

STATE OF SOUTH CAROLINA
In the Court of Appeals

 ORIGINAL

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

R. Markley Dennis, Circuit Court Judge

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JUN 01 2017

Appellate Case No. 2013-002665
Criminal Case No. 2011-GS-10-2074

SC Court of Appeals

State of South Carolina.....Respondent,

vs.

Jarret Graddick.....Petitioner.

PETITION FOR REHEARING

COMES NOW Jarret Graddick, Petitioner, by and through his undersigned counsel, and pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, respectfully requests a rehearing of the following issues, which were identified in the Court's Opinion dated May 17, 2017 (Op. No. 2017-UP-201) as the bases on which Petitioner's underlying conviction was affirmed:

- A. With regard to the disposition of Petitioner's argument regarding the denial of his motion for directed verdict:
1. The Court misapprehended facts and circumstances in arriving at its holding that the issues raised in the appeal were not preserved for review;
 2. The Court misapprehended the facts and circumstances underlying its conclusion that different grounds were argued between the motion for directed verdict and on appeal; and,
 3. The Court overlooked the lack of substantial evidence to support its affirmation of Petitioner's conviction.
- B. With regard to the disposition of Petitioner's argument arising under the Confrontation Clause, the Court misapprehended the facts, law, and circumstances in arriving at its holding that an inculpatory declaration made by a non-testifying co-defendant, for which there was no opportunity for cross-examination, did not offend Petitioner's rights under the Sixth Amendment of the United States Constitution.
- C. With regard to the disposition of Petitioner's argument regarding the infringement of his rights of due process, in holding that the issue had not been preserved, the Court overlooked the fact that the State did not jointly indict Petitioner with his co-defendants, nor ever filed a motion to consolidate the indictments or to try the defendants jointly.

ARGUMENT

A. The Court erred in affirming the denial of Petitioner's motion for directed verdict.

At the close of the State's case-in-chief, Petitioner requested a directed verdict on the basis that there was insufficient evidence to establish that Petitioner was involved in the armed robbery at issue. (R. 496:20–497:8; Tr. 721:20–722:8.) The trial court denied Petitioner's motion, ruling that the State had presented substantial circumstantial evidence of Petitioner's involvement. (R. 427:9–22; Tr. 722:9–22.) Later, Petitioner renewed his motion for a directed verdict, arguing that the State had failed to meet its burden that Petitioner was one of the robbers. (R. 515:9–16; Tr. 773:9–16.) The motion was denied. (R. 515:17–24; Tr. 773:17–24.)

On appeal, Petitioner contended that the motion for directed verdict should have been granted because the State failed to present substantial evidence of Petitioner's guilt, as the allegations of such guilt were set out in the indictment. Petitioner's briefs on appeal dedicated a significant amount of discussion to the allegations of the indictment, and compared such allegations to the evidence that was presented at trial, as reflected in the trial transcript. (Appellant's Final Op. Br. 6-16; Appellant's Final Reply Br. 1-11.) In relevant part, Petitioner explained how the most substantial part of the evidence presented at trial was entirely circumstantial, and additionally, how the evidence pertained to other co-defendants—not to him personally. Petitioner further explained how there was no connection of physical evidence to him personally, and how the State's case was established by relying on the existence of a conspiracy that was not alleged in the indictment. It was, and still is, Petitioner's position that the State did not present substantial evidence of

Petitioner's guilt, and that is especially true if the State is precluded from relying on evidence of guilt derived from the actions and conduct of supposed co-conspirators. However, it is also true even if the State may rely on evidence attributable to co-conspirators.

In any event, the Court apparently misapprehended the nature of Petitioner's arguments on appeal in concluding that the appellate arguments regarding the directed verdict had not been preserved for review, or that the arguments were somehow different between the trial motion and the appellate grounds raised. Furthermore, the Court overlooked the dearth of substantial evidence to implicate Petitioner's guilt for the crime of which he was convicted. For these reasons, the Court is requested to reconsider the disposition of Petitioner's motion for directed verdict, to hold that the issues presented on appeal were preserved at trial, and to reverse the trial court's decision to deny the motions for directed verdict on the basis that there is, in fact, insubstantial evidence of Petitioner's guilt on which to rest his conviction, all as a matter of law.

B. The Court erred in failing to conclude that Petitioner's Sixth Amendment right to confront adverse witnesses was not infringed.

On appeal, the Court held that the only statements which may qualify for protection under the Sixth Amendment's Confrontation Clause are those made in the context of an investigatory or judicial proceeding. In so ruling, the Court misapprehended the law, particularly State v. Evans, 316 S.C. 303, 450 S.E.2d 47 (1994), and its progeny, which establish that the Sixth Amendment right of confrontation is implicated regardless of whether the statement in question was made

to law enforcement or a third party. See also State v. Ladner, 373 S.C. 103, 112, 644 S.E.2d 684, 688-89 (2007).

Furthermore, on this matter, the Court held that only “testimonial” statements are subject to protection under the Sixth Amendment, and that Coakley’s statement was not “testimonial” because it would not “lead an objective witness to reasonably believe that the statement would be available for use at a later trial.” In so ruling, the Court either overlooked the material facts and circumstances attending the disclosure of the statement at issue, or misapprehended those facts and circumstances.

Petitioner was tried jointly with his co-defendants, Coakley and Smalls. During its case-in-chief, the State called Brian Mazyck. Mazyck was also indicted for the same armed robbery at issue, (R. 340:4–17; Tr. 525:4–17), and he was present in the vehicle that Petitioner, Coakley, and Smalls occupied at the time of their arrest. During his direct examination, Mazyck testified to a statement made by Coakley that was self-incriminating. Mazyck testified that, immediately after the robbery was alleged to have occurred, Smalls was driving around the vicinity of the scene of the crime. Suddenly, a police cruiser appeared behind them and signaled for Smalls to pull over. At this point, Coakley grabbed a gun, pointed it at the back of the driver’s seat—the seat occupied by Smalls, and yelled something to the effect of, “Drive! I’m not going back to jail.” (R. 334:20–337:15; Tr. 519:20–522:15.)

Petitioner anticipated that the State would try to elicit this statement and objected prior to its presentation to the jury. (R. 325:17–331:17; Tr. 510:17–516:17.) The basis of the objection was that the statement, if presented to the jury, would be a violation of Petitioner’s Sixth Amendment right to confront adverse witnesses against

him, since Coakley had elected to exercise his Fifth Amendment right not to testify at trial. See, e.g., Bruton v. United States, 391 U.S. 123 (1968). The trial court overruled Petitioner’s objection, stating, among other things, “It’s not a Bruton issue[;] it has nothing to do with Bruton.” (R. 328:1–330:25; Tr. 513:1–515:25.)

In reality, the admission of this statement had everything to do with Bruton. Coakley’s statement—“Drive! I’m not going back to jail.”—reasonably incriminates Petitioner by implication. From the outset of trial, the State argued that Petitioner, Coakley, and Smalls participated jointly in the commission of the armed robbery. (R. 30:17–38:7; Tr. 127:17–135:7.) Both Petitioner’s and Coakley’s trial strategy focused on the lack of any direct evidence linking them to the alleged crime scene. (R. 38:11–44:14; Tr. 135:11–141:14.) Therefore, the State could have had only one purpose in offering Coakley’s statement: To provide evidence that, in the immediate aftermath of the armed robbery he allegedly did not participate in, Coakley was acting exactly as the perpetrator would by trying to flee the area of the crime and evade the police. This conclusion is only bolstered by the fact that, at trial, the State elicited the statement from Mazyck no less than three times in front of the jury in the span of a few minutes.

There is no question that this statement was prejudicial to Coakley; but it was also prejudicial to Petitioner. The State presented evidence that two people actively committed the armed robbery; despite the fact those perpetrators were never positively identified, the State argued it was Coakley and Petitioner. Therefore, when the State offered Coakley’s self-incriminating statement into evidence, through its theory of conspiratorial liability, the State was also effectively pointing Coakley’s

finger at Petitioner. The prejudicial impact of this statement was only amplified by the fact that Petitioner's counsel could not cross-examine Coakley at trial, and that no curative instruction was given.

In any event, the Court of Appeals apparently held, relying on State v. Ladner, 373 S.C. 103, 112, 644 S.E.2d 684, 688-89 (2007), that, as a matter of law, Coakley's statement was not "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." This represents a substantial misapprehension of the circumstances attending the disclosure of the statement. According to the State's theory of the case, the statement was made while Coakley was in active flight from the scene of a crime and immediately after law enforcement attempted to arrest Coakley's flight; the undeniable implication is that Coakley's conduct was consistent with the behavior of an individual who had just committed a crime. Contrary to the Court's assessment, Coakley's statement is the exact type of extrajudicial statement that an objective witness would anticipate being used later at trial, and importantly, was in fact used at trial.

As previously explained, Petitioner, Coakley, and Smalls were tried jointly, Coakley did not testify at trial, and there was no opportunity for cross-examination. Coakley's statement presents a textbook situation where the Sixth Amendment requires special care be given to the rights of co-defendants, specifically so their rights to a fair trial are not jeopardized. In this case, at a minimum, the Court should have given a limiting or curative instruction to the jury for Petitioner's benefit.

However, no instruction was given, and this amounted to substantial prejudice against Petitioner's constitutional rights.

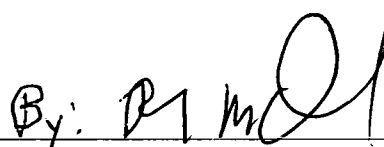
For these reasons, the Court is requested to reconsider its disposition of the impact of Coakley's self-incriminating statement on Petitioner's Sixth Amendment right of confrontation, and hold that the admission of such statement under circumstances where there was no opportunity for cross-examination, and no curative instruction, was an infringement of such right.

C. The Court erred in disposing of the argument related to the infringement of Petitioner's due process rights arising from the State's unilateral decision to subject Petitioner to a joint trial.

On appeal, the Court held that Petitioner's argument related to the infringement of his due process rights arising from the State's unilateral decision to subject Petitioner to a joint trial had not been preserved for appellate review. The Court arrived at this decision, presumably, by observing that Petitioner's trial counsel did not raise an objection prior to trial about his case being consolidated with his co-defendants. However, in reaching this decision, the Court ostensibly overlooked the fact that the State indicted Petitioner and each co-defendant separately, though never filed a motion to consolidate the indictments or the trials. Additionally, there is no indication from the trial transcript that an oral motion was ever raised. As discussed in Petitioner's appellate briefs, it is fundamentally unfair for the State to neglect procedure, yet use the absence of an objection from Petitioner as a shield against any subsequent judicial review of the manner in which Petitioner proceeded to trial. For this reason, Petitioner respectfully requests that reconsideration be given to the arguments as to the manner in which he was subject to trial.

[Signature Block Follows]

Respectfully submitted,

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June 1, 2017

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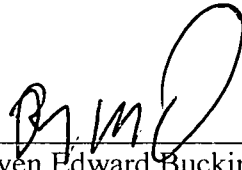
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PETITIONER'S CERTIFICATE OF SERVICE

The undersigned counsel for Petitioner hereby certifies that a true copy of Petitioner's Petition for Rehearing and Suggestion for Rehearing *En Banc* for the above-referenced case has been served upon Deborah R.J. Shupe, Esq., and William M. Blicht, Jr., Esq. at the Rembert Dennis Building, Post Office Box 11549, Columbia, SC 29201, this 1st day of June 2017. The undersigned counsel further certifies that a true copy of the same was served upon Jarret Graddick, SCDC No. 358060, at Lieber Correctional Institution, Post Office Box 205, Ridgeville, SC 29472 as of the same date.



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SUBSCRIBED AND SWORN TO before me
this 1st day of June 2017.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: May 12, 2027.