

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of General Sessions

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2003-GS-26-0020

RECEIVED

APR 7 2015

S.C. Supreme Court

THE STATE,.....Respondent,

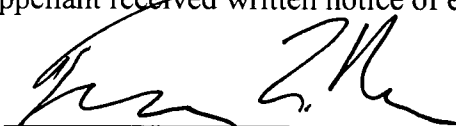
v.

LUZENSKI ALLEN COTTRELL,.....Appellant.

NOTICE OF APPEAL

Luzenski Allen Cottrell appeals his conviction and death sentence in this case. The death sentence was imposed by The Honorable Larry B. Hyman, Jr., on September 27, 2014. This appeal is taken from the order of The Honorable Larry B. Hyman, Jr., March 25, 2015, which denied appellant's motion for a new trial. Appellant received written notice of entry of this order on March 26, 2015.

April 6, 2015



William Sean McGuire
SC Bar No. 9722
Attorney, Capital Trial Division
SC Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, SC 29201
803-734-7818

Other Counsel of Record:
Jimmy A. Richardson, II
Scott R. Hixsen
Fifteenth Circuit Solicitor's Office
P.O. Box 1276
Conway, SC 29528
843-915-8610
Attorneys for Respondent

Teresa L. Norris
SC Bar No. 15081
Blume, Norris & Franklin-Best, LLC
900 Elmwood Avenue, Suite 101
Columbia, SC 29201
803-765-1044
Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of General Sessions

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2003-GS-26-0020

THE STATE,.....Respondent,

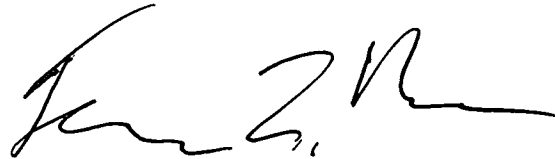
v.

LUZENSKI ALLEN COTTRELL,.....Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record, Scott R. Hixsen, Fifteenth Circuit Solicitor's Office, P.O. Box 1276, Conway, SC 29528.

April 6, 2015.



Teresa L. Norris
SC Bar No. 15081
Blume, Norris & Franklin-Best, LLC
900 Elmwood Avenue, Suite 101
Columbia, SC 29201
803-765-1044
Attorney for Appellant

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

STATE OF SOUTH CAROLINA

VS.

LUZENSKI ALLEN COTTRELL

Defendant.

) IN THE COURT OF GENERAL SESSIONS

) 2003-GS-26-20

) **Order Denying Defendant's**
) **Motion for a New Trial**

FILED
HORRY COUNTY
2015 MAR 25 PM 2:16
MELISSA HUNTER, CLERK
CLERK OF COURT

This matter comes before the Court on motion of the Defendant, Luzenski Allen Cottrell, by and through his attorneys, Teresa Norris and William McGuire, for an Order granting the Defendant a new trial. This Court conducted a hearing on this matter, Monday, November 10, 2014. Teresa Norris presented arguments for Mr. Cottrell, and Chief Deputy Solicitor Scott Hixson presented arguments on behalf of the State.

Factual/Procedural Background

On September 27, 2014, a jury found Luzenski Cottrell guilty of the murder of Officer Joe McGarry and sentenced him to Death. During the trial of the case, counsel for Defense sought to introduce testimony of Horry County Police Detective Nathan Johnson detailing his investigation of the November 23, 2002 murder of Richard Hartman, and how he identified Cottrell as a suspect in an effort to show law enforcement lacked probable cause to arrest Cottrell. Hartman had been killed roughly 37 days prior to Officer McGarry's murder at the hands of Cottrell on December 29, 2002.

On September 8, 2014, the Court conducted a pre-trial hearing to proffer the testimony of potential witnesses including Detective Johnson. At issue was the limits on admissibility of information developed during the Horry County Police Department (HCPD) investigation of the murder of Hartman, as relayed to Myrtle Beach Police Department (MBPD). The articulable suspicion - not rising to the level of probable cause for a formal arrest - developed in the Hartman killing served as part of the basis for McGarry's brief investigative detention or "Terry" stop of the Defendant to check for warrants and pat down for weapons the evening McGarry was killed.

Detective Johnson's testified in camera that witness Ryan Beall, as well as others, told him that Cottrell was one of Hartman's small group of trusted friends. Cottrell worked for Hartman as a driver and security for the prostitutes in Hartman's illicit escort service. Cottrell also supplied Hartman with drugs. Beall stated that Cottrell was scary, that he had seen him with guns, and that he did not like being around him. Cottrell was one of only two male friends with whom Hartman shared social time riding Hartman's wave runner watercraft. The other friend, a local bondsman, was cooperating with the investigation and was not a suspect. Further, Beall told Detective Johnson that Hartman and Cottrell had gotten into an argument the day before

Hartman's murder. The basis for the disagreement was Cottrell's personal relationship with one of Hartman's prostitutes, Amber Counts, and Hartman's anger with them for not showing up for work or calling in. The Court heard testimony that Hartman spoke with a male drug source several times on the telephone to arrange a drug transaction and that Hartman had gone to buy drugs when he was killed. A witness overheard this telephone conversation and stated the victim was cutting up and joking with the man on the other end, indicating a close relationship with the caller. During this conversation, Hartman had been speaking about how cold it was and said "I guess we couldn't have taken the wave runners out today". Cottrell was the only male individual who would go out on the wave runners with Hartman and who was not already cooperating with investigators. SLED crime scene had informed Johnson that Hartman was shot several times in the head by an assailant, sitting in a position of trust, in the passenger seat of the Hartman's truck. The truck with the victim still inside was found in an isolated area consistent with a covert drug transaction.

MBPD Lt. Amy Stanley-Prock testified that, after speaking with HCPD Detective Johnson, she briefed Officer McGarry on the HCPD investigation because McGarry was personally familiar with Cottrell. McGarry, a street crimes officer, had recently arrested Cottrell on a felony PWID marijuana charge and a minor traffic offense. Lt. Stanley-Prock testified that as a narcotics supervisor she reviewed the arresting officer's "high court" case files before sending them to the Solicitor for prosecution. This review ensured that the officer had obtained the Defendant's NCIC "rap sheet" and had reviewed it for any prior record for charging enhancements. McGarry obtained Cottrell's August 2002 rap sheet which showed an arrest and pending charge for attempted murder from New York. During the briefing, Lt. Stanley-Prock told McGarry that Cottrell was a murder suspect based on HCPD's investigation. After this meeting, Lt. Stanley-Prock called Detective Johnson back and updated him on the additional background information provided by McGarry.

MBPD Officer Mike Guthinger testified that he and Officer McGarry entered the Dunkin Donuts when they both noticed Cottrell behaving loudly and somewhat boisterously at the service counter. McGarry's demeanor changed upon seeing Cottrell. McGarry whispered to Guthinger, "suspect 10-61, 10-32." Guthinger testified about MBPD's radio ten codes in use at that time, as well as his practical understanding of what this communication meant to him personally. Guthinger testified that "10-61" is a "shooting suspect," which referred back to the HCPD investigation into Hartman's murder. The second, "10-32" is a "person with a gun" or "person with a concealed gun," which covered the present threat on December 29, 2002, facing McGarry and the innocent public in the Dunkin Donuts. It is uncontested that there was insufficient evidence for probable cause to formally arrest the Defendant at that moment.

Based on McGarry's prior dealings with the Defendant, his observations of Cottrell's behavior that night, and Lt. Stanley-Prock's briefing of HCPD's ongoing investigation, Officer McGarry conducted an investigative detention on Cottrell. The evidence indicated that this stop occurred at the first available opportunity for Officer McGarry to investigate the concerns he possessed. The initial interaction between McGarry and Cottrell was outwardly relaxed and non-confrontational. He asked for the Defendant's identification, received it, and called dispatch to check for pending warrants. A recording of McGarry's radio traffic corroborates this fact and demonstrates the Officer's initially benign demeanor. The entire interaction was very brief, roughly one and a half minutes from the time Officer McGarry asked Cottrell for his ID until Officer Guthinger called dispatch to announce that shots were fired and an officer was down.

Cottrell's gave a post Miranda statement, which this Court found was voluntarily given at a previously held Jackson v Denno hearing. The Defendant's statement corroborates the fact that McGarry was attempting to conduct a brief Terry stop. Cottrell stated that McGarry "asked for my I.D. and when I showed it to him he said he was going to pat me down. I told him no and I walked off." Cottrell pulled an illegally carried handgun he was concealing under his baggy shirt and fatally shot Officer McGarry in the face. The evidence presented shows that McGarry was waiting for the answer to this warrant check via a return call from dispatch when he became locked in the fatal struggle or was already shot. The dispatcher did call back to inform him that there were no pending warrants at that time. McGarry never answered that call.

Law

Rule 401 of the South Carolina Rules of Evidence states: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probably than it would be without the evidence." This rule is identical to the federal rule and consistent with South Carolina common law. State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991); State v. Schmidt, 288 S.C. 301, 342 S.E. 2d 401 (1986).

Rule 403 of the South Carolina Rules of Evidence states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." This rule is identical to the federal rule and is consistent with the common law of South Carolina. Alexander, 303 S.C. 377(relevant evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice; State v. Hess, 279 S.C. 14, 301 S.E.2d 547 (limitation of defense testimony upheld where it was merely cumulative to other testimony), cert. denied, 464 U.S. 827, 104 S.Ct. 100, 78 L.Ed2d 105 (1983); State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941) (trial judge properly limited the defendant's presentation of certain evidence to guard against confusion of the jury by the injection of collateral issues). When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case. State v. Gillian, 373 S.C. 601, 609 (2007).

Rule 404(b) of the South Carolina Rules of Evidence states (in relevant part): "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404(b) SCRE does not set for the the burden of proof required for the admission of evidence of bad acts not the subject of a conviction and, therefore, case law controls this issue. State v. Smith, 300 S.C. 216, 387 S.E.2d 245 (1989). Evidence of a defendant's crimes, wrongs, or acts is generally not admissible. State v. Lyle, 125 S.C. 406, 118 S.E.803 (1923). Such evidence may be admissible for the limited purposes of proving identity, motive, common scheme or plan and lack of mistake or accident. Id. Even if evidence offered for the limited purpose of proving identity, motive, common scheme or plan, or mistake is relevant and permissible for one of the specific purposes enumerated in Lyle, a trial judge may exclude such evidence if the prejudicial effect of the evidence substantially outweighs its probative value. State v. Garner, 304 S.C. 220, 403 S.E.2d 631 (1991).

A Judge has a responsibility for safeguarding both the rights of the accused and the rights of the public in the administration of criminal justice. State v. Stanley, 365 S.C. 24, 615 S.E.2d

455 (Ct. App. 2005). The conduct of a trial, including the admission and rejection of proffered testimony, is largely within the sound discretion of the trial Judge. State v. Gregory 198 S.C. 98, 16 S.E.2d 532, 534 (1941). The right to present a defense is not unlimited, but must “bow to accommodate other legitimate interests in the criminal trial process.” State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001)(overruled on other grounds by State v. Gentry 363 S.C. 93, 610 S.E.2d 494 (2011)(citing Rock v. Arkansas, 483 U.S. 44, 55, 107 S.Ct. 2704, 2711, 97 L.Ed.2d 37,49 (1987)((quoting Chambers v. Mississippi, 410 U.S. 284, 295, 93 S.Ct. 1038, 1046, 35 L.Ed.2d 297, 309 (1973))). While defendants are entitled to a fair opportunity to present a defense, that right does not encompass the right to present any evidence, regardless of its admissibility under the rules of evidence. See United States v. Lancaster, 96 F.3d 734 (4th Cir. 1996).

When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm. Terry v. Ohio, 392 U.S. 1 at 24 (1968). The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. Id. “[A]nd in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion... And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search ‘warrant a man of reasonable caution in the belief that the action taken was appropriate’?” Terry v. Ohio, 392 U.S. 1 at 21-22 (1968).

In deciding whether to conduct a Terry stop, an officer may rely on information provided by other officers as well as any information known to the team of officers conducting the investigation. U.S. v Navarrete-Barron, 192 F.3d 786 (citing United States v. Robinson, 119 F.3d 663, 666–667 (8th Cir.1997). Terry stops are not limited to crimes currently being committed or about to be committed, but are also permissible for crimes that have already been committed. See State v. Hensley, 469 U.S. 221, 105 S.Ct.675(1985). Where police have been unable to locate a person suspected of involvement in a past crime, the ability to briefly stop that person, ask questions, or check identification in the absence of probable cause promotes the strong government interest in solving crimes and bringing offenders to justice. Id. If police have a reasonable suspicion grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, then a Terry stop may be made to investigate that suspicion. Id. at 229.

Findings

This court finds that as a preliminary issue and viewing the facts in the light most favorable to the Defendant, McGarry conducted a legally permissible Terry encounter with Cottrell. McGarry possessed an objective reasonable belief, based specific articulable facts short of probable cause, that Cottrell may have committed a crime and also may have been presently committing a crime by carrying a handgun unlawfully. Further, McGarry had been briefed by Stanley-Prock that Cottrell was a suspect in a Murder investigation. McGarry would not have any knowledge of a prior encounter that day between Cottrell and Johnson. McGarry was acting

with a reasonable and articulable suspicion that Cottrell may have a weapon on his person and may have outstanding warrants based on his briefing from Stanley-Prock. McGarry was legally permitted to briefly detain Cottrell to check his ID, pat him down for weapons, and check for warrants per Terry and Hensley.

I find that the details of the prior murder investigation are not relevant in the instant case and thus were excluded under Rule 401, SCRE. The number of witnesses against Cottrell for the prior murder, the reliability of the witnesses, even other physical evidence, if it existed, linking Cottrell to the prior murder investigation does not make it more or less likely that Cottrell killed McGarry with malice aforethought. Whatever detailed and specific facts existed in Johnson's mind concerning Hartman's murder that were unknown to McGarry, were not relevant to the reasonableness of McGarry's mindset in detaining Cottrell for a warrants check and a pat down for weapons.

The only limited relevant issue in the instant case was whether McGarry had a reasonable articulable suspicion that the defendant either 1) was carrying a weapon as a felon or 2) had outstanding warrants from a completed crime. I admitted testimony from Stanley-Prock that she had informed McGarry that Cottrell was a suspect in a prior shooting case. That testimony was sufficient for the jury to determine whether McGarry had a reasonable articulable suspicion to conduct a Terry stop.

Notwithstanding my holding regarding Rule 401, I find that Rule 404(b) mandates that I exclude any testimony of Cottrell's prior bad acts as that evidence would not be offered for one of the limited reasons allowed by Lyle: proving identity, motive, common scheme or plan, or mistake. There is no evidence in the record and no evidence has been presented from either party that evidence that Cottrell committed a prior murder would comply with any of the Lyle requirements.

Notwithstanding my holdings regarding Rules 401 and 404(b), I find that the proffered testimony of Johnson that the defense seeks to admit would be highly prejudicial and that prejudice would outweigh its probative value under Rule 403 of SCRE. A "trial within a trial" about whether law enforcement had probable cause to arrest Cottrell for the prior murder when the state concedes that no probable cause existed only serves to confuse the issues and mislead the jury. Further, probable cause to believe Cottrell committed the prior murder was not required for McGarry to conduct a lawful Terry stop. This Court admitted very limited testimony concerning McGarry's objective beliefs at the time of the stop under res gestae to explain why the Officer singled this individual out for questioning over all other citizens in the Dunkin Donuts that evening. That testimony was sufficient for the jury to make a determination of whether McGarry had a reasonable and articulable suspicion.

This Court finds that the presentation of the facts of Hartman's murder to the jury, through the testimony of Detective Johnson would have created substantial unfair prejudice to the Defendant, would have confused and misled the Jury.

For the foregoing reasons, the Defendant's motion for a new trial is respectfully DENIED.

IT IS SO ORDERED

Conway, South Carolina
March 25 2015

MEGAN HENNING-SHAW
CLERK OF COURT
2015 MAR 25 PM 2:16
HURRY COURT
FILED



The Honorable Larry Hyman
Presiding Judge

FILED
MORRY COURT

2015 MAR 25 PM 2:16

MELANIE HUGGINS-TARU
CLERK OF COURT