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STATE OF SOUTH CAROLINA
In the Supreme Court

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OCT 20 2014
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

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

BRENDAN J. McDONALD
Assistant Attorney General

SCARLET ANNE WILSON
Solicitor, Ninth Judicial Circuit

P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-3188

ATTORNEY(S) FOR RESPONDENTS

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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appellate review, and on November 20, 2013, the Court of Appeals affirmed Petitioner's conviction and sentence via an unpublished opinion.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). Petitioner's subsequent request for rehearing was denied by the appellate panel and he thereafter sought certiorari in this Court. (App. 11). Certiorari was granted to determine "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." This brief follows.

WHY THIS COURT SHOULD AFFIRM SMITH'S CONVICTION

Simply put, Petitioner, who has not alleged that his confession is erroneously admitted, is asking this Court to reverse his conviction and order a new trial despite the fact:

- he had a complete Jackson v. Denno, 378 U.S. 368 (1964) 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;
- defense counsel acknowledged it would be making the same suppression argument to Judge Dennis as it made to Judge Harrington in the first pre-trial Denno hearing; and
- Judge Dennis, after hearing all of the evidence regarding the Denno issue, ultimately adopted Judge Harrington's pre-trial ruling and made his own findings as to Petitioner's statement on the record.

In other words, Petitioner, who concedes he received a full and fair pre-trial Denno hearing before Judge Harrington and further acknowledges defense counsel did not present additional arguments or evidence in support of suppression, now says that, despite these facts, he is entitled to a new trial because Judge Dennis allegedly erred in finding he was collaterally estopped from re-litigating a pre-trial issue. For a variety of reasons, 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.[1] See Rule 4(b), SCRCrimP. (explaining that once a motion has been

[1] Indeed, this is not unique to South Carolina. See Frank v. Magnum, 237 U.S. 309, 334 (1915) ("It is a fundamental principle of jurisprudence ... that a question of fact or of law distinctly put in issue and directly determined by a[criminal or civil] court of competent jurisdiction cannot afterwards be disputed between the same parties."); Bradley v. Duncan, 315 F.3d 1091, 1098 (9th Cir. 2002) (concluding that a second trial judge was bound by the first trial judge's ruling in a re-trial where there was no change in the evidence presented or the legal argument made to either judge); In re: Alberto, 125 Cal. Rptr.2d 526, 2002 WL 31116128, slip. Op. 11205 (Ct. App. 2002) ("[F]or one

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, the effect of a mistrial does not extend to dispositive 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); Schwering v. TRW Vehicle Safety Sys., Inc., 132 Ohio St.3d 129, 133, 970 N.E.2d 865, 868-69 (2012) (recognizing that pre-trial rulings concerning the admission of evidence in a first trial are not disturbed when that trial subsequently ends in a mistrial); Souza v. Corvick, 441 F.2d 1013, 1017-19 n.6 (D.C. Cir 1970) (concluding a retrial is not designed "to afford either party an opportunity to fortify a position it was unable to maintain at a previous trial."); City of Cleveland v. Cleveland Elec. Illuminating Co., 538 F.Supp. 1328, 1330-31 (N. Dist. Ohio 1981) ("[A] mistrial occasioned by the jury's inability to arrive at a verdict does not convert those matters which were previously the subject of dispositive rulings by the trial court to matters the litigants are free to litigate *de novo* in the second trial). Third, even assuming Petitioner is correct—that a mistrial extends to all pre-trial rulings regardless of the law or facts—Judge Dennis did not abuse his discretion when he ultimately adopted Judge Harrington's pre-trial ruling as his own and found the State satisfied the requirements of Denno. See City of Cleveland v. Cleveland Elec. Illuminating Co., 538 F.Supp. at 1332 (adopting 16 of a prior trial judge's pre-trial orders after a mistrial was declared

superior court judge, no matter how well intended, even if correct as a matter of law, to nullify a duly made, erroneous ruling of another superior court judge places the second judge in the role of a one-judge appellate court.").

as a result of the jury's failure to reach a verdict in the initial trial) (citing 1B Moore's Federal Practice P 0.404(1) at p. 405). Thus, as explained below, Judge Dennis did not commit reversible error when he denied Petitioner's request for a second pre-trial Denno hearing. Accordingly, the judgment of the Court of Appeals, as well as Petitioner's conviction and sentence, should be affirmed.

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.[2] (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).

[2] 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).

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.[3] (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).

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 Denno 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

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

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 indicated it was adopting Judge Harrington's ruling stating, "[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).

ARGUMENT

I. The trial court did not commit reversible error in declining to conduct a second, pre-trial *Denno* hearing as: (A) Circuit Court judges do not possess the authority to overrule one another in pre-trial rulings on the same set of facts; (B) the effect of a mistrial does not extend to dispositive pre-trial rulings made on the same facts, and (C) even if it did, Petitioner was not prejudiced when Judge Dennis, understanding Petitioner was merely reasserting his previous argument from the first *Denno* hearing ultimately decided to adopt Judge Harrington's ruling and found Petitioner's statement was admissible

Petitioner argues that because the effect of a mistrial is no trial, when a jury fails to agree on a verdict, dispositive pre-trial rulings of one trial judge should also be rendered nugatory. 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). In response, the State, while agreeing with the narrow proposition from Woods and Grooms that the effect of a mistrial is *no trial*, submits these holdings do not, and should not, extend to dispositive *pre-trial* rulings based on the same facts and argument in light of the following reasons: (A) South Carolina Circuit Courts do not possess authority to overrule one another on dispositive pre-trial rulings on the same set of facts; and (B) South Carolina law, as well as other jurisdictions, already recognize that a jury's failure to agree on a verdict in one trial does not negate a trial court's dispositive pre-trial rulings based on the same facts in a re-trial. Moreover, even if this Court disagrees with the State and Judge Dennis as to the effect of a mistrial on pre-trial rulings, Petitioner was not prejudiced in light of the fact Judge Dennis, who was aware that Judge Harrington's ruling was based on the exact same law and facts, ultimately adopted Judge Harrington's Denno ruling. Accordingly, as discussed below, the State asks this Court to affirm the conviction and sentence of Oran Smith.

A. Circuit Court Judges do not Possess the Authority to Overrule One Another on Pre-Trial Rulings based on the same Legal Arguments and Set of Facts

As detailed above, Judge Dennis denied Petitioner's request for a second Denno hearing on the basis that Petitioner had already received a Denno hearing prior to his first trial and if he were to conduct another hearing based on the exact same facts and arguments, he would be overruling another Circuit judge, which he lacked the authority to do. (R. 788). Judge Dennis is correct.

As a factual matter, there is no dispute Judge Harrington previously ruled on the same argument and set of facts prior to the jury being sworn in the first trial and as result, Judge Harrington's ruling is clearly a *pre-trial ruling*, as opposed to an *in trial ruling*. (R. 154-55, 163, 788). It is equally true that Judge Dennis is legally correct in that under South Carolina law, one Circuit Court judge lacks the authority to overrule another Circuit Court judge. 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.")). Moreover, as noted by the Supreme Court of the United States, "[i]t is a fundamental principle of jurisprudence ... that a question of fact or of law distinctly put in issue and directly determined by a[criminal or civil] court of competent jurisdiction cannot afterwards be disputed between the same parties." Frank, 237 U.S. at 334; see also Bradley, 315 F.3d 1091, 1098 (9th Cir. 2002) (concluding that a second trial judge was bound by the first trial judge's ruling in a re-trial where there was no change in the evidence presented or the legal argument made to either judge); In re: Alberto, 125 Cal. Rptr.2d 526, 2002 WL 31116128, slip. Op. 11205 (Ct. App. 2002) ("[F]or one superior court judge, no matter how well intended, even if correct as a matter of law, to nullify a duly made, erroneous ruling of another superior court judge places the second judge in the role of a one-judge appellate court."). Therefore, unless this Court determines that the effect of a mistrial extends to dispositive pre-trial rulings based on the same legal arguments and set of facts, Jude Dennis did not commit legal error in declining to conduct a second Denno hearing.

B. The Effect of a Mistrial does not Extend to Dispositive Pre-Trial Rulings

Furthermore, while Petitioner argues Judge Dennis erred when he allegedly failed to understand the effect a mistrial had on Judge Harrington's ruling, the State submits this argument fails to appreciate the fact that Judge Harrington's ruling was made in pre-trial rather than at trial.[4] Specifically, while Petitioner suggests he is entitled to a new trial because the effect of a mistrial is no trial, a mistrial does not extend to pre-trial rulings on the same facts since the purpose of a retrial is not to re-litigate evidentiary issues but is instead, to let a new jury "reach a final disposition of . . . issues . . . left unresolved by the failure of the original jury to agree upon a verdict." City of Cleveland v. Cleveland Elec. Illuminating Co., 538 F.Supp. at 1330.

As noted in City of Cleveland v. Cleveland Elec. Illuminating Co., "a mistrial occasioned by the jury's inability to arrive at a verdict does not convert those matters which were previously the subject of dispositive rulings by the trial court to matters the litigants are free to relitigate de novo in the second trial." Id. Indeed, this has been recognized both by South Carolina's appellate courts as well as other jurisdictions. For instance, 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

[4] To be clear, 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)). Rather, the State simply suggests these rulings do not extend to dispositive pre-trial rulings such as a Denno hearing when they are based on the same facts and legal arguments.

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.

Likewise, the Ohio Supreme Court has also found that a mistrial does not affect pre-trial evidentiary rulings established in a previous trial. See Schwering v. TRW Vehicle Safety Sys., Inc., 132 Ohio St.3d 129, 133, 970 N.E.2d 865, 868-69 (2012) (recognizing that pre-trial rulings concerning the admission of evidence in a first trial are not disturbed when that trial subsequently ends in a mistrial). Specifically, in Schwering, the Supreme Court of Ohio, addressing an analogous question certified by the U.S. District Court for the Southern District of Ohio, acknowledged that prior rulings issued by its district appellate courts were correct in finding Ohio trial courts, when presiding over a re-trial following a mistrial, are bound by previous pre-trial rulings based on the same facts. Id. (citing State v. Harris, 6th Dist. No. L-83-223, 1984 WL 7878 (May 11, 1984); State v. Anderson, 7th Dist. No. 03MA252, 2006-Ohio-4618 2006 WL 2573785)). This was also mentioned by the D.C. Circuit in Souza v. Corvick, which, in a footnote, mentioned that purpose of a retrial is not "to afford either party an opportunity to fortify a position it was unable to maintain at a previous trial." Souza v. Corvick, 441 F.2d 1013, 1017-19 n.6 (D.C. Cir 1970). Thus, the State submits both South Carolina law, as well as other jurisdictions, recognize the distinction between the effect of a mistrial on pre-trial rulings as opposed to those occurring in trial.

In light of this the State submits that, 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.*[5] This is so

[5] 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

because, as discussed in section (A), 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.").

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.

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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).

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 and as such, 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 Denno hearing were based on the same facts which supported its first motion and therefore redetermination of 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 Denno hearing.

C. 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 Denno hearing, Petitioner was not prejudiced by such an error as Judge Dennis, after hearing the evidence, ultimately adopted Judge Harrington's order from the first Denno hearing and found

the State met the necessary requirements for admission of Petitioner's statements.[6] This is especially true since Petitioner has never alleged Judge Harrington erred in ruling on the Denno issue, Petitioner's argument to Judge Dennis was based on the exact same legal argument and set of facts as those that were advanced to Judge Harrington, and Petitioner has never alleged the ruling issue by Judge Dennis was erroneous. In other words, because Judge Dennis, after hearing the evidence, adopted the ruling of Judge Harrington, a ruling which Petitioner has never alleged as erroneous, the State submits that even if Judge Dennis erred in his understanding as to the legal effect of a mistrial, Petitioner cannot show he was prejudiced.

In City of Cleveland v. Cleveland Elec. Illuminating Co., a federal district court, following the declaration of a mistrial and prior to the jury being sworn in the second trial, was asked to review a variety of pre-trial motions ruled upon by the previous trial judge prior to the jury being sworn in the first trial. 538 F.Supp. at 1332. In ruling on the motion, the district court, citing Moore's Federal Practice, applied the federal "law of the case" doctrine and adopted 16 of the prior judge's pretrial rulings. Id. at 1332. The State submits Judge Dennis did essentially the same thing in this case, when, after questioning counsel regarding the underlying facts and law supporting Judge Harrington's ruling ultimately adopted her findings and determined that he would have come to the same conclusion. (R. 1133-35).

Understanding this, the State submits that even assuming the trial court erred regarding the effect a mistrial has on dispositive pre-trial rulings based upon the same facts, the record before this Court established that Petitioner was not prejudiced as he still received a complete

[6] Specifically, Judge Dennis, after explaining he was standing by his previous ruling that Petitioner would not receive a second Denno hearing, 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 indicated it was adopting Judge Harrington's ruling stating, "[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).

Denno hearing in his first trial and defense counsel admitted it would have made the exact same argument in his second trial. 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 her Denno ruling, 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 a second 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 affirm Petitioner's conviction and sentence.

CONCLUSION

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

Respectfully Submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

BRENDAN J. McDONALD
Assistant Attorney General

SCARLETT ANNE WILSON
Solicitor, Ninth Judicial Circuit

South Carolina Office of Attorney General
P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-3188

Brendan J. McDonald
S.C. Bar No. 77784

ATTORNEY(S) FOR RESPONDENTS

October 20, 2014.

STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from 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

PROOF OF SERVICE

I, Brendan J. McDonald, counsel for the Respondent, certify that I have served the within Brief of Respondent 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 20th day of October, 2014.

BRENDAN J. McDONALD
S.C. Bar No. 77784
Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3188
ATTORNEY FOR RESPONDENT