THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

VICTOR WELDON,

APPELLANT

APPELLATE CASE NO. 2012-212563

Appeal from Clarendon County

Ralph F. Cothran, Circuit Court Judge

Opinion No. 2014-UP-463

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, appellant requests rehearing because this Court may have overlooked the fact that appellant's DNA being found on duct tape, which is impossible to date, in a small community is *substantial circumstantial evidence* that appellant participated in the burglary, armed robbery, kidnapping and grand larceny. The trial judge and this Court both found that appellant's DNA being found on the duct tape *by itself* was sufficient to constitute *substantial circumstantial evidence* of appellant's guilt to this very serious crime which resulted in a sixty year prison term. DNA found on a piece of duct tape -- left at some point somehow -- invited a verdict based on speculation based on that single shred of evidence.

The victim in this case said he saw three black men in his garage with masks over their faces. R. 12, ll. 2-17. He was robbed of his wallet -- which he said had about eight hundred dollars in it -- and his money clip (with contained thirty to forty dollars). R. 13, l. 7 – 14, l. 19.

The victim was never able to identify the robbers. He was thrown to the ground "and one [of them] jumped on top of me and sat across my chest and was beating me there. And then one was sitting across my legs and the bigger guy was kicking me in the side and stomping me in the chest and . . ." R. 15, ll. 4-13.

He acknowledged he never saw a gun during the robbery. However, he speculated that one or more of the men could have been armed. At one point he saw something that could have been a weapon. He recalled: "They tried to put tape around you know, wrap it around my face . . . I kept kicking them - - I kept kick moving my legs and stuff. They never did get it wrapped around my feet so I could move. But they did get it around my face." R. 17, l. 8 – 18, l. 22.

According to a police witness co-defendant Pearson "adamantly denied knowing Mr. Gibbons." However, they stated their investigation led them to know that co-defendant Pearson had done yard work for Gibbons in the past. R. 115, l. 6 – 117, l. 18. Co-defendant Pearson's fingerprints -- his right thumb actually -- was matched to Gibbons' garage according to Marie Hodge of the Sumter Police Department. R. 124 l. 1 – 136, l. 18.

Appellant's fingerprints were *not* found anywhere on the property owned by Gibbons. The state's case against appellant was appellant's DNA was found on the same duct tape that had been tied around the head of Gibbons. R. 176, l. 17 -180, l. 2. The state also put in evidence that appellant said he did not know co-defendant Pearson, but appellant and Pearson allegedly worked briefly for a Vocational Rehabilitation sponsored facility for a short time. Again, this was in

Manning, South Carolina and it appeared strangers were few. R. 174, l. 21 – 175, l. 17; R. 244, l. 17 – 245, l. 6.

Directed verdict motion

An extensive directed verdict motion was made in this case. Defense Counsel Knobeloch for appellant cited State v. Mitchell, State v. Bostick and State v. Arnold in support of his argument that a directed verdict should be granted in this case. Defense counsel noted that the state's case against Arnold was actually stronger than the evidence in this case against appellant. Yet the Supreme Court direct a verdict of acquittal for Arnold. R. 271, l. 19 – 278, l. 3. In Arnold the defendant was placed in the victim's car in another state a short time after the crime. R. 277, l. 22 – 278, l. 3.

The judge here ultimately ruled "it's a number of facts they've (the jury) has got to struggle with. But I'm going to let them make that call." The judge opined he thought there was more evidence in this case "than the Mitchell, Arnold, or Bostick cases." R. 283, l. 10 – 285, l. 3.

Pearson was later granted a verdict of acquittal by this Court. State v. Pearson, 410 S.C. 392, 401-403, 764 S.E.2d 706, 711-712 (2014). The panel of this Court reasoned that the most damaging evidence against Pearson was his fingerprint being found on the victim's automobile. This Court nonetheless correctly reasoned that Pearson's fingerprint could have innocently been placed on the vehicle at an earlier time. Respectfully, nothing extremely consequential or substantial separates appellant's DNA being found on the duct tape from Pearson's fingerprint being found on the victim's car.

"Mere suspicion" of guilt is insufficient to take the case to the jury, and beyond a directed verdict motion. State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001). Again, the state's evidence against appellant is that his DNA at some point, somehow, got on the duct tape. From there the jury

was asked to speculate that because appellant worked with Pearson at the same place for a short time, that appellant knew him, and participated in this violent crime with him. Therefore, appellant should be convicted based on that circumstantial evidence.

Case Law

Where, as here, the state fails to produce substantial circumstantial evidence the defendant committed the particular crime the defendant is entitled to a directed verdict. State v. Rothschild, 351 S.C. 238, 569 S.E.2d 346 (2002); State v. Walker, 349 S.C. 49, 562 S.E.2d 313 (2002).

In State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011), the Supreme Court held the state failed to produce substantial circumstantial evidence Bostick killed his neighbor, Ms. Polite, and set her house on fire. The state's case was that Ms. Polite worked at her church and always brought the collection proceeds home on Sunday afternoon.

The state presented evidence that investigators found the decedent's personal items, burned by an accelerant, including a watch and two sets of car keys belonging to Ms. Polite in a burn pile on Bostick's *next door property*. Bostick's mother testified she never used accelerants in the family burn pile.

The Supreme Court noted that the evidence above as well as the fact Bostick had a pattern of gasoline on his shoes and *gasoline was the accelerant used to start the fire* at the Polite home. The Court held this evidence raised a suspicion that Bostick may have been guilty but it was not sufficient for the case to have gone to the jury.

Earlier, and similarly, in State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000) the Supreme Court held that the state's circumstantial evidence against Martin was insufficient to take the case to the jury. In Martin the defendant borrowed his girlfriend's car which was later placed near the scene of the murder.

On the morning after the murder the manager of a restaurant found several bags of garbage near the bar where defendant Martin and co-defendant Wilson picked up Martin's girlfriend late the prior night. Inside the trash were items belonging to the victim. Also found were inside were latex gloves similar to those Martin's girlfriend used to clean her dogs.

When Martin girlfriend's asked him why he and co-defendant Wilson were so late in picking her up from the bar, defendant Martin replied "some shit happened" and co-defendant Wilson added "someone may have died tonight."

The Supreme Court held that this circumstantial evidence was not substantial circumstantial evidence, and it was insufficient to take the case to the jury. The Court in Martin cited State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984) which was a case which provided a strong suspicion of the defendant's guilt.

In State v. Schrock, Schrock admitted to the police that he smoked Marlboro brand cigarettes – the same brand as the cigarette butts found at the murder scene. However, a saliva test could not match a cigarette butt to the defendant. A similar footprint to Schrock's was found at the scene and nearby the scene. Schrock apparently later disposed of the clothes and shoes he had been wearing and he did not present an alibi. The Supreme Court held this evidence only raised a suspicion of Schrock's guilt and that he was entitled to a directed verdict.

In State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004), the Supreme Court affirmed the holding of this Court that a directed verdict should have been issued. The victim, Cox, was shot, and his body found off of a road *in Colleton County.* On the last day Cox was seen alive he borrowed a friend's BMW Z3 to go to the dentist's office. *The car was found in a parking lot in Johnson City, Tennessee and there was evidence the defendant telephoned a friend from 10 miles away from the car. The defendant's fingerprints were found inside the car.* The Supreme Court

reasoned the state only proved that the defendant was in the BMW on the last day that Cox was seen alive, and that was insufficient evidence to make this a jury question.

Similarly, in State v. Mitchell, 341 S.C. 406, 409 535 S.E.2d 126 (2000) a home was burglarized and two guns were stolen. Mitchell had been a guest at their several times. The day after the burglary was reported, investigators found a fingerprint on a screen leaning up against the house which matched Mitchell. Id. Mitchell was arrested and convicted of burglary; during his trial, Mitchell moved for a directed verdict, which was denied by the circuit court. Id.

The Supreme Court noted that the fingerprint was the only evidence linking Mitchell to the burglary. The Court wrote that the evidence presented was entirely circumstantial. "The fact that [Mitchell's] fingerprint was on a screen that was propped up against the house does not prove entry where [Mitchell] had been in and around [Mathis's] house at least three times prior to the burglary." Id. The State did not produce any evidence concerning whether the screen was on the window when the window was broken or when the screen had been removed. Id." Accordingly, the Supreme Court agreed with this Court that Mitchell was entitled to a directed verdict.

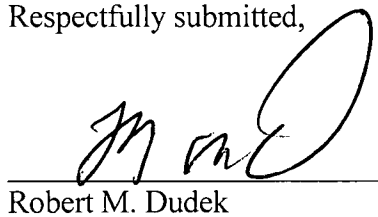
In this case there was evidence that Pearson did yard work for the victim, and Pearson had been in his garage. The state tried to make much of the fact that appellant and Pearson knew each other. The state's witnesses admitted there was not any way too date when Pearson's fingerprint was placed, and no way too similarly date when appellant's DNA got on the duct tape -- or how. If appellant's sweat or saliva or whatever else could cause a DNA "match" was transferred by Pearson onto the duct tape then appellant risked being convicted on this one false piece of seemingly damning evidence.

Unlike Mitchell, there was no evidence appellant had ever been to the victim's house. To the extent that cuts in the state's favor here in distinguishing Mitchell, it also differentiates

appellant's case from the state's alleged case against Pearson as for notice, opportunity and prior presence in the victim's house and garage. The Supreme Court granted a directed verdict in yet another case where the evidence was stronger against the defendant than here in State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2011).

In Odems the defendant was in a car with the stolen property, fled from the police, and lied to attempt to have a woman cover from him. The Court nonetheless said this very suspicious behavior was not sufficient for the case to go to the jury. The DNA, which cannot be dated, being found on a piece of duct tape was not *substantial circumstantial evidence* of appellant's guilt. Rehearing, and oral argument should respectfully be granted. State v. Mitchell; State v. Arnold; State v. Bostick; State v. Schrock; State v. Odems, supra.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

This 31st day of December, 2014

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon David Spencer, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 31st day of December, 2014.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 31st day
of December, 2014.

Rhonda Denise Foxworth (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021.