

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2015-001459

RECEIVED

FEB 05 2016

S.C. SUPREME COURT

Travell L. Hill, Respondent-Petitioner,

vs

State of South Carolina, Petitioner-Respondent.

RESPONDENT-PETITIONER'S
PETITION FOR WRIT OF CERTIORARI

C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646
(864) 229-5010
SC Bar #: 006188

Attorney for Respondent-Petitioner

INDEX

	<i>Page:</i>
Table of Authorities	ii
Statement of Issues Presented	1
Statement of the Case	2
Argument	
Question I	
Did the Post Conviction Relief Judge err in failing to find trial counsel was ineffective when trial counsel did not cross-examine Tyra Rogers, who testified for the State, as to the possible sentence she was facing?	2
Question II	
Did the Post Conviction Relief Judge err in not granting the petition for Post Conviction Relief when the State failed to inform the trial attorney for Mr. Hill that Tyra Rogers had a deal with the State to receive a probationary sentence in exchange for her testimony?	4
Question III	
Did the Post Conviction Relief Judge err in failing to find that trial counsel was ineffective in his failure to object to the charge by the trial judge “The Defendant’s knowledge and possession may be inferred when a substance is found on the property under the Defendant’s control” as the charge is not supported by the case law of the State of South Carolina and is a comment on the facts in violation of Article V, § 21 of the Constitution of the State of South Carolina?	8
Conclusion	13

Table of Authorities

Cases:	Page:
<i>Finch v. Atlanta and C Airline Ry.</i> , 87 S.C. 190, 69 S.E. 208 (1907)	9
<i>Gibson v. State</i> , 334 S.C. 515, 514 S.E.2d 320 (1999)	7
<i>In Re Winship</i> , 397U.S. 358 (1970)	12
<i>Leary v. United States</i> , 385 U.S. 6 (1969)	11
<i>Pauling v. State</i> , 331 S.C. 606, 503 S.E.2d 468 (1998)	4
<i>Riddle v. Ozmitt</i> . 369 S.C. 39, 631 E.E.2d 70 (2006)	6
<i>State v. Adams</i> , 291 S.C. 132, 352 S.E.2d 483 (1987)	10
<i>State v. Cain</i> , 152 Ariz. 479, 733 P.2d 676 (Ct. App. 1987)	8
<i>State v. Hixson</i> , 94 Wash. App. 862, 973 P.2d 496 (1999)	8
<i>State v. Hudson</i> , 277 S.C. 200, 284 S.E.2d 773 (1981)	10, 11
<i>State v. Mizzell</i> , 349 S.C. 326, 563 S.E.2d 315 (2002)	2, 3
<i>Yarborough v. Southern Ry.</i> , 78 S.C. 103, 58 S.E. 936 (1907)	9
Constitutional Provisions:	
Article I, § 3, Constitution of the State of South Carolina	12
Article V, § 21, Constitution of the State of South Carolina	8
Other:	
http://www.judicial.state.sc.us/juryCharges/GSInstructions.2015.pdf	10

STATE OF ISSUES ON APPEAL

Question I

Did the Post Conviction Relief Judge err in failing to find trial counsel was ineffective when trial counsel did not cross-examine Tyra Rogers, who testified for the State, as to the possible sentence she was facing?

Question II

Did the Post Conviction Relief Judge err in not granting the petition for Post Conviction Relief when the State failed to inform the trial attorney for Mr. Hill that Tyra Rogers had a deal with the State to receive a probationary sentence in exchange for her testimony?

Question III

Did the Post Conviction Relief Judge err in failing to find that trial counsel was ineffective in his failure to object to the charge by the trial judge “The Defendant’s knowledge and possession may be inferred when a substance is found on the property under the Defendant’s control” as the charge is not supported by the case law of the State of South Carolina and is a comment on the facts in violation of Article V, § 21 of the Constitution of the State of South Carolina?

STATEMENT OF THE CASE

Travell Hill was arrested on February 19, 2008 and charged with trafficking cocaine. He was tried before the Honorable G. Edward Welmaker and a jury on March 30-31, 2010. He was convicted and sentenced to 27 years in prison. His appeal was denied by the South Carolina Court of Appeals on May 15, 2013.

On January 9, 2014, Mr. Hill filed a Post Conviction Relief Petition. A hearing was held before the Honorable Daniel D. Hall on February 18, 2015. By his order dated February 25, 2015 Judge Hall granted relief on the question of whether trial counsel was ineffective for his failure to preserve the legality of the search of the automobile he was driving. He denied relief on all other issues. By order dated June 1, 2015 he affirmed his prior ruling. The State filed a Notice of Appeal on July 2, 2015 and Mr. Hill filed a timely Notice of Appeal on July 6, 2015.

ARGUMENT

Question I

Did the Post Conviction Relief Judge err in failing to find trial counsel was ineffective when trial counsel did not cross-examine Tyra Rogers, who testified for the State, as to the possible sentence she was facing?

In *State v. Mizzell*, 349 S.C. 326, 563 S.E.2d 315 (2002) our Supreme Court ruled that a defense attorney may cross-examine a testifying co-defendant as to the possible sentence the testifying co-defendant is facing. The Court said:

The fact the witness has yet to reach a plea bargain or been found guilty should not prevent the admission of such

evidence. The lack of a negotiated plea, if anything, creates a situation where the witness is more likely to engage in biased testimony in order to obtain a future recommendation for leniency.

Id. at 333, 563 S.E.2d at 318.

The *Mizzel* case was decided over eight years before the trial of this case. Trial counsel admitted he was familiar with the case. App. at 280, ll 1-13. His decision not to ask the co-defendant about her possible sentence was that the trial judge would not follow the law. As he said:

Q. (By Mr. Wise) You didn't think he would follow State v. Mozelle (sic)?

A.(By Mr Posey) I did not, based on previous experience.

App. at 280, ll 11-13.

Trial counsel admitted if the jury knew what sentence she was facing the jury would look at her testimony closer. He testified:

Q. Now, it certainly would have been helpful for the jury to understand that the co-defendant was up there testifying was looking at 25 years mandatory minimum?

A. I have no doubt about that.

Q. All right. That would have made them look at her testimony a little closer?

A. I would hope so, yes.

App. at 279, ll 19-25.

Defense counsel expressed no trial strategy in not asking the witness the question about

her possible punishment. He simply believed the trial judge would not follow the law. He further admitted that if the trial judge did not follow the law, a good appellate issue could have been created. App. at 280, ll 18-25. He gave no justified trial strategy for not asking a question about her possible sentence. This Court has held that the failure to impeach a witness in a criminal sexual conduct case is a ground for granting a post conviction relief petition. *Pauling v. State*, 331 S.C. 606, 503 S.E.2d 468 (1998). In the present case the principle witness against Mr. Hill was Tyra Rogers. The failure to impeach her is ineffective. Nothing in the record justifies trial counsel's failure to impeach this witness. The Post Conviction Relief judge should have granted Mr. Hill relief on this issue.

As Ms. Roger was the key witness against Mr. Hill her testimony was important in securing his conviction. Mr. Hill never admitted to knowing the drugs were in the car. Knowledge was imputed to Mr. Hill through the testimony of Ms. Rogers. Mr. Hill was prejudiced by the failure of his trial counsel to properly impeach the witness against him.

Question II

Did the Post Conviction Judge err in not granting the petition for Post Conviction Relief when the State failed to inform the trial attorney for Mr. Hill that Tyra Rogers had a deal with the State to receive a probationary sentence in exchange for her testimony?

At the trial of Mr. Hill, Tyra Rogers, the passenger in the automobile, testified she did not know any drugs were in the car. The drugs were found under the floor mat on her side of the automobile. They made a noticeable lump in the floor mat. App. at 123, ll 7-13. She

testified:

A. (By Ms. Rogers)I didn't know that it was in the car.

App. at 124, 16.

A. And I just said I didn't know the drugs were in my vehicle at all and that I didn't make enough in a year - - because I asked them how much did something like that roughly cost. I said I don't even make that in a year to even think about paying for that.

App. at 116, 11 .

She further stated she had not been promised anything for her testimony. She testified:

Q. (By Mr. Posey) Do you expect to be convicted of drug trafficking?

A. (By Ms. Rogers) No, I don't.

Q. So you don't expect to spend any time in jail for drug trafficking?

A. I mean, that's - - I don't expect to, but I don't know what the jury is going to say.

App. at 119, 19-24.

Q. And what do you expect to happen to those charges?

A. Nothing was offered to me, nothing was promised to me. I'm still - - -

Q. That's not my question. What do you expect to happen?

A. What I expect is, I guess, the right thing to happen.

Q. Well, what do you consider to be the right thing?

A. Whoever did it should take the wrap for it.

App. at 118, ll 3-11.

At her plea, however, a different story was told. She entered a plea to possession of cocaine. The assistant solicitor who handled the case at her plea, stated that the deal was for probation. Supp. App at 27, ll 4-7. Ms. Rogers, contrary to her sworn testimony at trial, admitted she knew the drugs were in the automobile. She stated:

THE COURT: Okay. Ms. Rogers, are you guilty of possession of cocaine?

DEFENDANT ROGERS: Yes, Sir.

Supp. App. at 23, ll 21-23.

The plea she entered was not an *Alford* in which she could have continued to deny she knew the drugs were in the automobile. She freely and voluntarily admitted she knew the drugs were in the automobile. Trial counsel agreed that the information that Ms. Rogers would receive probation, would have been helpful to his defense. App. at 284, ll 5-18.

The South Carolina Supreme Court has held the failure of the State to provide the defendant with *Brady* material is alone sufficient grounds to grant a post conviction relief petition. As the South Carolina Supreme Court has said “If a *Brady* violation is found to have occurred, PCR must be granted.” *Riddle v. Ozmitt*. 369 S.C. 39 ___, 631 E.E.2d 70, ___ (2006).

Our Court has further held;

In “specific request”and “general- or no-request”situations, “favorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonably probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.... A reasonable

probability of a different result is accordingly shown when the Government's evidentiary suppression undermines confidence in the outcome of the trial.

Gibson v. State, 334 S.C. 515, 525, 514 S.E.2d 320, 325 (1999)(citations omitted)

As discussed in Question I, Ms. Rogers was the key evidence against Mr. Hill on the issue of knowledge. Had the jury known she was promised probation in exchange for her testimony, a reasonable probability exists that the result would have been different. The jury deliberated for about two hours on the first day. After an overnight recess, they deliberated approximately two hours and twenty minutes the next morning. They even requested additional evidence to determine if Mr. Hill possessed the drugs. App. at 170, ll 12-15. Mr. Hill was prejudiced by the failure of the State to inform his counsel of the deal that had been reached with Ms. Rogers.

In addition to the above, Mr. Hill now has new evidence in his defense. Ms. Rogers has now admitted that her previous testimony was false. She has now admitted that she in fact knew the drugs were in the automobile. This is new evidence to which Mr. Hill did not have access when the case was tried. This Court should grant the writ of certiorari and grant Mr. Hill a new trial because of this new evidence. The State by offering a plea, and the trial judge by accepting the guilty plea, are ethically obligated to determine a factual basis for the plea. As one court has said "It behooves the trial judge in the acceptance of a plea of guilty to determine exactly what statute is claimed to be violated and to personally make sure the factual basis obtained from the defendant is sufficient. The prosecutor certainly has the same duty and should assist the trial

judge in establishing an appropriate factual basis.” *State v. Cain*, 152 Ariz. 479, 482, 733 P.2d 676, 679 (Ct. App. 1987). If the assistant solicitor at her plea felt that Ms. Rogers was misrepresenting the facts to the court, the assistant solicitor had a ethical duty to correct the misinformation. “We conclude if a prosecutor in good faith perceives a defendant misrepresenting the record, he or she has an equal obligation to not hold back a relevant correction.” *State v. Hixson*, 94 Wash. App. 862, 869, 973 P.2d 496, 500 (1999). The State should now be estopped from denying that the statements in her plea which contradicted her trial testimony are not true. This Court should grant the writ of certiorari and reverse the decision of the post conviction relief judge.

Question III

Did the Post Conviction Relief Judge err in failing to find that trial counsel was ineffective in his failure to object to the charge by the trial judge “The Defendant’s knowledge and possession may be inferred when a substance is found on the property under the Defendant’s control” as the charge is not supported by the case law of the State of South Carolina and is a comment on the facts in violation of Article V, § 21 of the Constitution of the State of South Carolina?

Article V, § 21 of the Constitution of the State of South Carolina provides “Judges shall not charge juries in respect to matters of fact, but shall declare the law.” In interpreting this provision our Supreme Court has held that a trial court may not charge a jury that they can infer acceptance by the railroad of a package left on their loading dock for a period of time. As the

Court said:

The circuit judge laid down in the charge of the proposition that the jury might properly infer the consent of the railroad company to the placing of property on its platform from the fact that an agent has notice of its being placed there and makes no objection. In view of the issues made on the trial, we think this was a charge on the facts.

Yarborough v. Southern Ry., 78 S.C. 103, ___, 58 S.E. 936, 937 (1907). The Court held that charging such an inference is a comment upon the facts in violation of the State constitution.

In *Finch v. Atlanta and C Airline Ry.*, 87 S.C. 190, 69 S.E. 208 (1907) the South Carolina Supreme Court held that instructing a jury they may infer negligence from particular facts was a comment on the facts in violation of our State constitution. The Court said:

What inferences may be drawn from the circumstances appearing on the trial, from the direct evidence, from the manner of the witnesses, the introduction of evidence, or the failure to introduce it-all are for the jury. The Constitution does not allow the presiding judge to state the evidence, much less does it allow him to single out any particular act or omission of the defendant, and instruct the jury that, if that appears, then they may infer that the defendant was negligent.

Id. at ___, 69 S.E. at 209. In this case the trial judge singled out a particular fact - who was driving the automobile - and instructed the jury they may infer he was the possessor of the drugs. Such a charge is a charge on the facts in violation of our constitution. The charge takes one particular fact, and heightens it above all the others. Could the trial judge have charged that the jury may infer that drugs found under a floor mat are in the possession of the person sitting on that side of the automobile? That charge would actually make more factual sense than saying a

person driving an automobile knows what is in the automobile. This is especially true when the person is not the owner of the automobile. No trial court would ever charge that a jury can infer the defendant did not possess the drugs because he was not the owner of the house or automobile. Why is the State the only party to achieve such an inference charge?

Unless the prohibition against commenting on the facts is to have one meaning in a civil trial and another in a criminal trial this Court should grant the Petition for Writ of Certiorari of the Petitioner and clarify the law in this area. This issue will come before this Court in other cases. On the website for the Supreme Court of the State of South Carolina the recommended jury charges in criminal cases contain no less than six occasions that the suggested charge uses an inference in a manner that violates the two civil cases cited above.

<http://www.judicial.state.sc.us/juryCharges/GSInstructions.2015.pdf> , at 65, 202, 203, 207, 210, and 217 (visited January 26, 2015).

In the suggested jury charges reference is made to *State v. Adams*, 291 S.C. 132, 352 S.E.2d 483 (1987) for the proposition that a trial judge may charge the jury they may infer possession if the property is under the dominion and control of the defendant. In *Adams* the Supreme Court said “The proper charge on constructive possession is to instruct the jury that the defendant's knowledge and possession may be inferred if the substance was found on premises under his control.” *Id.* at 135, 352 S.E.2d at 486. In support of this statement this Court cited *State v. Hudson*, 277 S.C. 200, 284 S.E.2d 773 (1981). But *Hudson* does not support such a charge. All *Hudson* holds is that if a defendant is exercising dominion and control over the

premises, then the case should be submitted to the jury. The Court said “Where contraband materials are found on premises under the control of the accused, this fact in and of itself gives rise to an inference of knowledge which may be sufficient to carry the case to the jury.” *Id.* at 203, 284 S.E.2d at 775. This Court in *Hudson* made no reference to a jury charge. In addition, for a judge to tell the jury they may infer what the *Hudson* court said they may infer on their own, is a charge on the facts in violation of our constitution. The charge places emphasis on one particular fact to the exclusion of other facts. For the jury to reach such a conclusion on their own without an instruction from judge is certainly permissible. To give the State the edge by telling, and thus encouraging, the jury they may make such an inference, is not permissible.

In addition in *Adams* and *Hudson* the drugs were found on the property either owned or the residence of the defendant. In the present case, Mr. Hill was merely the driver of an automobile rented for the passenger. To tell a jury they may infer knowledge and possession from the fact that Mr. Hill was the driver of an automobile leased for another, is not only a charge on the facts but a misleading charge on the facts.

In *Leary v. United States*, 385 U.S. 6 (1969) the United States Supreme Court addressed the question of whether congress could constitutionally pass a statute that established a presumption of knowledge of illegal importation from the mere fact that the defendant possessed a small amount of marijuana. In rejecting such a presumption the Court held “Such information is ‘not within specialized judicial competence or completely common place.’” *Id.* at 38. Likewise, under the facts of this case, it is not commonplace to infer knowledge and possession


from the fact that Mr. Hill was driving an automobile he did not rent. As there is no basis in fact to support such an inference, the charge also violates the due process clause of Article I, § 3 of the Constitution of the State of South Carolina and the Fourteenth Amendment of the Constitution of the United States of America.

To what use did the jury use the inference? While this question obviously cannot be answered with certainty, the Court can only assume the jury followed the judge's instructions. That being true, the reasonable assumption is that the jury used the inference if the case were close simply because that is what they were instructed to do. When the jury decides that in a close case, they will use the inference to persuade them the case has been proven beyond a reasonable doubt, then the burden of proof required of the State has been lessened. This would violate the principles established in *In Re Winship*, 397U.S. 358 (1970). When the only means the State has to win a case is to tell the jury they may infer guilt from the proof of certain facts, the State has not proven its case beyond a reasonable doubt.

CONCLUSION

If this Court denies the Writ of Certiorari for which the State has filed a petition, there will be no need to grant this Petition as all issues could be developed at a new trial. In the event this Court grants the Petition for Writ of Certiorari filed by the State, the Court should also grant this Writ of Certiorari filed by the Respondent.

February 2, 2016



C. Rauch Wise
305 Main Street
Greenwood, SC 29646
(864) 229-5010
rauchwise@gmail.com
S. C. Bar № 06188

Attorney for Travell Hill

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Daniel D. Hall, Circuit Court Judge

RECEIVED

FEB 05 2016

Appellate Case No. 2015-001459

S.C. SUPREME COURT

Travell L. Hill, Respondent-Petitioner,

vs

State of South Carolina, Petitioner-Respondent.

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Traynham who, after being duly sworn, deposes and says that she is the receptionist for C. Rauch Wise, Attorney for the Appellant in the above entitled case. That on February 2, 2016, she did deposit in the United States Mail with proper postage affixed thereto two copies of the Respondent-Petitioner's Petition for Writ of Certiorari and Supplemental Appendix in the above case addressed to Karen Christine Ratigan, Office of the Attorney General, P.O. Box 11549, Columbia, South Carolina.

SWORN to and Subscribed

Sandy Traynham

before me this 2 day

of February, 2016.

Mary Jane Hartley (L.S.)
Notary Public for South Carolina
My Commission expires: 11/30/22