

2014-DD1601
ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lancaster County

J. Ernest Kinard, Jr., Circuit Court Judge

RECEIVED

Opinion No. 2014-UP-178 (S.C. Ct. App. filed 4/30/2014)

JUL 24 2014

10-GS-29-01000, 01001

S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

ANTHONY RODRIEKUS CARTER

PETITIONER

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

INDEX

INDEX.....	1
CERTIFICATE OF COUNSEL.....	2
QUESTION PRESENTED	3
STATEMENT OF THE CASE.....	4
ARGUMENT	
The Court of Appeals erred in finding the issue procedurally barred and refusing to find that the trial judge erred in refusing to direct a verdict of acquittal for murder when the State failed to prove who fired the fatal shot and the State failed to introduce evidence that Appellant and the co-defendant joined to accomplish an illegal purpose.....	8
CONCLUSION	14

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 6/25/2014.

QUESTION PRESENTED

Did the Court of Appeals err in finding the issue procedurally barred and refusing to find that the trial judge erred in refusing to direct a verdict of acquittal for murder when the State failed to prove who fired the fatal shot and the State failed to introduce evidence that Appellant and the co-defendant joined to accomplish an illegal purpose?

STATEMENT OF THE CASE

In August of 2010, the Lancaster County Grand Jury indicted Anthony Rodrikus Carter for murder, possession of a firearm during the commission of a violent crime, indictments #10-GS-29-1000, 1001. Earlier, in 2009, the Lancaster County Grand Jury indicted Carter for possession of a pistol by a person convicted of a violent crime, indictment #2009-GS-29-1167. On November 7, 2011, Carter proceeded to jury trial before the Honorable Ernest J. Kinard. Michael Lifsey represented Carter at trial. Doug Barfield prosecuted the case. At the close of the State's case on November 9, 2011, Carter pled guilty to possession of a pistol by a person convicted of a violent crime. Sentencing was deferred. On November 10, 2011, the jury found Carter guilty of murder and possession of a firearm during the commission of a violent crime. On November 17, 2011, Judge Kinard sentenced Carter to 32 years for murder, 5 years concurrent for possession of a firearm during the commission of a violent crime and time served for possession of a pistol by a person convicted of a violent crime. A timely notice of intent to appeal was served on November 18, 2011, and the direct appeal perfected. On April 30, 2014, the Court of Appeals, in an unpublished opinion, affirmed Appellant's convictions for murder and possession of a firearm during the commission of a violent crime. State v. Carter, Op. No. 2014-UP-178 (S.C. Ct.App. filed April 30, 2014). A petition for rehearing was filed and denied on June 25, 2014. This petition for writ of certiorari follows.

STATEMENT OF FACTS

On May 3, 2010, gunfire erupted at the Countryside Mobile Home Park in Lancaster. Three year old Jaylen J. was fatally shot as she sat in her car seat in a car parked at the mobile home park. On that evening of May 3, 2010, Marico Stevens and Anthony Carter drove Emmie Amanda Coats to her home in the mobile home park. Stevens was the driver, Carter was in the passenger seat, Coats and Jaylen J. were in the backseat. (R. p. 191, lines 1- p. 192, lines 1-5). Carter and Coats were romantically involved. (R. p. 178, lines 4-20). Stevens was the boyfriend of Jaylen J.'s mother, Rodriana Nisha Cunningham. (R. pp. 126-127).

Coats testified that she was aware of an earlier dispute between Carter "Ant" and Beneco "Neco" Ganson, J.D. Hemphill and John Jarrod Hill, "John John." (R. p. 192, lines 19-23). Hill testified that he gave Carter \$450 to buy drugs and Carter "jumped the fence." (R. p. 251, lines 2-23). Coats testified that on the way to the mobile home park Carter told Stevens about an earlier incident where Ganson, Hemphill and Hill had chased Carter out of the mobile home park. (R. p. 194, lines 1-16). Coats told police that Ganson told Carter that if he ever came to the mobile home park again, he better have a gun. (R. p. 223, lines 2-9). Ganson testified at trial and admitted that he, Hill and Hemphill tried to "get" Carter after he took the money from Hill. (R. p. 299, lines 5 – p. 303, lines 1-7). Ganson also admitted that a group of them beat up Carter's brother. (R. p. 303, lines 14 – p. 304, lines 1-12).

According to Coats, Stevens handed a gun to Carter on their way to the mobile home park. When Stevens pulled into the mobile home park to drop Coats off, Coats saw Hemphill and Ganson. (R. p. 199, lines 12- 24). They parked in front of Coats' trailer and Carter got out of the car, with the gun, and met J.D. Hemphill in the middle of the road. (R. p. 204, lines 1- p. 205, lines 1-25). An argument ensued and then Carter turned around and returned to the back passenger side

of the car. (R. p. 206, lines 1-12). Stevens was standing by the front passenger side of the car near the front of the car. (R. p. 206, lines 18-22). When Carter got back to the car, Coats heard gunshots and saw a flash from across the street. (R. p. 207, lines 6-11). According to Coats, Carter “Ant” turned like he was going to shoot back but then Coats went inside her trailer and heard shooting back and forth. (R. p. 207, lines 17-22). Kayla Estes, Carter’s girlfriend, testified that he told her that he met Hemphill in the middle of the road, the “whole thing was quashed.” (R. p. 320, lines 17-22). Carter turned and walked away and heard Ganson say, “Fuck that, I’ll get him.” (R. p. 320, lines 23 – p. 321, lines 1-2). Carter told Estes that he then heard shots, co-defendant Stevens ended up with the gun and started shooting. (R. p. 321, lines 1-10).

Investigator Jeff Steele with the Lancaster County Sheriff’s Department testified that casings recovered from the scene included 7.65 millimeter casings, a .380 caliber cartridge casing, and .22 caliber casings. (R. pp. 395-416). Additionally, three .40 caliber casings were obtained from Coats the morning after the shooting. (R. p. 369, lines 18-24; pp. 211 – 214; pp. 236 - 26240). The only gun recovered was a .40 caliber Hi-Point semi-automatic pistol. (R. p. 522, lines 22 – p. 523, lines 1-2).

During the course of the investigation, investigators spoke with Eric and Jackie Sanders, the co-defendant’s father and step mother, about recovering the gun. Jackie Sanders testified that her husband called someone named Derrick about recovering the gun. (R. p. 360, lines 5-15). As a result of that phone conversation, Jackie met Derrick at a Stop and Go and he gave her a gun. (R. p. 361, lines 10 – p. 362, 363, lines 1-25). Jackie then turned the gun over to Mike Howell of the Lancaster County Sheriff’s Department. (R. pp. 373-375). DNA analysis was performed on the gun and co-defendant Sanders could not be excluded as a possible contributor. (R. p. 510, lines 20-22). Appellant, Carter was excluded as a possible contributor. (R. p. 510, lines 17-18).

Michelle Eichenmiller, a firearms examiner with SLED, testified that the three .40 caliber cartridges collected by Coats, a bullet jacket fragment found in the passenger side floor board of the car, a copper fragment from the headrest in the backseat of the car and a bullet jacket fragment found in the driveway were all fired by the recovered .40 caliber pistol. (R. pp. 523-530). Ken Taylor, a crime scene investigator with the Lancaster County Sheriff's Department, testified that the bullets that entered the car came from the front of the car towards the back of the car. (R. p. 436, lines 3-7).

After the shooting, appellant and co-defendant Stevens left the mobile home park and went to Lawrence Alexander's apartment. (R. pp. 329-333). They did not realize that the child had been shot until Alexander asked about the child. (R. p. 331, lines 22 – p. 332, lines 1-19). Once they realized the child had been shot, they rushed to the hospital. (R. pp. 96 – 102). The child was airlifted to Carolina Medical Center where she was later pronounced dead. (R. p. 120 line 18 – p. 121 lines 1-21). The child died from a gunshot wound to the head. (R. p. 345, lines 19-23).

ARGUMENT

The Court of Appeals erred in finding the issue procedurally barred and refusing to find that the trial judge erred in refusing to direct a verdict of acquittal for murder when the State failed to prove who fired the fatal shot and the State failed to introduce evidence that Appellant and the co-defendant joined to accomplish an illegal purpose.

In closing argument the State argued to the jury, “Nobody, I will tell you straight –up, I’m straight-up here, nobody involved in this case contends that anybody meant to shoot and kill Jaylen [J.], that’s clear and I’m not going to argue otherwise.” (R. p. 591, line 25- p.592, lines 1-3). Instead, the State relied on a theory of transferred intent, arguing that both the co-defendant Stevens and Appellant, under a theory of the hand of one is the hand of all, intended to kill Ganson and Hemphill and mistakenly struck Jaylen J.. (R. p. 592, lines 3 – p. 593, lines 1-3). The State was unable to prove who fired the fatal shot that killed Jaylen J. The State argued, “I submit to you it doesn’t matter whether you conclude he [Appellant]shot Jaylen [J.] or Marico Stevens shot Jaylen [J].” (R. p. 607, lines 15-17). The State, however, failed to offer evidence that co-defendant Stevens and Petitioner joined to accomplish an illegal purpose required under the theory of the hand of one is the hand of all. Stevens’ act of handing the gun to Petitioner, after learning of the prior threats made to Petitioner, without more, does not constitute an illegal purpose. Instead, the act of Stevens’ handing the gun to Petitioner, demonstrates that Petitioner was lawfully arming himself in self-defense. As the State failed to prove that Petitioner fired the fatal shot, and, at the time shots were fired, the co-defendant had the right to act in self-defense, the State failed to prove the element of malice required for murder, even under a theory of transferred intent.

At the close of the State’s case, Petitioner moved for a directed verdict of acquittal. (R. p. 585, lines 22-25). The judge denied the motion for directed verdict stating, “In the light most

favorable to the State, under the hand of one, hand of all situation he could be guilty of various crimes.” The judge erred in refusing to direct a verdict of acquittal for murder.

First, the State offered no evidence that Petitioner and co-defendant Stevens joined to accomplish an illegal purpose. “Under the ‘hand of one is the hand of all’ theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.” State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584. The State failed to establish liability under the hand of one is the hand of all¹. The State presented evidence that after learning that Petitioner had been threatened in the mobile home park and warned that if he returned he should be armed, co-defendant provided a gun to Petitioner. The State did not present evidence that Petitioner and co-defendant Stevens went to the mobile home park to seek retaliation. Instead, the evidence shows that Petitioner and Steven were simply taking Emmie Coats home. Petitioner did not join co-defendant Stevens to accomplish an illegal purpose but merely legally armed himself in self-defense.

Second, the State argues that Petitioner was not entitled to self defense because he was not without fault in bringing on the difficulty. (R. p. 606, lines 2-19). The question of whether Petitioner was entitled to have shot in self-defense after he turned his back and walked away and Ganson and Hemphill fired the first shots, would have been a question for the jury if the State established that Appellant fired the fatal shot. The State, however, can not prove that Petitioner fired the fatal shot. Co-defendant Stevens was clearly without fault in bringing on the difficulty and was entitled to have fired back at Ganson and Hemphill in self-defense. If Stevens had been on trial, based the evidence presented by the State at Petitioner’s trial, the judge would have

erred in refusing to direct a verdict of acquittal. See State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011). As the State proceeded under the hand of one is the hand of all, the judge erred in refusing to direct a verdict of acquittal for murder as to Petitioner.

In closing the State argued, “Well, if Carter didn’t shoot the gun then how did Stevens get the gun? From Carter. One way or the other Stevens – if you believe Stevens shot, Stevens ended up with the gun from Carter during something that Carter started. They’re both guilty of it, we’re only trying Carter today but they’re both guilty of the murder of Jaylen [J.] based on all of the facts and circumstances of what happened.” (R. p. 609, lines 13-20). The State’s theory ignores the absence of any evidence that Petitioner and co-defendant Stevens joined to accomplish an illegal purpose. The evidence shows that co-defendant Stevens handed the gun to Petitioner and Petitioner legally armed himself in self-defense before taking Coats home to the mobile home park where Petitioner had been threatened. Additionally, the State’s theory ignores co-defendant Stevens’ right to act in self-defense once Ganson and Hemphill started shooting.

In State v. Zeigler, 364 S.C. 94, 107, 610 S.E.2d 859, 866 (Ct.App. 2005) the South Carolina Court of Appeals wrote:

Where two or more acting with a common plan or intent [are] present at the commission of a crime, it does not matter who actually commits the crime, all are guilty. The hand of one is the hand of all. Present means to be sufficiently near to aid and abet and assist in the commission of the crime. Intent is also a necessary element, for there must have been a common design or intent to commit the crime, and the crime must have been committed pursuant to that plan, with the person aiding and abetting by some overt act.

¹ The judge charged the jury, without objection, on the theory of the hand of one is the hand of all. (R. p. 649, lines 12-21). This error may need to be raised in post conviction relief.

The only common intent between Petitioner and co-defendant Stevens was the intent to defend themselves from earlier threats and then when the parties made good on the threat, defending themselves from the shots being fired from across the street.

The State's theory of transferred intent fails because the State failed to establish that Petitioner fired the fatal shot. If Petitioner did not fire the fatal shot, no intent existed and no intent could be transferred. Additionally, the State's theory of transferred intent through the hand of one is the hand of all fails because the State failed to establish that Petitioner and co-defendant Stevens joined to accomplish an illegal purpose required under the hand of one is the hand of all theory argued by the State and ruled upon by the judge as the reason for denying the directed verdict motion.

In State v. Fennell, 340 S.C. 266, 272-273, 531 S.E.2d 512, 516-517 (2000) the South Carolina Supreme Court, in addressing the theory of transferred intent, wrote:

In the classic case, the defendant intends to kill or seriously injure one person, but misses that person and mistakenly kills another. Although the defendant did not act with malice toward the unintended victim, the defendant's criminal intent to kill the intended victim (i.e., his mental state of malice) is transferred to the unintended victim. "If there was malice in [defendant's] heart, he was guilty of the crime charged, it matters not whether he killed his intended victim or a third person through mistake." State v. Heyward, 197 S.C. 371, 377, 15 S.E.2d 669, 672 (1941) (affirming murder conviction where defendant testified he mistakenly shot and killed police officer who allegedly broke open his front door, believing the officer to be an assassin sent by an angry former employer). See also State v. Gandy, 283 S.C. 571, 324 S.E.2d 65 (1984) (affirming murder conviction where defendant intending to kill one man shot through a closed door, killing unintended victim instead), *overruled on other grounds by State v. Lowry*, 315 S.C. 396, 434 S.E.2d 272 (1993); State v. Horne, 282 S.C. 444, 447, 319 S.E.2d 703, 704 (1984) (holding that State in future may prosecute defendant for murder of viable fetus when defendant attacks a pregnant woman with malice and in the process kills the fetus, an unintended victim); State v.

Williams, 189 S.C. 19, 24, 199 S.E. 906, 908 (1938) (affirming murder conviction where defendant shot at intended victim who was driving a wagon of cotton, but missed him and mistakenly killed the man sitting beside him); LaFave & Scott, Substantive Criminal Law, § 3.12(d) (1986) (discussing transferred intent); McAninch & Fairey, at 17-19 (same).

The theory of transferred intent does not apply in the present case. The State can not prove that co-defendant Steven acted with malice when he shot in self defense and the bullet mistakenly hit Jaylen J. The State failed to prove that Petitioner fired the fatal shot and failed to prove that Petitioner and co-defendant Stevens joined to accomplish an illegal purpose under a theory of the hand of one is the hand of all. The judge erred in refusing to direct a verdict of acquittal. Because the State relied upon the theory of the hand of one is the hand of all, this Court should remand the case and order the trial court to direct a verdict of acquittal for the murder charge.

The Court of Appeals found the issue procedurally barred writing, “We find any issue regarding the sufficiency of evidence that Anthony Rodriekus Carter fired the fatal shot or could be guilty under an accomplice liability theory is not preserved because he only presented a self-defense argument to the trial judge in support of his directed verdict motion.” (App. p. 2). The Court of Appeal erred. In denying the directed verdict motion the judge ruled on the hand of one is the hand of all theory stating, “In the light most favorable to the State under the hand of one, hand of all situation he could be guilty of various crimes.” (R. p. 586, lines 1-3).

Rule 19(a) SCRCrP provides, “On motion of the defendant **or on its own motion**, the court shall direct a verdict in the defendant’s favor on any offense charged in the indictment after the evidence on either side is closed, if there is a failure of competent evidence tending to prove the charge in the indictment.” (emphasis added). Although trial counsel referenced self defense in the

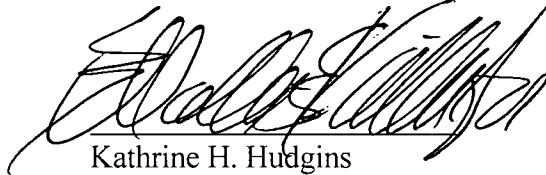
directed verdict motion, the trial judge considered the other evidence presented by the State, specifically the hand of one is the hand of all evidence. The issue was properly before this Court because the trial judge ruled, in denying the motion for directed verdict, that the State introduced sufficient evidence under the hand of one is the hand of all.

In ruling on the directed verdict motion the judge found that the State presented sufficient evidence under the hand of one is the hand of all theory. The State could not prove who fired the fatal shot but argued that Petitioner was guilty even if the co-defendant shot under the hand of one is the hand of all theory. The State, however, failed to produce sufficient evidence that Appellant and co-defendant Stevens joined to accomplish an illegal purpose required under the hand of one is the hand of all theory argued by the State. Petitioner challenged the trial judge's finding that the State presented sufficient evidence. The Court of Appeals erred in finding the issue unpreserved for appellate review. Upon considering the merits of the issue, this Court should reverse as the State failed to present sufficient evidence, either directly or under a theory of the hand of one is the hand of all, to survive the directed verdict stage.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Kathrine H. Hudgins', written over a horizontal line.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER.

This 24th day of July, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lancaster County
J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 2014-UP-178 (S.C. Ct. App. filed 4/30/2014)
10-GS-29-01000, 01001

THE STATE,

RESPONDENT,

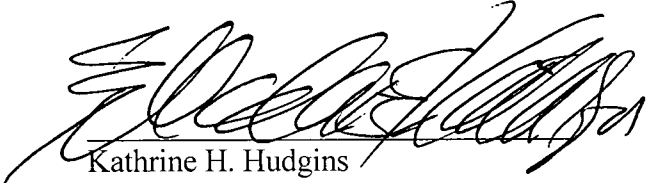
V.

ANTHONY RODRICKUS CARTER,

APPELLANT

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 Edgar Salter, III, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and the S.C. Court of Appeals this 24th day of July, 2014.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 24th day
of July, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 24, 2021