext and that petitioner did not prove pretext.

Reasons for Granting Certiorari

The Court of Appeals' decision regarding this issue conflicts with the decisions of this Court and the United States Supreme Court. Rule 242(b)(3) and (5), SCACR. The Court of Appeals decided that petitioner did not show pretext even after showing the State failed to apply its originally neutral reason in a neutral manner. App. 3-4. This decision conflicts with established precedent of this Court and the United States Supreme Court. State v. Inman, ___ S.C. ___, ___ S.E.2d ___, 2014 WL 2765674, Shearouse Adv. Sheet No. 24, Op. No. 27402, p. 6 (June 18, 2014) (citing State v. Oglesby, 298 S.C. 279, 281, 379 S.E.2d 891, 892 (1989). See also Miller-El v. Dretke, 545 U.S. 231, 241 (2005). As this case involves discrimination in striking a jury, it also involves a substantial constitutional issue under the Fourteenth Amendment. Rule 242(b)(4), SCACR.

This case also involves a novel question of law because the Court of Appeals' opinion allows a solicitor to make erroneous notes about a juror and then rely on those notes as the reason for striking the juror. App. 4. The court failed to squarely address petitioner's argument that such a rule would allow attorneys to insulate themselves from indisputable factual information about

jurors by making inaccurate (or misleading) notes about jurors they want on their jury. Just as in Issue One of this petition, the Court should use this case to ensure that incentives are not created that promote gamesmanship from the State.

Relevant Facts

During jury selection sixteen females and eight males were presented. R. 29, l. 14 – 40, l. 8. The State only struck two females. R. 31, ll. 5 – 11; R. 35, ll. 8 – 13. The State struck three of the eight males. R. 32, ll. 3 – 10; R. 34, l. 24 – 35, l. 7; R. 38, ll. 1 – 7. During the selection of the alternates, two females were presented and one male was presented. R. 39, l. 3 – 40, l. 8. The State did not exercise any strikes in the selection of alternate jurors. The defense was out of strikes when Juror 119, Donna Humphreys, a female, was seated on the jury as an alternate. R. 39, ll. 3 – 24.

The defense made a Batson motion challenging the State's striking of male jurors. R. 48, ll. 6 – 11. The State claimed that it struck the male jurors because of prior arrests on their rap sheets. R. 48, ll. 12 – 19. The solicitor stated, with respect to male Juror 84, "He actually, um, had [an] item on his record that I was not sure if it was a conviction or not and out of abundance of caution I decided to strike him." R. 48, ll. 16 – 19. She agreed with the defense's characterization of her strike strategy as striking anyone with an arrest resulting in a rap sheet being generated. R. 51, l. 22 – 53, l. 12. The solicitor stated that "[I]f they hit the radar for a criminal record, whether they have it [or] not... I struck them. R. 52, ll. 8 – 12.

However, Juror 119 (Humphreys) the first alternate selected, also had a rap sheet. R. 53, ll. 7 – 15; R. 450 (rap sheet). In an attempt to explain her failure to strike Humphreys, the solicitor introduced her notes which contained a handwritten notation regarding Humphreys stating "no charges on rap sheet." R. 454, Court's Ex. 3. Humphreys' rap sheet says "The

criminal history record is maintained and available from the following: California.... The record(s) can be obtained through the interstate identification index by using the appropriate NCIC transaction." R. 451. (rap sheet). The court ruled that the State's reason for striking males was race-neutral and denied the defense's Batson motion. R. 58, l. 21 – 59, l. 2.

Discussion

The Court of Appeals held that deference must be paid to the trial judge's decision to credit the solicitor's "interpretation of Juror 119's purported rap sheet." App. 4. Nothing was "purported" about Humphreys' rap sheet. The solicitor never disputed that Humphreys had a rap sheet. R. 53, l. 1 – 57, l. 17. The rap sheet clearly states Humphreys' criminal history was maintained in California. R. 451 (rap sheet). The Court of Appeals failed to address the solicitor's differing treatment of Juror 84, who the solicitor said she struck "out of an abundance of caution" because she was unsure whether he had a conviction because of an item on his rap sheet. Nowhere is this contradictory use of excuses or strikes mentioned in the court's opinion.

Petitioner proved pretext. "[P]retext generally will be established by showing that similarly situated members of another [class] were seated on the jury." State v. Adams, 322 S.C. 114, 124, 470 S.E.2d 366, 372 (1996); State v. Oglesby, 298 S.C. 279, 281, 379 S.E.2d 891, 892 (1989). Although the State had a strike available, it did not use it to strike Humphreys. R. 39, ll. 16 – 22. Even though the solicitor had earlier stated that "if they hit the radar," meaning a rap sheet was generated, she backpedaled when it was revealed that Humphreys' rap sheet indicated she had a criminal record. The solicitor claimed she had a "blank Rap sheet with no actual charges" and that she relied on her notes which said "no charges on Rap sheet." R. 54, ll. 7 – 16.

The only reason given by the trial judge for denying defendant's Batson motion was that "the printing of the Rap sheet showing actual specific charges is a difference." R. 58, l. 24 – 59,

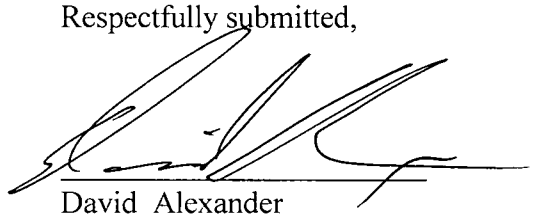
l. 2. This reasoning is directly contrary to the State's initial justification that if a potential juror "hit the radar," they would be struck. It is also contradicted by the solicitor's earlier statement regarding Juror 84 when she said she was not sure about an item on his record and struck him out of an abundance of caution. R. 48, ll. 12 – 19. Certainly Humphreys "hit the radar" and the State's reason was pretext. The trial court erred by not finding a Batson violation.

If left standing, the Court of Appeals' opinion, allowing the solicitor to rely on notes that were flatly contradicted by the unequivocal statement on the rap sheet that Humphreys' criminal record was available from California, would invite gamesmanship from attorneys on how they "interpret" factual material about a juror that simply is not open to interpretation. Imagine a scenario where an attorney only wants black jurors and wants to strike whites. Under the rule used by the court, the attorney could make "erroneous" notes about every white juror that would provide a race-neutral reason for striking the juror and, if called down for discriminatory behavior, could simply say he relied on his notes. This example is not any different from what happened in appellant's case because there can be no dispute that Juror 119's rap sheet showed a criminal record which directly contradicted what the solicitor wrote in her notes. This Court should grant certiorari to address this erroneous decision on a substantial constitutional issue.

CONCLUSION

For the foregoing reasons, the Court should grant the petition with the ultimate relief of reversing petitioner's conviction and granting him a new trial.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER.

This 11th day of July, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

Carmen T. Mullen, Circuit Court Judge

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THE STATE,

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V.

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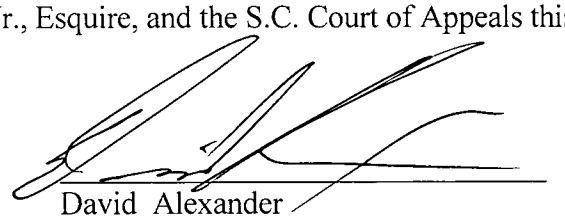
PETITIONER.

APPELLATE CASE NO. 2014-001017

CERTIFICATE OF SERVICE

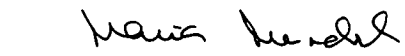
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on William M. Blitch, Jr., Esquire, and the S.C. Court of Appeals this 11th day of July, 2014.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 11th day
of July, 2014.



_____(L.S.)
Notary Public for South Carolina
My Commission Expires: