STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from York County
The Honorable Michael G. Nettles, Circuit Court Judge

Opinion No. 2014-UP-228 (S.C. Ct. App. filed June 18, 2014)
Appellate Case No. 2014-001969

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

TAURUS LAMARE THOMPSON,

PETITIONER.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

The Court of Appeals properly determined that the directed verdict argument raised on appeal was not preserved for review where Petitioner failed to renew his directed verdict motion at the close of the defense case. However, even if the issue had been preserved, the trial judge properly denied Petitioner's directed verdict motion on the charge of resisting arrest where the officer fully intended to arrest Petitioner for violating the municipal code; where Petitioner knew the officer was trying to arrest him but he continued to run away; and where Petitioner continued to resist arrest even after the officer manually touched him.

STATEMENT OF THE CASE

Petitioner was indicted in York County in May 2011 for resisting arrest pursuant to S.C. Code § 16-9-320 (B). On July 24, 2012, Petitioner waived his right to a jury trial and had a bench trial before the Honorable Michael G. Nettles. Judge Nettles found Petitioner guilty of the lesser included offense of resisting arrest under S.C. Code § 16-9-320 (A) and sentenced Petitioner to a total of 155 days of incarceration, with credit for 55 days of time already served. A timely notice of appeal was served and filed.

On June 18, 2014, the South Carolina Court of Appeals affirmed Petitioner's convictions. See State v. Thompson, Op. No. 2014-UP-228 (S.C. Ct. App. filed June 18, 2014). Petitioner's request for rehearing was denied on August 25, 2014. Petitioner timely submitted a Petition for Writ of Certiorari to the Court of Appeals, and this Return follows.

ARGUMENT

The Court of Appeals properly determined that the directed verdict argument raised on appeal was not preserved for review where Petitioner failed to renew his directed verdict motion at the close of the defense case. However, even if the issue had been preserved, the trial judge properly denied Petitioner's directed verdict motion on the charge of resisting arrest where the officer fully intended to arrest Petitioner for violating the municipal code; where Petitioner knew the officer was trying to arrest him but he continued to run away; and where Petitioner continued to resist arrest even after the officer manually touched him.

Issue Preservation

Petitioner first argues that the Court of Appeals erred in concluding his directed verdict issue was not preserved for appellate review and failing to reach the merits. To the contrary, the Court of Appeals' determination that Petitioner's directed verdict issue was not preserved was correct. In criminal cases, a defendant must renew his directed verdict motion at the close of the defense case in order to preserve directed verdict issues for appellate review. See State v. Hepburn, 406 S.C. 416, 431-32, 753 S.E.2d 402, 410-11 (2013) (expressly adopting the "waiver rule" as set forth in State v. Harry: "[W]hen the defendant presents testimony, he loses the right to have the court review the sufficiency of the evidence based on the state's evidence alone"); State v. Harry, 321 S.C. 273, 277, 468 S.E.2d 76, 79 (Ct. App.1996) ("A motion for a directed verdict made at the close of the [state's] case is not sufficient to preserve error unless renewed at the close of all the evidence, because once the defense has come forward with its proof, the propriety of a directed verdict can only be tested in terms of all the evidence.") (alteration in original) (citation omitted); see also State v. Parler, 217 S.C. 24, 26, 59 S.E.2d 489, 489 (1950) (holding, under Circuit Court Rule 76, a defendant who fails to renew a directed verdict motion after presenting evidence during the defendant's case has not preserved the

denial of the motion for appellate review); Note to Rule 19, SCRCrimP (stating the rule is "substantially the substance of Circuit Court Rule 76").

Contrary to Petitioner's contentions, a criminal defendant who elects to have a bench trial is not exempted from this rule. As the Court of Appeals pointed out in its opinion, Petitioner's "reliance on Norell Forest Products v. H&S Lumber Co., 308 S.C. 95, 417 S.E.2d 96 (Ct. App. 1992), *rev'd on other grounds*, 310 S.C.368, 426 S.E.2d 800 (1993), is misplaced, as Norell is a civil case in which this court's holding was based in part on Rule 52(b) of the South Carolina Rules of Civil Procedure." State v. Thompson, Op. No. 2014-UP-228 (S.C. Ct. App. filed June 18, 2014). Rule 52(b) of the civil rules states that "[w]hen findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment." Significantly, subsection (a) of Rule 52 requires that "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon." Thus, because the trial judge in a civil case must make specific findings of fact when he decides a case without a jury, the sufficiency of the evidence can be reviewed even if no directed verdict motion was made.

There is not a rule similar to Rule 52, SCRCP, in the criminal rules of procedure. There is no rule requiring specific findings of fact when a trial judge determines whether or not a criminal defendant is guilty in a bench trial; therefore, a trial judge may simply find a defendant "guilty" in the same way a jury would, without an explanation. Further,

Rule 19 of the criminal rules of procedure does not distinguish between jury trials and bench trials in any fashion. See Rule 19, SCRCrimP ("Directed Verdict"). Therefore, contrary to Petitioner's assertions, the "same logic" from Norell does not apply in a criminal case where a defendant proceeds with a bench trial. (See Petition for Writ of Certiorari, p. 10). Further, the fact that the civil rules of procedure specifically provide that a motion for directed verdict is not necessary in a civil bench trial - but the criminal rules do not - illustrates that the provisions of Rule 52(b) do not apply in criminal bench trials. See Nelson v. Ozmint, 390 S.C. 432, 436-37, 702 S.E.2d 369, 371 (2010) (the canon of construction " *expressio unius est exclusio alterius* " or " *inclusio unius est exclusio alterius* " holds that "to express or include one thing implies the exclusion of another, or of the alternative"). Finally, there is no authority for Petitioner's contention that defense counsel's closing argument - which discussed issues pertaining to the weight and credibility of the evidence and specifically mentioned the "beyond a reasonable doubt" standard several times - could substitute for a specific renewal of Petitioner's directed verdict motion. (See R. p. 73-80).

In this case, Petitioner testified in his own defense but subsequently failed to renew his directed verdict motion after the defense rested. (See R. p. 63-73). Accordingly, the directed verdict issue raised on appeal was not preserved for appellate review and the Court of Appeals properly dismissed the appeal on error preservation grounds. Hepburn at 431-32, 753 S.E.2d at 410-11; Harry at 277, 468 S.E.2d at 79.

Discussion Regarding the Merits

Assuming the issue was somehow preserved, the trial judge correctly denied Petitioner's directed verdict motion. In ruling on a motion for directed verdict, the trial

judge must view the evidence, and all of its reasonable inferences, in the light most favorable to the State. See State v. Frazier, 375 S.C. 575, 581, 654 S.E.2d 280, 283 (2007). If the State presents direct or substantial circumstantial evidence reasonably tending to prove the guilt of the defendant, including evidence from which his guilt can be logically deduced, the defendant's directed verdict motion is properly denied. State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001). This Court has stated that the appropriate test to be applied when reviewing a directed verdict motion in a case relying solely on circumstantial evidence is as follows:

> When the state relies exclusively on circumstantial evidence and a motion for a directed verdict is made, the circuit court is concerned with the existence or nonexistence of evidence, not with its weight. The circuit court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. "Suspicion" implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. However, a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.

State v. Cherry, 361 S.C. 588, 593-594, 606 S.E.2d 475, 478 (2004) (citations omitted) (emphasis in original). On appeal from the denial of a motion for a directed verdict, the appellate court may only reverse the trial court only if there is no evidence to support the trial court's ruling. See, e.g., State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002).

In State v. Williams, the defendant was tried on charges of robbery, grand larceny, and assault with a deadly weapon. 237 S.C. 252, 254, 116 S.E.2d 858, 859 (1960). The defendant claimed that the trial judge should have directed a verdict on the assault charge because the alleged assault was committed while he was resisting an attempted unlawful arrest. Id. at 255, 116 S.E.2d at 859. In determining that Petitioner

was not, in fact, under arrest until after the officer saw contraband in plain view, this Court found that the officer's requiring the defendant to get out of the car during a traffic stop did not constitute an "arrest." Id. at 257, 116 S.E.2d 860. The Court explained:

> To constitute an arrest, there must be an actual or constructive seizure or detention of the person, performed with the intention to effect an arrest and so understood by the person detained. It is not necessary that there be an application of actual force, or manual touching of the body, or physical restraint which may be visible to the eye, or a formal declaration of arrest; it is sufficient if the person arrested understands that he is in the power of the one arresting and submits in consequence. However, in all cases in which there is no manual touching or seizure or any resistance, the intentions of the parties to the transaction are very important; there must have been intent on the part of one of them to arrest the other, and intent on the part of such other to submit, under the belief and impression that submission was necessary. There can be no arrest where the person sought to be arrested as not conscious of any restraint of his liberty. Id. at 257, 116 S.E.2d at 860-61 (citations omitted).

The Williams court concluded that, where neither the officer nor the defendant himself believed an arrest was occurring at the relevant time, no arrest had occurred. Id. at 257, 116 S.E.2d 861.

In State v. Brannon, the defendant was tried for breaking into motor vehicles and resisting arrest. 388 S.C. 498, 697 S.E.2d 593 (2010). The defendant claimed that the trial judge should have granted a directed verdict on the resisting arrest charge because the State failed to prove an arrest was being made at the time he fled from police. Id. at 501, 697 S.E.2d at 595. This Court looked to State v. Williams for the "specific elements to determine when an arrest has been consummated." Id. at 504, 697 S.E.2d at 597. After pointing out that an arrest is an "ongoing process," this Court stated that it had to determine "whether the arresting process was underway" at the time of the defendant's flight. Id. (citing State v. Dowd, 306 S.C. 268, 270, 411 S.E.2d 428, 429 (1991)). This Court found that, pursuant to State v. Williams, the intentions of the parties must be

evaluated under a subjective rather than an objective standard. The Court then concluded that an arrest was not in fact being made at the time the defendant fled because the officers did not testify that they intended to arrest the defendant at that time; instead, the officers testified that their intent was to question him. Id. at 505, 697 S.E.2d at 597. This Court also noted that there was no evidence the defendant had submitted to an arrest since he ran as soon as he saw the officers. Id.

In Petitioner's case, the trial judge properly denied Petitioner's directed verdict motion on the charge of resisting arrest under S.C. Code § 16-9-320 (A)[2] because the evidence presented reflected that the arresting process was underway at the time Petitioner fled and resisted arrest. Officer Englert pulled Petitioner over for driving without his headlines on. (R. p. 14, lines 14-22). Petitioner yielded to the traffic stop by pulling over into an apartment complex. (R. p. 14, lines 22-24). However, before Officer Englert could even get his seatbelt off, Petitioner hopped out of his vehicle and began running away. (R. p. 14-15). Officer Englert took off after Petitioner. (R. p. 15-16). Officer Englert testified that, while he was chasing Petitioner, he was yelling that Petitioner was under arrest; to stop running; to get on the ground; and that Petitioner was going to be tired when he got to jail. (R. p. 16-22; p. 26; p. 34-35). Petitioner admitted at trial that he knew during the chase that he was going to be arrested but he continued to run away from Officer Englert so as to try to avoid arrest. (R. p. 70, lines 14-21; p. 72, lines 13-15). Finally, even after Officer Englert had laid his hands on Petitioner to arrest

[2] S.C. Code § 16-9-320 (A) provides, in pertinent part: "It is unlawful for a person knowingly and wilfully to oppose or resist a law enforcement officer in serving, executing, or attempting to serve or execute a legal writ or process or to resist an arrest being made by one whom the person knows or reasonably should know is a law enforcement officer, whether under process or not." Petitioner was indicted under subsection (B) of this statute, which proscribes assaulting an officer while resisting arrest, but the trial judge concluded there was insufficient evidence under subsection (B) and found Petitioner guilty under subsection (A) as a lesser-included offense. (See R. p. 82, lines 3-11).

him when the two of them ended up in a creek, Petitioner continued to struggle and resist the arrest. (R. p. 15-18).

Officer Englert indicated that Petitioner violated two city ordinances that night, Rock Hill, South Carolina, Municipal Code § 23-7 (c), fleeing detainment, and Rock Hill, South Carolina, Municipal Code § 23-4, resisting police. (See R. p. 16-22; p. 24-26; p. 34-35; p. 47-48). Therefore, Officer Englert intended to arrest Petitioner for violating the Municipal Code from the moment Petitioner began running. (R. p. 18; p. 24; p. 34-35). Because Officer Englert fully intended to arrest Petitioner after he began running, this case is easily distinguished from State v. Brannon, where the officers intended only to question the defendant. This case is also distinguishable from Brannon because Petitioner admitted he was aware the officer was trying to arrest him while the chase was taking place. See Williams, at 257, 116 S.E.2d at 860 ("To constitute an arrest, there must be an actual or constructive seizure or detention of the person, performed with the intention to effect an arrest and *so understood by the person detained.*") (citation omitted) (emphasis added). Lastly, this case is distinguishable from Brannon because there was testimony that, even after the officer manually touched Petitioner for the purpose of placing him under arrest for violations of the municipal ordinances, Petitioner continued to struggle and resist arrest. (See R. p. 56, lines 14-25). See Williams at 257, 116 S.E.2d at 860-61.

Based upon the foregoing, the State presented ample evidence supporting that Petitioner committed the offense of resisting arrest. Accordingly, Petitioner's directed verdict motion was properly denied. (See R. p. 35-59). See State v. Weston, 367 S.C. 279, 292-93, 625 S.E.2d 641, 648 (2006) ("If there is any direct evidence or any

substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury.").

CONCLUSION

For the reasons discussed above, Respondent requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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October 27, 2014

STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from York County
The Honorable Michael G. Nettles, Circuit Court Judge

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THE STATE OF SOUTH CAROLINA,

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TAURUS LAMARE THOMPSON,

PETITIONER.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the **Return to Petition for Writ of Certiorari** in the above-referenced case has been served upon **Carmen V. Ganjehsani**, South Carolina Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, South Carolina 29211-1589, this **27th day of October, 2014.**

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October 27, 2014

The Honorable Daniel E. Shearouse
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RE: **State of South Carolina v. Taurus Lamare Thompson**
Appellate Case No. 2014-001969

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the State's **Return to Petition for Writ of Certiorari** and **Proof of Service** in the above-referenced appeal.

Thank you for your attention to this matter, and please do not hesitate to contact me at (803) 734-3713 should there be any questions or concerns.

Sincerely,

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