

The State of South Carolina
In the Supreme Court

Appeal From Horry County
Court of General Sessions

Larry B. Hyman, Jr., Circuit Court Judge

Unpublished Opinion No. 2014 - UP-354
(S.C. Ct. App. Filed October 8, 2014)

The State

Respondent,

v.

Lynel Witherspoon #254076 Pro Se Petitioner,

Appellate Case No. 2013-001650

Petition For A Writ of Certiorari

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S.C. Supreme Court

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Questions Presented

1. Did the trial judge err in failing to enter a Directed Verdict where the State failed to present Substantial Circumstantial evidence that appellant was the person in the car who sold the informant Crack cocaine?

2. Was trial courts giving of, confusing and misleading jury instructions an error of law?

Statement of the Case

On February 28, 2013, the Horry County Grand jury indicted Appellant Lynel Witherspoon on one count of distribution as a third offense. R. 178-179; R. 171, ln. 20 Tr. 173, ln. 4. On July 24, 2013, Appellant proceeded to trial before Judge Larry B. Hyman Jr. and a jury. Kia Wilson represented Appellant and Scott Graustein represented the State. Tr. 1.

During trial, Appellant's motion for directed verdict of acquittal was denied, tr. pg. 118, ln. 12 - pg. 119, ln. 20. Through course of trial defense made objections to Allen Charge, tr. pg. 162 ln. 7-13. Also trial records show issues of error of law, tr. pg. 143, ln. 11 - pg. 144, ln. 16.

At the conclusion of the trial on July 25, 2013, jury found Appellant guilty. R. 167, ln. 22 - R. 168, ln. 3. Appellant filed pro se brief along with Appellate Counsel Benjamin John Tripp's Anders Brief. The Court of Appeal granted counsel's relief as attorney in unpublished opinion No. 2014-UP-354 (S.C. Ct. App. filed October 8, 2014). Petitioner seeks a writ of certiorari to review that decision.

Argument

1. The court of appeals should have held that trial judge erred in failing to enter a directed verdict of acquittal where the state failed to present substantial circumstantial evidence that appellant was the person in the car who sold the informant crack cocaine?

Discussion

The accused is entitled to a directed verdict when the state fails to present evidence to support every element of the charged offense. See *State v. Brown*, 360 S.C. 581, 586, 602 S.E. 2d 392, 395 (2004); *In re Jeremiah W.*, 353 S.C. 90, 93-94, 576 S.E. 2d 185, 187 (Ct. App. 2003) (re'ld on other grounds, 361 S.C. 620, 606 S.E. 2d 766 (2004)); See also *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.")

Our Supreme Court "has repeatedly affirmed the principle that when the state fails to produce substantial circumstantial evidence that the defendant committed a particular crime, the defendant is entitled to a directed verdict." *State v.*

Odems, 395 S.C. 582, 720 S.E. 2d 48 (2011) (emphasis added). In Odems, the court cited State v. Bostick, 392 S.C. 134, 708 S.E. 2d 774 (2011) and State v. Lollis, 343 S.C. 580, 541 S.E. 2d 254 (2001) as "jurisprudence . . . instructive in explaining the proof required in cases built wholly on circumstantial evidence." Id. Specifically, the trial court "should grant a directed verdict motion when the evidence merely raises a suspicion that the accused is guilty." Odems, 395 S.C. at 586, 720 S.E. 2d at 50 (emphasis added) (citation omitted). "Suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." See State v. Buckmon, 347 S.C. 316, 322, 555 S.E. 2d 402, 404-05 (2001) (citing Lollis, 343 S.C. 580, 541 S.E. 2d 254). Therefore, a case based solely upon circumstantial evidence should be submitted to the jury only if there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced." Bostick, 392 S.C. at 139, 708 S.E. 2d at 776-777 (citing State v. Mitchell, 341 S.C. 406, 409, 535 S.E. 2d 126, 127 (2000)).

In this case, the State did not present substantial circumstantial evidence that appellant was the person in the car who sold the informant crack cocaine, tr. pg. 117, ln. 22 - pg. 118, ln. 18. tr. pg. 109, ln. 25 - pg. 110, ln. 25. None of the testifying law enforcement officers involved in the operation actually witnessed the alleged buy or identified accused. The state's hidden video recording did not record anyone's face or alleged transaction at all. Finally, the law enforcement officers

never tracked or located the marked money used in the alleged buy. Informant Stone never testified that she turned around and saw Appellant hand her the cocaine and take the money. Indeed, all of her testimony, should be disregarded. She has been convicted three times for forgery, which is a crime of dishonesty. The sum of the State's evidence at most merely raises a suspicion that Appellant provided Stone with the cocaine, and therefore the trial judge erred in failing to direct a verdict of acquittal.

2. Trial Courts giving of confusing and misleading jury instructions was an error of law.

Blurton v. State 573 S.E.2d 802 holds that, "it is error to give instruction which are calculated to confuse or mislead the jury." Where it was established in trial that there was no evidence to determine identity of defendant from, trial judge erred in charging the jury that "they must determine the accuracy of the defendant." This puts the burden of proof on the jury. State v. Logan, 405 S.C. 83, 90, 747 S.E.2d 444, 448 (2013), States, "In reviewing jury charges for error, this court considers the trial courts jury charge as a whole and in light of evidence and issues presented at trial." The trial records will reflect there was an "issue of the defendants identity" tr. pg. 62, ln 2-13;

tr. pg. 79, ln. 9-11; tr. pg. 117, ln. 22-25; tr. pg. 155, ln. 4-16.
Tr. pg. 144, ln. 13-16, trial judge instructs "If after examining the testimony you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty."
Tr. pg. 143, ln. 11-13 shows "reasonable doubt." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010) States, "The trial court is required to charge only the current and correct law of South Carolina." Trial Judge charges "the state has the burden of proving identity beyond a reasonable doubt."
In Jury Charge - By the Court (tr. pg. 143, ln. 11-13) where trial judge states "An issue in this case is the identification of the defendant as a person who committed the crime charged," gives rise to a reasonable doubt to the guilt of the accused. The state failed to prove defendant's identity.

In Re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970) holds that "Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Trial Judge's statements in charge, tr. pg. 143, ln. 11-13 "An issue in this case is the identification of the defendant as a person who committed the crime charged," shows the state's failure in meeting the burden of proof. Appellant contends trial courts erred when instructing jury, "or you must determine the accuracy of the identification of the defendant," tr. pg. 143, ln. 21-23, which improperly shifted the burden of

Proof. Battle v. State, 382 S.C. 197, 203, 675 S.E.2d 736, 739 (2009) "In determining whether a defendant was prejudiced by improper jury instructions, the court must find that, viewing the charge in its entirety and not in isolation, there is reasonable likelihood that the jury applied the improper instruction in [A] way that violates the Constitution." Id. at 204, 675 S.E. 2d at 740.

Therefore trial judge erred in giving misleading instruction where it's established by record, that the state failed to prove the identity of defendant and charged that the jury must determine the identity of the defendant where evidence was not produced to prove such from. This constituted an error of law which led to defendant's unfair trial.

Conclusion

For the reasons stated, petitioner asks the Court to grant the petition for a writ of Certiorari.

Respectfully Submitted,
Pro Se Lynel Witherspoon
Manning Correctional Inst
502 Beckham Drive
Columbia, S.C. 29203

Oct 22, 2014

Verification

I declare that the facts stated in this petition are true and correct, and can be further verified by contacting Petitioner, Lynel Witherspoon #254076 at Manning Correctional Institution, 502 Beckham Drive, Columbia, S.C. 29203

Lynel Witherspoon
Petitioner

Sworn to and subscribed before me this

27th day of October

Elizabeth Wood
Notary Public

My Commission Expires May 30, 2017

My Commission Expires 8

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V.

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Appellate Case No. 2013-001650

PROOF OF SERVICE

I Lynel Witherspoon (petitioner), certify that I have served a Pro Se Petition FOR A WRIT OF CERTIORARI pursuant to Rule 221(b) with the following courts:

South Carolina Court of Appeals
Jenny Abbott Kitchings, Clerk
P.O. Box 11629
Columbia, S.C. 29211

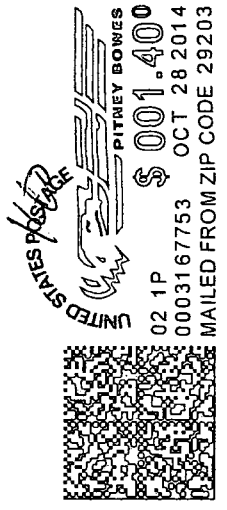
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The Supreme Court of S.C.
Daniel E. Shearouse, Clerk of Court
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