THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHESTERFIELD COUNTY
Court of General Sessions
Donald B. Hocker, Circuit Court Judge

Case No.(s): 2014-GS13-602-604; 2014-GS-13-76,77
2017-UP-037 (S.C. Ct. App. filed Jan. 11, 2017)
Appellate Case No: 2017-00718

The State, ...Respondent,

v.

Curtis Brent Gorny, ...Petitioner.

REPLY TO RESPONDENT'S RETURN

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ARGUMENT IN REPLY

Without restating the issues or making redundant arguments which have been thoroughly set forth in his opening brief, Appellant offers the following points of clarification and rebuttal to the arguments raised by Respondent.

ARGUMENT

I. RESPONDENT FAILS TO ACKNOWLEDGE THE SIGNIFICANCE OF THE PROXIMITY OF THE PARKING LOT IN RELATION TO THE CASE AT HAND.

Respondent relies upon the fact that the shooting incident, "occurred not inside the courthouse but outside in the public parking spaces on Main Street." (Res. Br. p. 14). Respondent's statement paints a picture that the area in question is but a mere faceless lot for vehicles and fails to recognize that these parking spaces are not just general public parking spaces for the Town of Chesterfield. The area in question is directly in front of the Chesterfield County Courthouse.

The Chesterfield County Courthouse occupies an entire block of Main Street where these spaces are located. The opposite side of the street is sparsely populated with the county's small, infrequently visited Voter Registration Office and Solicitor's Office, both being housed in one building along with Chesterfield Presbyterian Church, which is open to the public only for a few hours a few days during the week. Moreover, there are very few parking spaces upon the actual premises of the Courthouse. The Chesterfield County Courthouse houses four courts; the Court of General Sessions, the Court of Common Pleas, Family Court, and Probate Court. More often than not, the spaces in front of the Courthouse have to be utilized by Courthouse patrons and staff, as the spaces upon the Courthouse premises are inadequate in number, even on days where

only a small number of visitors are present. Additionally, these spaces are used, in conjunction with the Courthouse lawn during community functions and activities periodically throughout the year. Given this context, it is not hard to see that the lion's share of the use of these spaces is for Courthouse business.

It is evident to anyone who has visited the Courthouse that these spaces are necessary to accommodate Courthouse visitors. It is also evident that these spaces hold a greater significant meaning to the citizens of Chesterfield County, as they are closely tied to the community as a common ground for community events. Perhaps the most important acknowledgement as to these spaces is that one was used by the victims on the date in question *specifically* for Courthouse business. Given these facts, it would be impossible for a citizen of Chesterfield County to disassociate these spaces from the Chesterfield County Courthouse, thus maintaining an inherent impartiality to this case.

II. RESPONDENT IGNORES THE RELEVANT LAW REGARDING ADMISSIBILITY OF EVIDENCE AND JURY VIEWS.

Respondent maintains that there is no significant difference between a juror viewing photographs of the scene and actually visiting the scene. Respondent exclaims, ". . . simply being in proximity to where part of the crime occurred told the jurors nothing that they could have not learned from photographs of the scene . . ." (Res. Br. p. 14). However, South Carolina law maintains distinguishable standards for photographic evidence and physically viewing the scene of the incident. Rule 402, *SCRE* and S.C. Code Ann.§ 14-7-1320.

Rule 402, *SCRE* states, "All relevant evidence is admissible, except otherwise provided

by the Constitution of the United States, the Constitution of the State of South Carolina, *statutes*, these rules, or by other rules promulgated by the Supreme Court of South Carolina." (emphasis added). Rule 402. *SCRE*. Rule 401, *SCRE* defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without evidence." Rule 401, *SCRE.* Rule 403, *SCRE* further explains that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . ." Rule 403, *SCRE.*

The allowance of a jury view is governed by S.C. Code Ann.§ 14-7-1320, which demands a greater level of relevance than the admission of photographs. Jurors are *only* permitted to view a scene when ". . . such view is necessary to a just decision." S.C. Code Ann.§ 14-7-1320. In creating this caveat, it is evident that the legislature recognizes a high probability that such views could be inherently prejudicial and thus demands a higher standard of scrutiny, a clear showing of relevance, and necessity.

III. RESPONDENT FAILS TO RECOGNIZE THAT THE RISK OF IMPARTIALITY WAS NOT CURED BY THE TRIAL JUDGE'S INSTRUCTIONS TO THE JURY

Respondent asserts that any risk of impartiality was cured by the Trial Judge's instructions to the jury. Respondent points to the trial judge's instructions to the jury, " . . . to decide the case base 'solely 100 percent' on the evidence presented in the courtroom and that they were not to conduct their own investigation of the scene." (Res. Br. p. 15). Despite the given instructions, it is well settled that an unauthorized visit to the scene of the alleged crime constitutes juror misconduct. *See Holy Cross v. Orin Exterminating Co.*, 682 S.E.2d 489, 384 S.C. 441 (2009).

In the immediate case each juror, whether voluntarily or by force and/or necessity engaged in such misconduct. Respondent's argument that any impact of constantly viewing the scene during the trial and constantly engaging in this misconduct was mitigated merely by the one jury instruction requires one to suspend disbelief, deny human nature, and ignore the fact "that in spite of forms [jurors] are extremely likely to be impregnated by the environing atmosphere." *Turner v. Lousiana*, 379 U.S. 466, 85 S.Ct. 546 (1965).

IV. THE IMMEDIATE CASE AND THE CASES OF BAUMRUK AND TURNER ARE FACTUALLY DISTINGUISHABLE

Case law directly on point with these particular set of facts is exceedingly rare. *State v. Baumruk* appears to be the only recorded case directly on point. *See State v. Baumruk*, 85 S.W.3d 644 (Mo., 2002). *Turner v. Lousiana*, appears to be the only controlling authority on the concept of "inherent prejudice." As such, Respondent has gone to great lengths to distinguish these cases.

However, the similarities greatly outweigh the differences. In both *Baumruk* and the case at hand, the alleged crimes occurred at a courthouse. In all three cases, the witnesses were primarily employed at the courthouse. In *Baumruk* and the case at hand, there was pretrial publicity. Respondent's focus and assertion that somehow the alleged actions of Petitioner were less heinous or traumatic than those of *Baumruk* is distinguishable without merit. (Res. Br. p. 17).

It is worth noting that the *Baumruk* trial did not occur in the same courtroom where the alleged crime occurred. (R. pp. 99-100 lines 20-6). The St. Louis County Courthouse is a large facility with multiple courtrooms. *Id.* There is nothing in the opinion noting that the jurors viewed the actual scene. In the immediate case, all of the jurors regularly viewed the scene of the

alleged crime.

V. RESPONDENT FALSELY ASSERTS THAT PETITIONER'S MOTION FOR CHANGE OF VENUE ONLY PERTAINED TO ALLEGED CRIMES OCCURRING AT THE COURTHOUSE

Respondent asserts that Petitioner's change of venue only pertained to the charges arising from the event that occurred at the Courthouse. (Res. Br. 19). As such, Respondent maintains that should Petitioner be granted relief, that relief should only extend to the relevant charges and the other conviction and their sentences should remain unaffected. *Id.* This is not reflected in the record. The exchange between the Trial Court and Defense Counsel in regards to this matter is as follows:

> THE COURT: . . .Let me just ask this, I'm just kinda thinking out loud, and, and I realize we have three indictments alleged [attempted] murder. One is where the alleged attempted murder takes place on the Road to Pageland, and, again, I'm thinking out loud. All right. Let's assume I was inclined to grant your motion concerning the change of venue as I relates to the two shootings here in – on the street outside of the courthouse. What would prevent the state from deciding to go forward on the one indictment related to the alleged shooting on the road to Pageland?
>
> MR. COCKRELL: Your Honor, I'd, I'd ask the Court for at least a recess in time for me to at least research and either have a motion or - - in limine in regards to any of the events leading up to that, and , and may just renew altogether my, my [change] of venue motion because it's too, too close in time. (R. pp. 89-90 lines 21-13).

It is clear from the record that the Court's questions to Defense Counsel were hypothetical in nature and do not amount to a ruling by a Court. Further, it is evident that Defense Counsel *did* respond to this hypothetical inquiry by requesting that the additional time to research the issue, file a Motion *in Limine*, or in the alternative renew the Change in Venue Motion due to the

relationship between the alleged crimes. (R. p. 90 lines 8-13).

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal." *State v. Dunbar*, 587 S.E.2d691, 56 S.C. 138 (2003) (*citing Humbert v. State*, 345 S.C. 332, 548 S.E.2d 862 (2001)). The exchange between the Court and Defense Counsel did not necessitate any preservation action by Counsel. The trial court made it abundantly clear that there was no ruling, merely "just kind of thinking out loud." (R. p. 89 lines 21-22). Essentially, the trial court was engaging in a line of hypothetical questioning to inform the subsequent ruling. In any event, Defense Counsel indicated the actions he would take which would properly preserve the issue had one been presented.

VI. ASSUMING *ARGUENDO* THAT RESPONDENT'S ARGUMENTS ARE VALID, THIS IS A NOVEL ISSUE BEFORE THE COURT AND A DEFINITIVE RULING IS NECESSARY.

Even assuming that Respondent's arguments are valid, it is imperative that this Court issue a definitive ruling on this matter. The facts of this case create a novel issue for this Court and the State of South Carolina. The *only* authority with similarly situated facts on the subject is, at best, only persuasive. *See State v. Baumruk*, 85 S.W.3d 644 (Mo., 2002). The *only* controlling authority which addresses this concept of "inherent prejudice" does not fully encapsulate the salient facts of this particular case. *See Turner v. Lousiana*, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed. 2d 424 (1965).

The lower South Carolina courts need guidance upon when exactly when an area, such as the Courthouse from which the case is tried, in connection with pretrial publicity, becomes so

engrossed and indoctrinated within the minds of the jury or potential jurors that impartiality becomes inherent. Only a decision from this Court, using *Turner* as a basis of law and comparing that basis with the facts of this case and *Baumruk* can provide that guidance and end the novelty of this issue.

CONCLUSION

Based upon the foregoing argument and citations of authority, the Petitioner respectfully requests that this Court reverse the ruling of the trial court and Court of Appeals and grant Petitioner a new trial on the merits.

Respectfully Submitted,

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PROOF OF SERVICE

I, Stephanie H. Cockrell, certify that I have served the Reply in Support of Writ of Certiorari on Respondent by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

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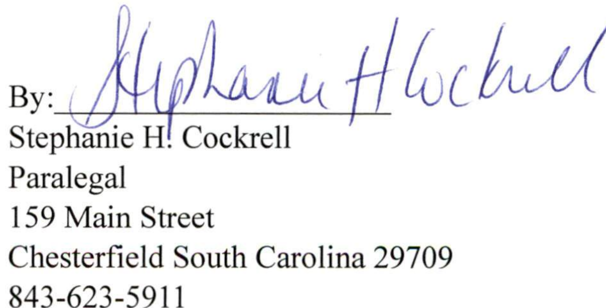

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