

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM MARION COUNTY
Court of Common Pleas

D. Craig Brown, Circuit Court Judge

Case No. 2011-GS-33-113
2016-UP-406 (S.C. Ct. App. filed Aug. 24, 2106)
Appellate Case No. 2016-002333

RECEIVED

DEC 30 2016

S.C. SUPREME COURT

The State, Respondent,

v.

Darryl Wayne Moran, Petitioner.

REPLY

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ARGUMENTS

I. Petitioner Stated Sufficient Grounds to Justify Issuance of the Writ

The State first contends that Mr. Moran has not established a basis pursuant to Rule 242(b)(1-5), SCACR, to justify this Court's review of the Court of Appeals' decision. (Return, pp. 2-3 and n. 1). The Court should not be persuaded by this argument.

Mr. Moran pointed out that the Court of Appeals' decision ignored settled precedent of this Court. See Petition, pp. 7-8, 11 (pointing out that the Court failed to follow this Court's decision in *State v. Smith*, 316 S.C. 53, 447 S.E.2d 175 (1993)). Mr. Moran also pointed out that he was raising a novel issue of law. See Petition, pp. 9-11 (pointing out that this Court has mentioned but not adopted or rejected Wharton's Rule). Both of these arguments justify review under Rule 242.

The State also contends that Mr. Moran did not address the Court of Appeals' finding that the issue regarding Wharton's Rule was not preserved for review. (Return, p. 3). This is not so. Mr. Moran specifically argued that the Court of Appeals erroneously elevated form over substance in finding the issue not preserved. See Petition, pp. 12-13.

The Court should reject the State's contention that this case does not deserve review, and its assertion that Mr. Moran failed to challenge the Court of Appeals' ruling on error preservation.

II. The Trial Court Should Have Directed a Verdict for Mr. Moran or Granted Him a New Trial Regarding the Charge for Common Law Conspiracy

In its return, the State presents the Court with evidence it contends supports the jury's decision to convict Mr. Moran of conspiracy even though the jury acquitted Mr.

Moran and Mr. Herring of solicitation to commit murder. (Return, pp. 8-9). The Court should not be persuaded by the State's presentation.

Contrary to the State's description, Mr. Caulder did *not* testify "about the existence of a plot to kill [Mr. Parrott]" and his testimony did not corroborate Carlyle Rabon's testimony. (Return p. 8, ¶ 1). Mr. Caulder stated he never discussed any details of the "job" (R. p. 91, ll. 22-25), and had never heard of or spoke with Mr. Moran (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 ever 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 Mr. Moran and Mr. Herring to solicit Mr. Caulder to kill Mr. Parrott; rather, his testimony is all about the purported crime of solicitation, a crime for which the jury *acquitted* both Mr. Moran and Mr. Herring. (Return, pp. 8-9, ¶¶ 7-9).

Although Carlyle Rabon stated he ultimately concluded there was a plot to kill Mr. Parrott, that conclusion was reached only after a SLED agent showed up and Carlyle "put the pieces together." (R. p. 114, ll. 23-24). He never stated he was affirmatively aware of a plot to kill Mr. Parrott.

As for the fact that Mr. Moran knew where Mr. Parrott and Ms. Rabon lived and Mr. Moran asked Carlyle to conduct surveillance (Return, p. 8, ¶ 2), the testimony proves nothing about a conspiracy to solicit someone to kill Mr. Parrott. When placed in its proper context, the testimony establishes the purpose of the surveillance, which was to establish Ms. Rabon's adultery for the divorce. After all, the men all went to see the private investigator immediately after conducting the videotape surveillance. (R. p. 112,

ll. 6-17; p. 135, ll. 15-22).

Regarding the conversation Carlyle claimed to have heard about “Will he do it? How much would it cost? Will he do it for \$2,000?,” (Return, p. 8, ¶ 3), even Carlyle stated he heard nothing about a conspiracy to solicit anyone, including Mr. Caulder, to commit a murder, and that he thought the conversation was benign until SLED showed up and suggested otherwise. (R. p. 114, ll. 15-20, 23-24; p. 140, ll. 4-9; p. 140, l. 24 - p. 141, l. 6).

The State points to Carlyle’s testimony that Mr. Moran asked where he could get a silencer (Return, p. 8, ¶ 4) and that Mr. Moran asked Carlyle if he knew anyone who “would fuck Randy [Parrott] up?” (Return, p. 8, ¶ 5). Again, this testimony (R. p. 114, l. 25 - p. 115, l. 4; p. 115, ll. 7-14; p. 117, ll. 13-15) adds nothing to the charge of conspiracy to solicit the murder of Mr. Parrott. It is, in fact, no different than the statements that this 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.”).

As for Ms. Rabon’s testimony that Mr. Herring “would appear at unexpected times and places” and that Mr. Moran returned the “care package” to Ms. Rabon in WalMart unannounced (Return, p. 9, ¶¶ 10-11), this testimony proves nothing about an alleged conspiracy, that is, an agreement between Mr. Moran and Mr. Herring to hire Mr. Caulder to kill Mr. Parrott. This evidence is even more remote than the evidence this Court found insufficient in *Smith*.

The State contends it “need only show [Mr. Moran] formed an agreement with another to solicit for the conspiracy charge to stand.” (Return, p. 10). But this statement ignores that the jury found that the State did *not* prove either Mr. Moran or Mr. Herring solicited anyone to murder Mr. Parrott. If there is insufficient proof that they solicited a murder, how can there be sufficient proof that they conspired to solicit a murder? The reasoning the State proposes makes no sense.

The State posits “our jails are undoubtedly full of criminals who conspired to commit some heinous crimes but were thwarted in their attempts to do so for various reasons.” (Return p. 10). There is a meaningful difference, however, between a thwarted attempt to *actually commit* a crime and a completed conspiracy to solicit the *future* commission of a crime. This difference is more pronounced where the jury has announced that the defendant did *not* solicit the commission of that crime. In other words, even though Mr. Moran was acquitted of asking someone else to commit a crime, he is still somehow guilty (supposedly) of agreeing to ask someone else to commit a crime, which the jury affirmatively says he did not actually do.

The crime for which Mr. Moran was convicted (conspiracy) is not like other crimes – it is, in fact, difficult to define with precision. *E.g.*, *State v. Cole*, 107 S.C. 285, 288, 92 S.E. 624, 625 (1917) (“It has been said that there is perhaps no crime an exact definition of which is more difficult to give than the offense of conspiracy.”). The State’s argument here makes no sense – the State did not set out to prove that Mr. Moran conspired to solicit Mr. Parrott’s murder but was thwarted in his attempt. Instead, the State set out to prove completion of the crime (solicitation to commit murder), but the

jury rejected their proof. Mr. Moran takes issue with whether the State's hyperbolic statement that the jails are full of thwarted conspirators is "undoubtable" - the very jury in this case doubted the veracity of the State's proof.

Simply put, with regard to the charge of conspiracy on this record, "there is no there there." *U.S. v. Hanson*, 41 F.3d 580 (10th Cir. 1994) (quoting Gertrude Stein, *Everybody's Autobiography* (1937) in reversing Hanson's conviction). The trial court should have directed a verdict of acquittal. The Court of Appeals should have reversed that decision on appeal. This Court should grant review and reverse.

III. The Issue of Wharton's Rule was Preserved for Review

The State contends the Court of Appeals correctly found the argument regarding the trial court's failure to apply Wharton's Rule to grant his post-trial motion was not preserved for this Court's review. (Return, pp. 11-12). The Court should not be persuaded by this argument.

The State points to *State v. King*, 334 S.C. 504, 514 S.E.2d 578 (1999) purportedly for the rule that "[a] defendant may not use a motion for a new trial to raise an issue for the first time." (Return, p. 11). This is an overstatement of the holding in that case. In *King*, this Court described the issue as follows:

Immediately before beginning closing arguments, the trial judge ordered the bailiff not to allow anyone "to leave or reenter [the courtroom] once the arguments begin or [during] the charge of the law." In the middle of the judge's charge to the jury, a television news reporter entered the courtroom. With the use of a video camera, the reporter filmed the proceedings until the end of the jury charge.

Appellant did not object to this situation prior to the jury's verdict. Instead, appellant raised this issue three days later in his post trial motion for a new trial. During the post trial motions' hearing, defense counsel admitted he discussed the situation with appellant and appellant's father prior to the verdict and "a conscious decision [was] made not to make a motion for a mistrial." Only after the jury returned with an unfavorable verdict did defense counsel attempt to raise this issue.

In denying the new trial motion, the trial judge found appellant had waived this claim because his objection was not timely. Further, the trial judge found the reporter's activities were in accordance with Rule 605, SCACR, and did not distract or disrupt the proceedings.

We conclude appellant waived review *of this issue* by failing to object prior to the jury's verdict. Rule 103(a)(1), SCRE; *State v. Hicks*, 330 S.C. 207, 499 S.E.2d 209 (1998) (to preserve an issue for appellate review, the objection must be timely made, which usually requires it be made at the earliest possible opportunity); *see also State v. Kelly*, 331 S.C. 132, 502 S.E.2d 99 (1998) (a new trial motion may not be used to raise an *evidentiary issue* for the first time); *McGee v. Bruce Hosp. Syst.*, 321 S.C. 340, 468 S.E.2d 633 (1996) (an issue may not be raised for the first time in a motion for a new trial); *State v. Penland*, 275 S.C. 537, 538, 273 S.E.2d 765, 767 (1981) (finding appellant waived the issue where he did not make a motion for a mistrial until after the verdict).

Defense counsel, after consultation with appellant, made a strategic trial decision not to object. Appellant and defense counsel weighed their options and, rather than moving for a mistrial, decided to take the chance appellant would be acquitted. *Under these facts*, appellant has no basis on which to assert error.

334 S.C. at 509-510, 514 S.E.2d at 581 (emphasis added). Thus, the *King* Court limited its holding to "these facts," specifically noting the case involved a claim for a mistrial and that appellant and his lawyer made a conscious, strategic decision not to object until they made a post-trial motion. *King* is a limited holding and is distinct from this case in very meaningful ways.

The State also asserts that "[g]iven the nature of the Wharton's rule argument...

the proper time for the objection to the conspiracy charge on that basis would have been before the trial, on a motion to dismiss the indictment.” (Return, p. 11). While such a motion may have been available to Mr. Moran prior to trial, his failure to raise the issue prior to verdict should not act as a bar to his ability to raise the issue after the jury found that the State failed to prove its case regarding solicitation for murder.

Mr. Moran’s trial counsel challenged the jury’s ability to convict Mr. Moran 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 Mr. Moran 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 Mr. Moran’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, Mr. Moran 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 (i.e., ruled upon it).

As for trial counsel’s failure to use the words “Wharton’s Rule” when orally stating the new trial motion, the Supreme Court has pointed to Justice Cardozo’s words that “the law has outgrown its primitive stage of formalism, when the precise word was the sovereign talisman and every slip was fatal.” *Toole v. Toole*, 260 S.C. 235, 195 S.E.2d 389 (1973), citing *Wood v. Duff-Gordon*, 118 N.E. 214 (N.Y. 1917). Courts in South

Carolina do not elevate form over substance or require “magic words.” *See, e.g., Stephens v. CSX Transp.*, 415 S.C. 182, 200, 781 S.E.2d 534, 543 (2015) (“While a party is not required to use the exact name of a legal doctrine in order to preserve the issue, the party nonetheless must be sufficiently clear in framing his objection so as to draw the court's attention to the precise nature of the alleged error.”); *State v. Russell*, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001) (although appellant did not use exact words “*corpus delicti*,” it was clear from the argument presented in the record that his motion for directed verdict was made on that ground).

Mr. Moran appropriately raised whether Wharton’s Rule precluded a conviction on the conspiracy charge. The Court of appeals should have addressed his arguments on this point, reversed the conviction, and remanded the matter for further proceedings. This Court should grant review and reverse the Court of Appeals’ decision.

IV. Wharton’s Rule Precludes Mr. Moran’s Conviction for Conspiracy Because the Underlying Charge (Solicitation of Murder) Requires the Participation of Multiple Actors and Mr. Moran Was Acquitted of That Charge

A. Wharton’s Rule Is the Law of South Carolina

The State describes Wharton’s Rule as “somewhat complicated” and contends courts have been “hesitant in its application.” (Return, pp. 13, 14). Although this Court has not expressly stated that Wharton’s Rule, by name, is the law of South Carolina, the Court has on several occasions indicated that the rule adheres in this State but simply was not applicable to the particular cases.

For instance, in *State v. Ferguson*, Mr. Ferguson and D.O. Spires along with 17

other persons were charged with conspiring to set up a numbers lottery. A second count charged them with actually setting up the lottery. Sixteen of the defendants pled guilty, the case against another defendant was withdrawn from the jury, and the case was tried against Mr. Ferguson and Mr. Spires. Mr. Ferguson was convicted of both charges, but Mr. Spires was convicted solely on the conspiracy charge. On appeal, the appellants contended they could not be charged at the same time with conspiracy and with setting up a lottery. The Supreme Court stated:

It is true that in some cases where concerted action is necessary, as for example in certain sexual offense, it is not permitted to charge one in the same indictment with a conspiracy and also with the substantive crime. The setting up of a lottery, however, is not necessarily one which requires concerted action. One person may set up a lottery or expose it to be played.

221 S.C. 300, 303, 70 S.E.2d 355, 356 (1952). This is a classic expression of Wharton's Rule and its exceptions. William Shepard McAninch, W. Gaston Fairey & Lesley M. Coggiola, *The Criminal Law of South Carolina* 385-386 (5th Ed. 2007) (noting Wharton's Rule is "inapplicable if the particular conspiracy involves more persons than required for the particular offense," citing *Ianelli v. US*, 420 U.S. 770 (1975)). And in *State v. Wells*, this Court applied the *Ianelli* exception to Wharton's Rule because a larger number were involved in the conspiracy than those necessary to commit the substantive offense (*i.e.*, to commit an abortion). 249 S.C. 249, 153 S.E.2d 904 (1967). *See also* McAninch, Fairey and Coggiola, at 385 (discussing *Wells*). Wharton's Rule is the law of South Carolina.

B. Wharton's Rule Applies to the Facts of this Case

The State asserts Wharton's Rule does not apply, and accuses Mr. Moran of

misunderstanding the law. (Return, pp. 16-17). However, it is the State that misunderstands Mr. Moran's argument. Mr. Moran does not quarrel with the State's argument that under most circumstances, conspiracy to commit a crime does not merge with the completed offense. *See, e.g., State v. Rutledge*, 232 S.C. 223, 229, 101 S.E.2d 289, 292 (1957) ("a conspiracy to commit a crime is not merged in the commission of the completed offense"). However, Wharton's Rule is an exception to the general rules governing conspiracy, and applies where the offense underlying the conspiracy charge requires more than one person for completion. *See Iannelli v. United States*, 420 U.S. 770 (1975) (Wharton's Rule states an exception to the principle that the crime of conspiracy is separately punishable from the crime which is the object of the conspiracy).

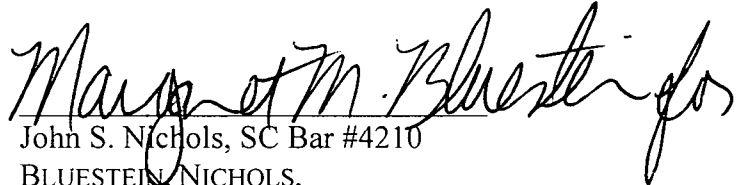
It has long been the law of this State that the crime of "conspiracy" requires more than one person. *State v. Jackson*, 7 S.C. 283 (7 Rich.) 283, 287 (1876) ("conspiracy" implies a combination between two or more to do either an unlawful act or to accomplish by unlawful means a legal end; the concurring will of at least two persons is as necessary to the offense). So does solicitation to commit murder. *E.g., State v. Prince*, 316 S.C. 57, 66, 447 S.E.2d 177, 182 (1993) ("Solicitation is counseling, enticing or inducing *another* to commit a crime." (emphasis added)). And under Wharton's Rule, the trial court should not have permitted the conspiracy charge to go to the jury as a matter of law.

The Court should reject the State's argument here and find that Wharton's Rule applies to this case because the State charged both conspiracy (which requires two or more persons) and solicitation (which also requires two or more persons).

CONCLUSION

For the reasons stated this Court should grant this petition, permit briefing and argument, and reverse the Court of Appeals and the judgment below.

Respectfully submitted,



December 30, 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 *Reply in Support of Petition for Writ of Certiorari* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

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