ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

DAVID LEE WALKER,

APPELLANT

RECEIVED
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SC Court of Appeals

APPELLATE CASE NO 2015-000519

Appeal from Laurens County

Honorable Frank R. Addy, Circuit Court Judge

Opinion No. 2017-UP-169

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, David Lee Walker, respectfully petitions the Court for a rehearing of its Opinion No. 2017-UP-169 filed on April 19, 2017 based upon the following points overlooked or misapprehended by the Court:

The opinion cites to *Barber v. State*, 393 S.C. 232, 712 S.E.2d 436 (2011), for the proposition that, "[l]ike a lesser-included offense instruction, an alternate theory of liability may only be charged when the evidence is equivocal on some integral fact and the jury has been presented with evidence upon which it could rely to find the existence or nonexistence of that fact."

The opinion then quotes *Barber's* definition of "hand of one is the hand of all theory," where "one who joins with anther to accomplish an illegal purpose is criminally liable for everything done by his confederate incidental to the execution of the common design and purpose."

Respectfully, in Appellant's case, the State never presented evidence that anyone other than Appellant was the shooter under its theory of the case. The assistant solicitor stressed in his opening argument, "[w]e submit to you that [Appellant] was the shooter, and we will present to you scientific evidence that will support that conclusion." R. 67, ll. 6-15. Two pistols were recovered from the incident scene. One belonged to Cheeks. The other was the murder weapon. According to Kelly Ball, Cheeks identified Appellant as the shooter. R. 101, ll. 4-9.

By contrast, in *Barber* there was evidence that two of the robbers were armed with .38 caliber pistol **at the time of the robbery**. 393 S.C. at 236-237, 712 S.E.2d at 439. The decedent was killed by a .38 caliber bullet. *Id.* While the defendant in *Barber* was identified by co-conspirators as the shooter, the jury could still conclude that the other co-conspirator with the second pistol shot the decedent and that the defendant was merely participating in the robbery. *Id.*

Here, the State's only argument in support of the "hand of one is the hand of all charge" was that Appellant's niece, Toris Moore, claimed that, **several hours before the incident**, Appellant tried unsuccessfully to borrow her mother's handgun and that Christopher Wells had a handgun with him at that time. R. 77, l. 17 - 79, l. 16. This is insufficient to justify a charge on an alternate theory of liability as it does not present a coherent alternative narrative "from which the jury could infer the defendant" was only an accomplice rather than the shooter.

The assistant solicitor was unequivocal in his belief that Appellant was the shooter. R. 67, ll. 6-15. The defense countered that Appellant was merely present at Cheeks' trailer when the

shooting occurred. R. 73, l. 16 - 74, l. 24. Clearly the jury was influenced by the "hand of one is the hand of all" instruction as they returned a guilty verdict as to murder, but a not guilty verdict as to possession of a weapon during the commission of a violent crime. R. 469, ll. 12-20. However, given the facts presented by the State at trial, there was simply no evidence to support charging the jury with the "hand of one is the hand of all" theory of accomplice liability.

In affirming Appellant's conviction with respect to the trial court's refusal to grant a continuance so that the defense could secure an independent gunshot residue expert, this Court cited to *State v. Williams*, 321 S.C. 455, 469 S.E.2d 49 (1996), stating that "where there is no showing that any other evidence on behalf of the appellant could have been produced, or that any other points could have been raised had more time been granted for the purpose of preparing the case for trial, the denial of a motion for continuance is not an abuse of discretion."

Respectfully, this holding overlooks the manifest prejudice caused by the trial court's refusal to grant a continuance to Appellant and constitutes an abuse of discretion. The trial court had only approved the *ex parte* funding order the week before trial. R. 26, l. 20 - 27, l. 23; R. 475 - 476; *Bailey v. State*, 309 S.C. at 459, 424 S.E.2d at 506. Moreover, the State only provided defense counsel with SLED's GSR report the week before trial. *Id.* In an effort to be ready for trial, defense counsel had secured the services of someone she believed was qualified to testify as an expert in GSR evidence. *Id.*

Defense counsel was informed on the day of trial by the State's expert witness, Jennifer Stoner, that this individual, a former SLED investigator, was not qualified to render expert opinions on GSR. *Id.* Clearly under these circumstances, counsel's motion for a continuance was not intended to delay Appellant's trial, but to allow time for counsel to secure an expert witness whose testimony was necessary to present a complete defense.

In denying the motion for a continuance, the trial court (with the wholehearted agreement of the assistant solicitor) opined that the defense could safely rely on the State's expert testimony to present unbiased scientific evidence. R. 60, l. 8 - 61, l. 8. Forcing an indigent defendant to rely on the State's expert witness because his attorney was unable to secure a defense expert in the week between the approval of funding for an expert witness and the start of Appellant's trial, violated Appellant's right to equal protection. *Ake*, 470 U.S. 68, 77, 105 S.Ct. 1087, 1093 (meaningful access to justice and fundamental fairness entitles indigent defendant to access to funds for expert witnesses). A non-indigent defendant would not have had to delay hiring an expert witness on the court's approval. *Ex Parte Lexington County*, 314 S.C. at 228, 442 S.E.2d at 594.

A review of SLED technician Jennifer Stoner's testimony demonstrates how reliance on an opponent's expert to testify in a neutral manner is totally improper in our adversarial justice system. *Ake*, 470 U.S. at 83, 105 S.Ct. at 1096 (holding that due process gives defendants the right to experts who will "assist in evaluation, preparation, and presentation of the defense").

The "pro-prosecution bias" of State crime laboratory experts has been widely criticized. *See* Andre A. Moenssens, *Novel Scientific Evidence in Criminal Cases: Some Words of Caution*, 84 J. Crim. L. & Criminology 1, 6 (1993) (noting that crime labs "may be so imbued with a pro-police bias that they are willing to circumvent true scientific investigation methods for the sake of 'making their point'").

In its opening argument, the State alluded to "scientific evidence" that will help jurors conclude Appellant was guilty. R. 67, ll. 6-15. This objective permeated Stoner's testimony. She repeatedly stressed that the particles found in the GSR kit were "consistent and associated" with GSR. R. 321, ll. 2 - 23.

Further, she misleadingly phrased her finding two particles consistent with GSR on the back of Appellant's left hand as "several" particles. R. 319, l. 5 - 321, l. 23. Finding two particles consistent with GSR (the particles are missing one of three GSR elements) falls well below the FBI's minimum threshold of three particles of actual GSR per sample (all three elements present) required before they will report a positive GSR test result. Michael A. Trimpe, *The Current Status of GSR Examinations*, FBI Law Enforcement Bulletin, May 2011, *available at* https://leb.fbi.gov/2011/may/the-current-status-of-gsr-examinations. An expert retained to assist the defense would not have reported these results as Stoner did.

Likewise, Stoner dismissed the multitude of environmental factors that could also lead to these elements being found on Appellant's hands, unrelated to firing a gun. R. 314, ll. 13-22. Appellant repaired cars for a living, auto mechanics frequently test positive for GSR as a result of materials and substances they come in contact with. R. 28, l. 18 - 29, l. 6; *see* Diana M. Wright and Michael A. Trimpe, "Summary of FBI Laboratory's Gunshot Residue Symposium, May 31 - June 3, 2005," *Forensic Science Communications*, July 2006, *available at* https://www.fbi.gov/about-us/lab/forensic-science-communications/fsc/july2006/research/ 2006_07_research01.htm.

The risk of contamination was particularly high in this case as Appellant was himself shot and then transported with Cheek, who had also been shot. In addition, Lt. Cheek collected GSR samples from Appellant several hours after the incident. R. 361, l. 1 - 362, l. 18. This gap, between the incident and the collection of evidence, presents a substantial risk of sample contamination. R. 357, l. 14 - 358 l. 18; *see* Wright and Trimpe, *supra.*

Stoner also minimized the inconvenient fact the particles could be present as a result of Appellant having been shot and not as a result of Appellant being the shooter. R. 322, ll. 1-17. Despite the weakness and ambiguity of the GSR evidence, Stoner claimed, with near absolute

certainty, that the particles found on Appellant's hands were the result of the firing a weapon. R. 327, l. 19 - 328, l. 4; *see Watson v. Ford Motor Co.*, 389 S.C. 434, 449, 699 S.E. 2d 169, 177 (2010) (observing that conferring the "expert" label upon a witness may cause juries to give excessive or undue weight to the "expert" testimony).

Like many other formerly unassailable fields of forensic science, GSR evidence has come under scrutiny as more rigorous scientific evaluation is conducted. Jessica D. Gabel & Margaret D. Wilkinson, *"Good" Science Gone Bad: How the Criminal Justice System Can Redress the Impact of Flawed Forensics*, 59 Hastings L.J. 1001, 1020 (2008); *see also* Dennis L. McGuire, "The Controversy Concerning Gunshot Residue Examinations", *Forensic Magazine*, Aug.-Sept. 2008. Notably, the FBI stopped conducting GSR tests in 2006. Julie Bykowicz, *FBI Lab Scraps Gunfire Residue: Agency Won't do Analysis, Putting Evidence in Doubt*, Baltimore Sun, May 26, 2006, *available at* http://articles.baltimoresun.com/2006-05-26/news/0605260327_1_gunshot-residue-forensic-evidence-analysis.

Since Appellant was not afforded a reasonable opportunity to retain an independent defense expert, the jury was never informed of the weakness of the State's scientific evidence. *Ake,* 470 U.S. at 83, 105 S.Ct. at 1096; *see also U.S. v. Stafford*, 721 F.3d. 380, 393-395 (6th Cir. 2013) (conducting a lengthy review of GSR evidence and holding that the scientific dispute regarding the reliability of GSR evidence went to the weight not the admissibility of the evidence); *State v. Council*, 335 S.C. 1, 515 S.E. 2d. 508 (1999) (holding that once evidence is admissible under Rule 702, SCACR, and determined to be probative, it is admissible and the jury may "give it such weight as it deems appropriate.").

A non-indigent defendant would not have faced this court imposed funding hurdle. *Ex Parte Lexington County*, 314 S.C. at 228, 442 S.E.2d at 594. The defense expert's role is to aid the

defendant and function as a "basic tool" for the defense. *Id.* at 77, 105 S.Ct. at 1093. To fulfill this function, an expert must be made reasonably available to "assist in evaluation, preparation, and presentation of the defense." *Id.* at 83, 105 S.Ct. at 1096. Such availability and assistance requires more than *pro forma* assurances of neutrality on the part of the State's expert and the opportunity for cross-examination. R. 59, l. 10 - 61, l. 6.

Given the pro-prosecution interpretation offered by SLED technician Stoner, it is abundantly clear that Appellant needed his own expert witness to challenge Stoner's conclusions. Concomitant with the need to retain an expert is the necessity for sufficient time to retain and consult with that expert. Accordingly, the trial court erred in not granting a continuance so as to allow Appellant the chance to secure a qualified expert.

Respectfully Submitted,

JOHN H. STROM
Appellate Defender

This 2nd day of May, 2017.

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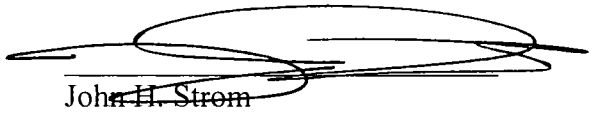
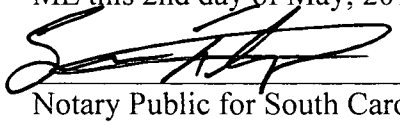
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Sherrie Butterbaugh, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and David Lee Walker, #274195, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 2nd day of May, 2017.



John ~~H. Strom~~
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 2nd day of May, 2017.



_____ (L.S)
Notary Public for South Carolina
My Commission Expires: 10/30/2022