ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
JUL 16 2015
SC Court of Appeals

Appeal from Kershaw County
James R. Barber, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ERNEST MAURICE ALLEN,

APPELLANT

APPELLATE CASE NO. 2014-000165

FINAL BRIEF OF APPELLANT

T. Jarrett Bouchette Esq.
Johnny Gardner Law Group P.A.
212 Main Street
Conway, SC 29526
Phone: 843-248-7135
Facsimile: 843-248-0270
Jarrett@johnnygardnerlaw.com

ROBERT M. DUDEK
Chief Appellate Defender

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

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

STATEMENT OF ISSUE ON APPEAL

I. Did the trial Court commit reversible error when it failed to grant appellant's motion for a directed verdict on the charge of resisting arrest, when the evidence showed that Appellant did not submit to the arrest and thus no arrest was ever effectuated?

II. Did the trial Court commit reversible error when it allowed evidence to be submitted to the jury that the Appellant was facing substantial jail time, as a motive and intent exception to Rule 404(b), even though no rule 403 prejudice analysis was conducted, and the PWID charges bore no logical connection to the charges for which he was on trial?

STATEMENT OF THE CASE

(Earnest Maurice Allen ("Appellant" or "Defendant") was indicted by the State of South Carolina ("The State" or "Respondent") in Kershaw County on one count of resisting arrest with a deadly weapon in violation of § 16-03-0625 S.C. Code of Laws. 1976, as amended on August 21, 2013; four counts of attempted murder in violation of § 16-3-19 S.C. Code of Laws. 1976, as amended on July 17, 2013; and one count of possession of a weapon during the commission of a violent crime in violation of §16-23-0490 S.C. Code of Laws, 1976 as amended on July 17, 2013. (R. 249-260).

A jury trial was held on January 16, 2014 in Kershaw County, lasting one day. At trial, directed verdict was granted in favor of Appellant on one count of attempted murder. The Jury found Appellant guilty of possession of a weapon during the commission of a violent crime, resisting arrest with a deadly weapon, and two counts of attempted murder. The jury found the Appellant guilty of a lesser included offense of assault and battery of a high and aggravated nature on one count of attempted murder. (R. 241-242.)

Appellant timely filed a notice of Appeal on January 27, 2014 and served upon respondent. This appeal was filed on January 7, 2014.

STATEMENT OF FACTS

This case originates from an incident that occurred on December 20th, 2012 in Kershaw County, South Carolina. On that date, four officers with the Kershaw county Sherriff's office sought to execute arrest warrants on the Appellant. The arrest warrants were for possession with intent to distribute cocaine (PWID), and carried significant prison time as penalties. (R.49, line 8-13.) The officers received information from a female individual that Appellant would be riding with her in her car later that day, and gave the officers a description of the car and an approximate time and location. (R. 50, line 1-17.) Once the officers spotted the vehicle, and believing the Appellant to be in the car, they initiated the blue lights. Once the blue lights were initiated, the Appellant exited the vehicle on foot and fled from the officers.(R. 51, line 15-22.) The officers later testified that the Appellant turned and fired a handgun at the officers. (R.68, line 1-11.) The firing of the handgun halted the officers' pursuit and the Appellant was not arrested that night. Later that night a handgun was discovered, and the evidence indicated that it was the gun used by the Appellant earlier that night. (R. 70.) Appellant was subsequently arrested and charged with resisting arrest with a deadly weapon, attempted murder, and possession of a weapon during the commission of a violent crime.(R. 71, line 14-24.)

From the outset of the trial, Counsel for The State sough to center the case around Appellant's pending charges for PWID, and thus prejudice the jury's perception of the Appellant before hearing all the facts. Before opening statements, Counsel for The State made a motion to allow into evidence the sentencing ranges that the Appellant was facing for those charges.(R. 31, line 10-24.) Despite objection from Counsel for Appellant, the trial allowed the testimony into evidence. (R. 34, line 12-24.) Almost immediately into his

opening statement Counsel for The State made the jury aware that the Appellant was had nine pending charges at the time of the incident for which he was on trial.(R. 49, line 8.) He continued his effort to establish a prejudicial view of the Appellant by telling them that the charges were "serious charges" and that "there four charges for which he could have done up to 30 years on."(R. 49, line 10-14.) Further testimony was presented which reiterated the fact that the Appellant was facing "serious felony charges." (R. 101, line 8.)

At the close of The State's case in chief, Counsel for the Appellant moved for a directed verdict on the charge of resisting arrest with a deadly weapon. (R. 179, line 7-25). Trial Counsel argued that no evidence was presented that an arrest had actually been effectuated. The trial Court denied the motion, but directed verdict was granted in favor of Appellant on one count of attempted murder.(R., line 3-12.)

Ultimately, the Jury found Appellant guilty of one count of possession of a weapon during the commission of a violent crime, once count of resisting arrest with a deadly weapon, and two counts of attempted murder. The jury found the Appellant guilty of a lesser included offense of assault and battery of a high and aggravated nature on one count of attempted murder .This appeal follows.

ARGUMENT

Standard of Review

A criminal Defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. *State v. Ladner* 373, S.C. 103, 12, 644, 644 SE 2d 684 (2007). When reviewing a denial of a directed verdict, the Court views the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *State v. Gaines,* 380 S.C. 23 667SE 2d 728 (2008).

Though the admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. *State v. Gaster,* 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002), an abuse of discretion does occur when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. *State v. McDonald,* 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000)

I. **The trial Court erred in failing to Grant Appellant's motion for directed verdict on the resisting arrest charge when it improperly applied a seizure analysis in determining whether an arrest had been effectuated, and since the evidence showed that appellant did not submit to the arrest, under the *Williams* standard, there was not sufficient evidence presented that an arrest had occurred.**

When the state seeks to ascribe criminal penalties against a Defendant for his resistance of an arrest for separate charges, the burden is on the State to show that an arrest had been effectuated, and when the arrest was effectuated, before the state can meet its burden. *State v. Williams* 237 S.C. 252, 116 S.E.2d 858 (1960); *State v. Brannon* 388 S.C 498, 697 S.E.2d 593 (2010).

It is well established jurisprudence that there is a distinction between an "arrest" and a "seizure" when dealing with an agent of the government. *Terry V. Ohio*, 392 U.S 1 S. Ct.1868 L.Ed 889 (1968) and its progeny, make clear that an individual can be seized under the Fourth Amendment, without being arrested. The US Supreme Court has gone on to clarify that an individual is seized under the Fourth Amendment to the US Constitution when a reasonable person, in the view of all the circumstances of a particular case, would not believe he was free to leave. *Michigan v. Chesternut*, 486 US 567, 573, 108 S. Ct. 1975,100 L.Ed.2d 565 (1988). This amounts to an objective standard.

In contrast, our state, in *State v. Williams*, 237 SC 252,116 S.E. 2d 858 (1960, further clarified that determining whether an arrest occurred required an analysis of intent, both of the officer and of the suspect. In *Williams*, the Court acknowledged that "It is not necessary that there be an application of actual force, or manual touching of the body, or physical restraint which may be visible to the eye, or a formal declaration of arrest". *Id* at 257. However, the Court made clear that the person being arrested must understand that he is in the power of the one arresting and submits in consequence. In cases, such as the present one, where there is no manual, touching the Court established that there must be an intent on the part of the officer to arrest the suspect, and intent on the part of the suspect to submit, under the belief and impression that submission was necessary." *Id.* This amounts to a subjective standard.

In *State v. Brannon* 388 S.C 498, 697 S.E.2d 593 (2010), the Court further clarified that on a resisting arrest charge the State must show that an actual arrest occurred, as opposed to a mere seizure, and that when a suspect flees he is clearly not submitting to the officers, and thus no arrest can occur since it fails to satisfy the second prong of the *Williams*

test. *Id* at 505. In that case, police responded to a call regarding a suspected vehicle burglary. When police arrived on the scene they noticed an individual standing beside a Ford Explorer, which was where the caller had identified the suspect as being. Upon seeing the suspect, the officer shouted "Stop Police". Thereafter, the suspect fled on foot for approximately 33-350 yard before being apprehended. He was charged with resisting arrest under South Carolina Code 16-9-320(A). At trial, Counsel for the Defendant moved for a directed verdict on the charge, arguing that there was no evidence that an arrest was made when he ran from police. The Court of Appeals reversed, finding that there was no seizure, and thus no arrest. The Supreme Court reversed, finding that seizure analysis was improper in determining whether or not an arrest was effectuated. The Court further held that the Defendant did not submit to the police officers, as required under the second prong of the *Williams* test, as evidenced by the fact that he ran from the officer. *Id.*

Though the Defendant in the case at hand was charged with violation of a different statute than that of the Defendant in *Brannon*, there still must be an inquirery into whether or not an arrest was being effectuated, in order to satisfy the State's burden. An Arrest itself is an ongoing process in South Carolina. *State v. Dowd* 306 S.C. 341, 268 411 S.E.2d (1991) In *Brannon*, the Defendant was charged with violation of 16-9-320(A). Here, the appellant was charged with 16-3-625.

Admittedly, the statute at issue in this case is a lower threshold than that of the statute in *Brannon*. However, the statute reads: "A person who resists the lawful efforts of a law enforcement officer to *arrest him* or another..." This language is unambiguous on its face, and as such the Court has no right to impose another meaning. *Gay v. Ariail* 381 SC 341, 673 S.E. 2d 418 (2009). Given that there are distinctions between a seizure and an

arrest, there must be a determination as to when (if ever) the officers' actions amounted to an effort to arrest, as opposed to an effort to seize. The record shows that officer's actions, at all relevant times, amounted to a continuation of the effort to seize, as opposed to an effort to arrest. This is especially true given the fact that it was never announced that he was under arrest, which was cited as a factor by the *Brannon* Court.

In this case, officers identified the vehicle and began following the car. Testimony was presented that an officer initiated the blue lights to conduct a traffic stop. Thereafter testimony was presented that the Appellant exited the side of the automobile and ran on foot away from the officers. There was no testimony that a verbal notification to the Defendant that he was under arrest was made. The appellant was not taken into custody on that date, but was later arrested and charged. At the close of the State's case, Counsel for the Defendant requested a directed verdict on the grounds that an arrest had not been effectuated, and cited *Brannon* as support. The State argued against the motion indicating that because the appellant "clearly knew he was under arrest" an arrest was effectuated at the time of the traffic stop, and the trial Court denied the motion. (R. 181.) This amounts to an analysis of whether or not the Appellant was seized, as opposed to whether or not he was under arrest, because it relies on the reasonable expectation of the Appellant, not on the actual intents of both the officer and the suspect.

In looking at the seizure, which appellant does not dispute occurred when the blue lights were initiated, and failing to use the two-prong test outlined in *Williams*, the Trial Court failed to analyze whether the Appellant ever intended to submit to the arrest, and thus committed reversible error. It is evident from the Court's holding in *Brannon*, that running from the police shows an intent on the part of the suspect to not submit to the arrest, and that

even if it is the officer intends to effect a full custodial arrest, until such time as the two prongs are satisfied, the officer is attempting a mere seizure and not an arrest.

Therefore, under *Brannon*, the Trial Court erred in failing to grand Defendant's motion for directed verdict because there was not sufficient evidence presented that the arresting offices actions ever effectuated an actual arrest.

II. **The trial Court erred in allowing evidence to be submitted to the jury that the appellant was facing substantial jail time on pending charges, under the intent/motive exception to SCRE rule 404(b), when the Court failed to conduct a prejudice analysis, and since the crimes for the pending charges held no logical relevance to the crime of attempted murder for which he was being charged, the evidence of the pending charges was inherently prejudicial.**

Whenever evidence is submitted to a jury of a criminal Defendant's prior criminal charges it is inherently prejudicial, and as a consequence the trial Court must evaluate the degree of prejudice presented, and determine whether there is any logical relevance between the prior charges and the charges being prosecuted. *State v. Adams*, 322 S.C. 114, 470 S.E. 2d 366 (1996); *State v. Wallace*, 384 S.C. 428, 683 S.E. 2d 275 (2009)

It is a fundamental tenant in South Carolina jurisprudence that admission of evidence regarding a criminal Defendant's prior bad acts is inherently prejudicial, and as such should only be submitted to the jury in certain limited circumstances. *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). In the years following *Lyle*, this state codified that long-held understanding in Rule 404(b) of the South Carolina Rules of Evidence. Rule 404(b) does carry with it the common law exceptions regarding motive, identity, existence of a common scheme or plan, absence of mistake, or intent. However, the rule does not set forth the

burden of proof required for the admission of evidence of bad acts which have not resulted in conviction and, therefore, case law controls on this issue. *State v. Smith,* 300 S.C. 216, 387 SE 2d 245 (1989).

Even if the trial Court does find that one of the exceptions listed in 404(b) applies, the trial Court then must determine whether the probative value of admitting evidence of the bad act substantially outweighs its danger of unfair prejudice, under SCRE 403. If not, then the evidence must not be submitted, even though it qualifies as an exception under 404(b). *Wallace at* 435.

In this case, after finding that evidence of the Defendant's pending charges could be admitted, under the intent and motive exceptions of 404(b), the Court failed to conduct a prejudice analysis as required under *Wallace*. The record is unclear as to exactly how many charges were pending against the Defendant, but it is clear that there were four Possession with Intent to Distribute (PWID) third offense charges of which the Defendant was aware. Each of these charges carried between ten and thirty year penalties. Counsel for the State sought to introduce into evidence the fact that the Defendant was facing serious jail time, and as such show a motivation that he "didn't want to be taken into custody". (R. 33, line 15-16.) Counsel for the Plaintiff objected to The State's request and requested that the Court address the 403 issue, if it allowed it under 404(b). (R. 35.)

The trial Court ultimately allowed evidence to be admitted regarding the four PWID charges, under the intent/motive exception. However, the Court failed to address the issue of prejudice, and whether or not the probative value substantially outweighed the risk of unfair prejudice. In his opening statement, Counsel for The State stated "He had nine charges pending at the time. Of those nine charges, on almost every one of them, he could

have done significant time. When I say significant, there were four charges for which he could have done up to 30 years on. That's a lot of time." (R., line 8-13.) Officer Edward Corey later testified that he had "outstanding bench warrants, all for *serious felony charges"* against the Defendant. (R. 101, line 7-10.)Though counsel for the Defendant did not renew his objection at this time, the admission of the evidence was so close in time to his objection prior to opening statements that it is preserved for review. *State v. Forrester*, 343 S.C. 637, 541 S.E. 2d 837 (2001)

Furthermore, the trial Court's decision to allow testimony that the Defendant had pending criminal charges was inconsistent with the logical relevance standard set forth in *Adams*. The charges that the Defendant was on trial for were attempted murder and resisting arrest. However, the serious felony charges that were referenced by Officer Corey were all drug related. It can hardly be argued that possession of cocaine is inherently linked with resisting arrest and attempted murder. The State argued at trial that the Defendant's alleged actions were motivated by his reluctance to be arrested and face the substantial jail time.

However, there is a significant logical leap between acknowledging that a Defendant facing significant jail time will may not want to be taken into custody, and inferring that the Defendant is willing to attempt murder as a result. Though the State's argument is admittedly stronger with regard to the resisting arrest charge, in light of attempted murder charges it seems that allowing the jury to know that the Defendant was facing "serious felony" charges has the primary effect of implying the Defendant is the type of individual who commits felonies, and as such is more likely to have committed this particular felony. This is precisely the scenario in which evidence of prior bad acts should not be admitted *Lyles* at 810.

The record supports a finding of the prejudicial nature of the evidence submitted to the jury by Counsel for The State. Shortly before the close of the State's case, it came to the Court's attention that a juror had declared his belief in the Appellant's guilt or innocence. (R. 153-154.) Juror 192 admitted that he had made statements to other jurors he "did not need to hear anymore", and that he had "made up his mind about this case and that he knew what the deal was with respect to guilt or announce."(R. 153-154.) The Court held the juror in contempt and ordered him to remain in custody until the jury reached a verdict. (R. 193, line 16.) It is important to note that juror 192's declaration came before the close of the State's case, and before the jury was aware of whether or not the Appellant, or any witnesses on his behalf, would testify.

Therefore, because the trial Court failed to conduct a prejudice analysis with regard to the admission of the Defendant's prior charges, and because there was no logical relevance between the prior charge of PWID and the charges for which the Defendant was being tried, it committed a reversible error.

CONCLUSION

The trial Court erred in failing to grant Defendant's motion for directed verdict on the charge of resisting arrest with a deadly weapon. There was no evidence that the Appellant ever intended to submit to the arrest. As such, there was no evidence that an arrest was ever effectuated. In addition the trial Court erred in allowing the admission of evidence regarding the Appellant's pending charges because it failed to conduct a prejudice analysis, and since the pending charges bore no rational relationship to the charges for which he was

on trial, such evidence violated rule 403 SCRE. South Carolina law indicates that both errors are not harmless, and request that this Court order a new trial.

Respectfully submitted,

By: RMmC

T. Jarrett Bouchette Esq.
Johnny Gardner Law Group P.A.
212 Main Street
Conway, SC 29526
Phone: 843-248-7135
Facsimile: 843-248-0270
Jarrett@johnnygardnerlaw.com

ROBERT M. DUDEK
Chief Appellate Defender

ATTORNEYS FOR APPELLANT

This 16th day of July 2015.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

July 16, 2015

By: RMD

Robert M. Dudek
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330

RECEIVED
JUL 16 2015
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Kershaw County
James R. Barber, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ERNEST MAURICE ALLEN,

APPELLANT

APPELLATE CASE NO. 2014-000165

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Jennifer Ellis Roberts, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 16th day of July 2015.

By: RMD

ROBERT M. DUDEK
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 16th day of July,2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.