

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MARION COUNTY
Court of Common Pleas

D. Craig Brown, Circuit Court Judge

Case No. 2011-GS-33-113

Appellate Case No. 2014-002331

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SEP 08 2016

SC Court of Appeals

The State, Respondent,

v.

Darryl Wayne Moran, Appellant.

Petition for Rehearing

Pursuant to Rules 221 and 240, SCACR, Appellant/Petitioner Darryl Wayne Moran files this Petition for Rehearing regarding this Court's decision in *State v. Moran*, 2016-UP-406 (S.C. Ct. App. filed Aug. 24, 2016). The Court overlooked or misapprehended the following points in affirming the judgment below.

- A. In finding the State presented sufficient substantial circumstantial evidence of conspiracy to solicit murder such that the trial court did not err in denying Petitioner's motion for directed verdict, the Court failed to consider the following:
1. The Court relied upon the testimony of Keith Caulder as "context." The Court overlooked that Mr. Caulder stated he never discussed any details of the "job" (R. p. 91, ll. 22-25), had never heard of or spoken with Petitioner

(R. p. 88, ll. 2-8; p. 95, ll. 14-17; p. 103, ll. 7-13, 17-19), and did not know who the alleged victim was (*i.e.*, he never even spoke Mr. Parrott's name at trial). (R. p. 91, ll. 22-25). Mr. Caulder also did not testify about details regarding the alleged agreement between Petitioner and Mr. Herring to solicit Mr. Caulder to kill Mr. Parrott; rather, his testimony is all about the purported crime of actual solicitation, a crime for which the jury *acquitted* both Petitioner and Mr. Herring. (Resp. Br. p. 18, ¶¶ 7-9).

2. The Court pointed testimony by Carlyle Rabon about conversations he overheard and an alleged discussion of a plot to kill Randy Parrott, the purported victim. The Court overlooked Appellant's argument that the testimony adds nothing to the charge of *conspiracy* to solicit the murder of Mr. Parrott, and was not different than the statements that the Supreme Court found to be woefully insufficient in *State v. Smith*, 316 S.C. 53, 57, 447 S.E.2d 175, 177 (1993) (Court held "[a]sking a person 'What would it take to take care of somebody' is insufficient evidence of solicitation [to commit murder] as a matter of law.>").
3. The Court described Caulder's testimony that "Herring approached him with an offer to split \$3,000 for killing a man who lived in Florence – where Parrott lived." In fact, Mr. Parrott testified he lived in Darlington, not Florence. (R. p. 52, ll. 7-11; p. 56, ll. 4-9). Jenny Rabon confirmed that fact (R. p. 69, ll. 13-19; p. 78, ll. 21-23), as did Carlyle. (R. p. 111, ll. 11-16; p. 134, l. 24 - p. 135, l. 9).

4. The Court also pointed to Mr. Caulder's testimony that Mr. Herring "went into detail about somebody had offered him money to kill somebody" and explained he and Herring

were supposed to meet the guy [who had offered money to have someone killed] the next morning[,] and the guy was going to give [Herring] the money[,] and we were supposed to go to the house and kill someone and then break in[to] the house and make it look like a robbery, if I'm not mistaken.

The Court overlooked that when asked if Mr. Herring had told him "a lot of the details," Mr. Caulder said:

No, not really a lot of the details. Just that he was - - somebody in Marion was going to pay him to kill someone and that we were supposed to go to Florence and the guy was going to pay us in advance.

(R. p. 91, ll. 22-25). Furthermore, Mr. Herring never mentioned Petitioner's name. (R. p. 103, ll. 17-19). Mr. Herring did not describe the property or "anything along those lines to" Mr. Caulder. (R. p. 92, ll. 6-8; p. 93, ll. 22-24). All Mr. Caulder knew was the crime was allegedly to occur in Florence. (R. p. 93, ll. 12-17). According to Mr. Caulder, the transaction was to have occurred the following morning. (R. p. 92, ll. 1-5). Mr. Caulder agreed that that was his "understanding of what Mr. Herring wanted [him] to do for him." (R. p. 94, ll. 20-22). This testimony is not substantial circumstantial evidence of any conspiracy to solicit anyone to do anything.

5. The Court also overlooked that the jury found that the State did not prove either Petitioner or Mr. Herring solicited anyone to murder Mr. Parrott, and therefore there was insufficient proof that they conspired to solicit murder. That is, there was no substantial circumstantial evidence that they conspired to solicit murder.

B. In finding Petitioner's argument regarding Wharton's Rule was not preserved for review, the Court overlooked Petitioner's arguments that he sufficiently raised the point below and obtained a ruling thereon. Petitioner's counsel challenged the jury's ability to convict Petitioner of conspiracy and solicitation, contending the verdict of acquittal on solicitation was inconsistent with the conviction of conspiracy since conspiracy required the concerted action of two people and the jury acquitted Mr. Herring. (R. p. 214, ll. 8-17). Importantly, counsel then requested 10 days to make a more formal motion which the trial court permitted. (R. p. 214, ll. 18-23). In that formal motion Petitioner argued Wharton's Rule and the State filed a memorandum in opposition specifically addressing (1) whether Wharton's Rule is the law in South Carolina and (2) whether Wharton's Rule applied to Petitioner's case because "the crime of solicitation only requires one actor...." (R. pp. 16-17). The State did not contend the issue had been waived. In reply, Petitioner once again contended that Wharton's Rule is the law of South Carolina and that it applied to this case. (R. p. 21). The trial court summarily denied the motion, thereby expressly ruling on the argument.

For the reasons stated this Court should grant this petition, withdraw its prior opinion, and issue a new opinion addressing the arguments Petitioner made and reversing the judgment below.

Respectfully submitted,



September 8, 2016

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel of record with a copy of the *Petition for Rehearing* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

Alan M. Wilson
Susannah R. Cole
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211

September 8, 2016



Erin Bridges
BLUESTEIN, NICHOLS, THOMPSON
& DELGADO, LLC



BLUESTEIN · NICHOLS · THOMPSON · DELGADO LLC
ATTORNEYS AT LAW

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VIA HAND DELIVERY

The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: The State v. Darryl Wayne Moran
Case Tracking No.: 2014-002331

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven (7) copies of the *Petition for Rehearing* in the above referenced case. I have also enclosed a proof of service of this document on counsel for the Respondent. Please return the additional filed copy to me via our courier.

Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,

Erin Bridges

Paralegal to John S. Nichols
BLUESTEIN, NICHOLS,
THOMPSON & DELGADO, LLC

/emb

Enclosures

cc: Alan M. Wilson, Esquire
Susannah R. Cole, Esquire