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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Clarendon County

Ralph F. Cothran, Circuit Court Judge

Opinion No. 2014-UP-463 (S.C. Ct. App. filed 12/17/2014)

11-GS-14-0068

THE STATE,

RESPONDENT,

V.

VICTOR WELDON,

PETITIONER

APPELLATE CASE NO. 2015-000340

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on January 23, 2015.

QUESTION PRESENTED

Whether the Court of Appeals erred by holding evidence petitioner's DNA was found on a piece of duct tape -- left at some point somehow – was by itself substantial circumstantial petitioner participated in the robbery since there was no other "logical explanation" for his DNA being on the duct tape, since this was not "substantial circumstantial evidence" under the precedents of this Court, not to mention burden-shifting?

STATEMENT OF FACTS

Procedural history

Petitioner was indicted by the Clarendon County Grand Jury for the offenses of burglary in the first degree, armed robbery, kidnapping, and grand larceny. R. 361. Michael Pearson was the co-defendant in this case. He was indicted for the same offenses, and also possession of a weapon during a violent crime.

Their joint cases were called to trial on May 14, 2012 before the Honorable Ralph F. Cothran, and a jury. Ernest A Finney, III and Jason Corbett were the prosecutors. John Knobeloch and Laura Knobeloch represented petitioner, Victor Weldon. Michael Pearson was represented by Harry Devoe. R. 1.

On May 18, 2012 the jury found Petitioner Weldon and co-defendant Pearson guilty on all counts. R. 354, l. 10 – 355, l. 9. Co-defendant Pearson was also found guilty of possession of a weapon during a violent crime. R. 355, ll. 7-9.

Judge Cothran sentenced Petitioner Weldon to thirty years imprisonment for burglary in the first degree, thirty years *consecutive* for armed robbery, twenty years concurrent for kidnapping, and five years concurrent for grand larceny. Co-defendant Pearson received the same sentence with an additional five years concurrent for possession of a weapon during a violent crime. R. 359, l. 6 – 360, l. 7.

The Court of Appeals affirmed petitioner's convictions in The State v. Victor Weldon, 2014-UP-463 (filed December 17, 2014). The Court found that Petitioner's DNA was found on duct tape "removed from Victim's face following the burglary. This evidence constituted substantial circumstantial evidence of Weldon's guilt because the only logical explanation for his

DNA being found on duct tape used in the Victim's robbery was that he participated in the robbery." App. 1-2.

A different panel of the Court of Appeals held that co-defendant Michael Pearson was entitled to a directed verdict of acquittal, where Pearson's fingerprint was found on the victim's stolen automobile. The Court reasoned that there was no showing as to when Pearson's fingerprint came to be placed on the victim's stolen automobile. The Court also held there was **no evidence** during the joint trial establishing a relationship between Pearson and Weldon. State v. Pearson, 410 S.C. 392, 764 S.E.2d 706 (2014) (Geathers, J., Few, CJ., and Short, J.).

A petition for rehearing was filed on Petitioner Weldon's behalf on December 31, 2014. App. 3-10. Rehearing was denied on January 23, 2015. App. 11-12. This petition for writ of certiorari follows.

ARGUMENT

The Court of Appeals erred by holding evidence petitioner's DNA was found on a piece of duct tape -- left at some point somehow – was by itself substantial circumstantial petitioner participated in the robbery since there was no other "logical explanation" for his DNA being on the duct tape, since this was not "substantial circumstantial evidence" under the precedents of this Court.

Relevant trial Facts

Edward "Slick" Gibbons owned the Clarendon Auto Parts store in Manning, South Carolina. He had operated that business for forty-five years. R. 2, l. 8 – 4, l. 11.

The front of the Gibbons home faced Country Club Drive and the back of his house faced a pond. The garage was separate from the house. Gibbons had neighbors on both sides of his house. R. 4, l. 3 – 6, l. 12.

The Auto Parts store was open six days a week and was closed on Sunday. That was also the victim's work schedule. He remembered on May 15, 2010, a Saturday, he was preparing to leave the house between 6:00 a.m. and 6:30 a.m. to go to work. R. 7, l. 14 – 8, l. 12.

That morning Gibbons went out in his garage to put his shoes on. He usually locked the door when he left for work because his wife was usually not out of bed. "When I shut the door and bent down three guys came out of that little closet room in there and that's when they jumped me; and it's a miracle I'm still here after that." R. 8, l. 8 – 9, l. 9.

The victim, Gibbons, 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.

Gibbons said one of the men said: "Slick, you know that [we] know that you got money and where is the rest of it? I said this is all I got. I said there's no use to beat me any more for money so just shoot me because this is all I got." R. 19, ll. 7-18.

The three unknown men stole his El Camino and drove away. R. 21, l. 16 – 30, l. 10. He remembered that he was taken to Clarendon Memorial Hospital and then taken by helicopter to a Columbia hospital where he was in intensive care before going to a rehabilitation center in Sumter for a week. R. 32, ll. 2-23.

On cross-examination, Gibbons admitted he never saw a gun during the robbery. He also thought it was daylight outside when the robbery occurred "between 6 and 6:30 in the morning." R. 60, ll. 5-10.

Cecil Eaddy had lived in the Manning area his whole life. He knew Gibbons as "Slick." He found the stolen El Camino shortly after the incident that morning in the road near his farm. R. 78, l. 18 – 82, l. 5.

Eaddy said: "I knew it was Mr. Gibbons' car . . . then I called the store and Ken answered the phone. And I asked if he [the victim] was there and he said no, he wasn't there. And then I told him I found the car. And he told me he [the victim] had just been beaten up at his house. . . . so I pulled it out of the road and switched it off and took the keys out. That's when I took it on up there to the store." R. 81, l. 7 – 82, l. 18.

An employee from the Auto Parts store came and picked up the car "and rode back to the store and I went on out to the farm." R. 83, ll. 4-24.

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.

Petitioner's fingerprints were *not* found anywhere on the property owned by Gibbons. As seen, a different panel of the Court of Appeals held that Pearson was entitled to a directed verdict given that the fingerprint evidence on the victim's stolen car was insufficient to withstand a directed verdict motion because there was no showing **when the fingerprint got placed on the stolen car.** State v. Pearson, 410 S.C. 392, 402-403, 764 S.E.2d 706, 712 (2014).

The state's case against petitioner was petitioner'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 petitioner said he did not know co-defendant Pearson, but petitioner 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. Nonetheless, in State v. Pearson, 410 S.C. 392, 402-403, 764 S.E.2d 706,

712 (2014), the Court of Appeals held there was no evidence of a relationship between Pearson and Petitioner Weldon.

Directed verdict motion

An extensive directed verdict motion was made in this case. Defense Counsel Knobeloch for petitioner cited State v. Mitchell, 341 S.C. 406, 409 535 S.E.2d 126 (2000), State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011), and State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004) 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 petitioner. Yet the Supreme Court directed 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.

Court of Appeals

As seen, the Court of Appeals affirmed petitioner's convictions in The State v. Victor Weldon, 2014-UP-463 (filed December 17, 2014). The Court found that Petitioner's DNA was found on duct tape "removed from Victim's face following the burglary. This evidence constituted substantial circumstantial evidence of Weldon's guilt because the only logical explanation for his DNA being found on duct tape used in the Victim's robbery was that he participated in the robbery." App. 1-2.

Rehearing

Petitioner argued, inter alia, on rehearing that: "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 to date when Pearson's fingerprint was placed, and no way to 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." App. 8. The Court of Appeals denied rehearing.[1] App. 11-12.

Discussion

The timing of *when* and *how* petitioner's DNA came to be placed on the duct tape is not conclusive evidence of his guilt any more than the fingerprint of Pearson on the stolen car was conclusive evidence of his guilt. Further, DNA can be transferred onto an object, whereas fingerprint evidence cannot be transferred.

The fact petitioner's DNA was found on the duct tape, respectfully, did not lead to the "only logical conclusion" that he was guilty of the burglary, armed robbery, kidnapping, and grand larceny in this case. If petitioner touched the duct tape at some point in time his DNA could be found on that duct tape. Petitioner understands that elements such as water can lead DNA to be removed or found inconclusive but it does not follow that "the only logical explanation" for a defendant's DNA being found on an object at the crime scene is that the defendant is guilty.

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[1] State v. Pearson, 410 S.C. 392, 764 S.E.2d 706 (2014) is pending before this Court on the state's petition for writ of certiorari.

This "only logical explanation" standard also was not only not in compliance with this Court's "substantial circumstantial evidence" cases, it required the defense to produce some explanation for how petitioner's DNA got on the duct tape if he was not present, and helping commit the crime. This Court has held that requiring the defense to rebut or explain evidence is improper. See State v. Legette, 282 S.C. 11, 316 S.E.2d 411 91984).

The judge also erred by deferring his duty to make the call on the directed verdict motion to the jury as seen above. In addition, the judge incorrectly opined there was more evidence in this case against petitioner than there was against the defendants in Mitchell, Arnold, or Bostick. "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).

The state's evidence against petitioner is that his DNA at some point, somehow, got on the duct tape. From there the jury was asked to speculate that because petitioner worked with Pearson at the same place for a short time, that petitioner knew him, and participated in this violent crime with him. Therefore, petitioner should be convicted based on that circumstantial evidence. Again, another panel of the Court of Appeals found there was no relationship tying Pearson and Petitioner Weldon together. See State v. Pearson, 410 S.C. 392, 402-403, 764 S.E.2d 706, 712 (2014).

Where the state relies exclusively on circumstantial evidence, the trial judge is only required to submit the case to the jury 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. State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001) If 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. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004), this Court affirmed the holding of the Court of Appeals 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.* This 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.

This Court noted that the fingerprint was the only evidence linking Mitchell to the burglary. This 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, this Court agreed with this Court that Mitchell was entitled to a directed verdict.

In State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011), this 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.

This Court noted that the evidence above as well as the fact Bostick had a pattern of gasoline on his shoes and that *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) this 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."

This Court held that this circumstantial evidence was not substantial circumstantial evidence, and it was insufficient to take the case to the jury. This 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. This Court held this evidence only raised a suspicion of Schrock's guilt and that he 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 prove that petitioner and Pearson knew each other. The state's witnesses admitted there was not any way to date when Pearson's fingerprint was placed, and no way to similarly date when petitioner's DNA got on the duct tape -- or how. If petitioner's sweat or saliva or whatever else could cause a DNA "match" was transferred by Pearson onto the duct tape then petitioner risked being convicted on this one false piece of seemingly damning evidence. Moreover, since there was no way to determine when and how petitioner's DNA got on the duct tape he should have been granted a directed verdict in the same manner as Pearson, especially where Pearson's fingerprint, unlike DNA, had to be placed on the victim's stolen car by Pearson himself.

Unlike Mitchell, there was no evidence petitioner 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 petitioner'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).

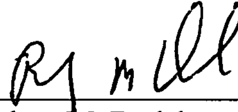
In Odems the defendant was in a car with the stolen property, fled from the police, and lied to attempt to have a woman cover for him. The Court nonetheless said this very suspicious behavior was not sufficient for the case to go to the jury.

Petitioner was entitled to a directed verdict of acquittal. State v. Mitchell; State v. Arnold; State v. Bostick; State v. Schrock; State v. Odems, supra.

CONCLUSION

By reason of the foregoing arguments, a writ of certiorari should be issued to allow full briefing on this issue.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 26th day of February, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Clarendon County
Ralph F. Cothran, Circuit Court Judge

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THE STATE,

RESPONDENT,

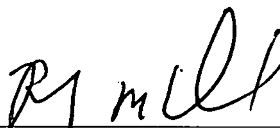
V.

VICTOR WELDON,

PETITIONER

CERTIFICATE OF SERVICE

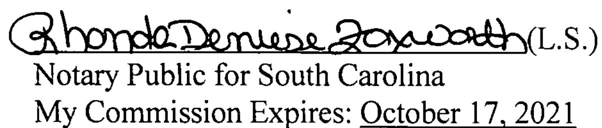
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on David Spencer, Esquire, Office of the Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and upon the S.C. Court of Appeals this 26th day of February, 2015.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 26th day
of February, 2015.

(L.S.)

Notary Public for South Carolina
My Commission Expires: October 17, 2021